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Alternatives to Detention and Immigration Judges' Bond Jurisdiction: Considering *Matter of Aguilar-Aquino* and *Matter of Garcia-Garcia*

by Sarah Byrd

Introduction

In addition to considering issues of removability and relief, Immigration Judges regularly conduct custody redetermination proceedings involving detained aliens. Traditionally, the issue addressed in these proceedings is whether to modify a bond set by the Department of Homeland Security ("DHS"). Now, however, Immigration Judges are playing a somewhat different role in certain custody and bond determinations. Specifically, as described below, they also now consider detention issues relating to three programs operated by DHS known as "alternatives to detention" ("ATD"). Aliens in these programs are not physically confined but, instead, must comply with a variety of requirements, such as wearing an electronic monitoring device around the ankle and periodically reporting to DHS by telephone. In two recent decisions, *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009), and *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009), the Board of Immigration Appeals considered Immigration Judges' custody jurisdiction over aliens in these programs. The Board ultimately held that Immigration Judges have the authority, upon a timely motion, to review aliens' placement in such programs. This article will provide an overview of DHS's alternatives to detention and will discuss the Board's decisions.

Immigration Detention and Alternatives

In August 2009, DHS, Immigration and Customs Enforcement ("ICE") announced plans for a major overhaul of its immigration detention system. One component of ICE's comprehensive detention reform has been to advance the effective use of its ADT programs.¹

The Office of Detention and Removal (“DRO”) is one of four divisions of ICE, the largest investigative agency in DHS. DRO is responsible for ensuring that detainees in ICE custody are placed “in safe and secure environments and under appropriate conditions of confinement.”² DRO oversees custody of a diverse population of detainees, including asylum seekers, survivors of torture, lawful permanent residents, unauthorized immigrants, and aliens with criminal convictions.³ On average, at any time, approximately 33,400 detainees are housed under the authority of ICE in up to 350 detention facilities across the nation.⁴ The majority of detainees are held in State and local facilities or facilities run by private contractors.⁵ However, future reforms aim to move away from the present decentralized system, which relies primarily on extra capacity in penal facilities. Rather, in the next 2 to 4 years, ICE plans to own and operate facilities specifically designed solely for civil immigration detention purposes.⁶

Alternatives to Detention

First started in 2002 by the former Immigration and Naturalization Service (“INS”), the ATD programs provide for supervision during removal proceedings of aliens whose detention is not required by statute, who present a low risk of flight, and who pose no danger to the community. The ATD programs allow ICE to reduce the number of aliens housed in detention facilities by using alternative methods, such as electronic and telephone monitoring, to provide an appropriate level of supervision to ensure aliens’ compliance with conditions of release, including attendance at immigration hearings and compliance with final court orders.⁷

There are currently three ATD supervision and monitoring programs. Two of these programs, the Intensive Supervision Appearance Program (“ISAP”), which was initiated in 2004, and the Enhanced Supervision/Reporting (“ESR”) program, which began in December 2007, are operated by vendors on contract with ICE. The ISAP and ESR programs employ contractors to supervise participating aliens using a variety of methods, including telephonic reporting, radio frequency with ankle bracelets, global positioning system (“GPS”) tracking, and unannounced visits to participants’ homes.⁸ However, these two programs are only available to aliens

whose homes are within a 50- to 85-mile radius of the 24 participating ICE field offices.⁹ The third ATD program, Electronic Monitoring (“EM”), which began in December 2007, is operated by ICE employees and is available to aliens residing in locations not covered by ISAP or ESR contracts, as funds allow. The EM program relies upon telephonic reporting, ankle bracelets, and GPS tracking to monitor aliens.¹⁰

Based on admittedly incomplete data, ICE estimates that its three ATD programs cost significantly less than regular detention and have high rates of success, as measured by the percentage of participants who appear for all their hearings.¹¹ Of the three programs, ISAP is the most restrictive and expensive, while EM is the least.¹² ICE reports that approximately 87 percent of ISAP participants, 96 percent of ESR participants, and 93 percent of EM participants appear for their removal hearings.¹³ However, all three programs have a limited capacity: ISAP has a daily capacity for 6,000 aliens, ESR for 7,000, and EM for 5,000.¹⁴ As of September 1, 2009, there were 19,160 aliens in ATD programs.¹⁵

ICE is currently working to enhance the ATD programs. Program enhancements underway for 2010 include “[d]eveloping and implementing a more refined risk assessment classification tool to ensure all eligible candidates are placed in ATD and the appropriate level of supervision is administered.”¹⁶ ICE has also been collaborating with the Executive Office for Immigration Review to implement an initiative to reduce the length of time aliens spend in ATD programs.¹⁷

Immigration Judges’ Jurisdiction Over Custody and Release Determination

With the recent expansion of DHS’s ADT programs, there have been open legal questions involving the extent to which Immigration Judges have the authority to order aliens taken out of these programs or to modify the conditions with which aliens in the programs must comply. The Board recently provided guidance on these issues in *Matter of Aguilar-Aquino*, 24 I&N Dec. 747, and *Matter of Garcia-Garcia*, 25 I&N Dec. 93.

Jurisdiction Over Bond Decisions Generally

The Immigration and Nationality Act provides that, subject to certain conditions, DHS has the authority

to detain aliens alleged to be unlawfully present in the United States. Specifically, section 236(a) of the Act, 8 U.S.C. § 1226(a), provides:

[A]n alien may be arrested and detained by the Attorney General¹⁸ pending a decision on whether the alien is to be removed from the United States. Except [for certain aliens subject to mandatory detention] and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole

The Federal regulations, in turn, provide Immigration Judges with jurisdiction in certain circumstances to review DHS's custody determinations. Referring to DHS's authority to detain aliens under section 236 of the Act, 8 C.F.R. § 1236.1(d)(1) states:

After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 1240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.¹⁹

In addition, 8 C.F.R. § 1003.19(a) states that “[c]ustody and bond determinations made by [DHS] pursuant to 8 CFR part 1236 may be reviewed by an Immigration Judge pursuant to 8 CFR part 1236.”

Matter of Aguilar-Aquino

In *Matter of Aguilar-Aquino*, 24 I&N Dec. 747, the Board found that an alien's release from detention into an ATD program constitutes a release from custody for purposes of 8 C.F.R. § 1236.1(d)(1). In this case, the alien was released on his own recognizance from custody by DHS and placed in the ESR program on February 14, 2008. In the ESR program, he was required to meet certain requirements, including reporting to DHS in person once a month, attending Immigration Court hearings, and surrendering for removal if ordered. In addition, he was required to wear an electronic monitoring device on his ankle and stay at home between 7 p.m. and 7 a.m.

On April 24, 2008, more than 2 months after being placed in the ESR program, the alien filed a request with the Immigration Judge for a redetermination of his custody status. He asked to have the electronic monitoring device taken off and to be released from the ESR program on his own recognizance. The Immigration Judge ordered that the alien be released from the ESR program upon payment of \$1500 bond. She ordered that the ankle bracelet be removed and that the alien not be subject to confinement in his home after he paid the bond. The Immigration Judge reasoned that the ESR program was a form of “custody” and that since the alien was in custody, she had jurisdiction to redetermine his custody status under section 236 of the Act and 8 C.F.R. § 1236.1(d)(1).

The Board held, however, that the restrictions imposed on the alien as part of the ESR program did not fall within the definition of “custody.” Rather, the Board ruled that these restrictions constituted “terms of release” from custody under section 236 of the Act and 8 C.F.R. § 1236.1(d)(1). In reaching this conclusion, the Board gave “custody” the narrow meaning usually associated with the term “detain,” stating that custody refers “to actual physical restraint or confinement within a given space.” *Matter of Aguilar-Aquino*, 24 I&N Dec. at 752. In reaching this conclusion, the Board noted that the term “custody” was replaced with “detain” in section

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR MARCH 2010

by John Guendelsberger

The United States courts of appeals issued 306 decisions in March 2010 in cases appealed from the Board. The courts affirmed the Board in 273 cases and reversed or remanded in 33, for an overall reversal rate of 10.8%. The Second and Ninth Circuits together issued 61% of the decisions and 85% of the reversals. There were no reversals from the First, Fourth, Fifth, Seventh, and Tenth Circuits.

The chart below shows the results from each circuit for March 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% reversed
First	1	1	0	0.0
Second	89	82	7	7.9
Third	41	38	3	7.3
Fourth	16	16	0	0.0
Fifth	7	7	0	0.0
Sixth	13	12	1	7.7
Seventh	5	5	0	0.0
Eighth	8	7	1	12.5
Ninth	97	76	21	21.6
Tenth	6	6	0	0.0
Eleventh	23	23	0	0.0
All circuits:	306	273	33	10.8

The 306 decisions included 174 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 56 direct appeals from denials of other forms of relief from removal or from findings of removal; and 76 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	174	156	18	10.3
Other Relief	56	50	6	10.7
Motions	76	67	9	11.8

The 18 reversals in asylum cases involved the following issues: 2 addressed the adverse credibility determination; 4 involved nexus; 4 concerned level of

harm for past persecution; 2 found that DHS had not presented sufficient evidence to rebut the presumption of continuing persecution after a finding of past persecution; and 2 involved the “disfavored group” analysis in the Ninth Circuit. Other cases included the right to counsel, a faulty frivolousness determination, and a remand to address protection under the Convention Against Torture.

The six cases in the “other relief” category included three remands in cancellation of removal cases for imprecise fact-finding, factors not considered, or arguments not addressed; a remand to provide further opportunity to obtain representation; and a remand to allow the respondent to complete fingerprint requirements. The Ninth Circuit also issued a decision finding that the aggravated felony grounds for removal do not apply to convictions rendered prior to November 18, 1988.

The nine cases involving motions included four based on ineffective assistance of counsel; new medical evidence in a cancellation of removal case; application of the *Velarde* factors to reopening for adjustment of status; and arriving alien adjustment of status.

The chart below shows the combined numbers for the first 3 months of 2010 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Ninth	493	434	59	12.0
Eighth	20	18	2	10.0
Tenth	10	9	1	10.0
Seventh	11	10	1	9.1
Eleventh	77	71	6	7.8
Second	305	283	22	7.2
Sixth	29	27	2	6.9
Third	104	99	5	4.8
Fourth	45	43	2	4.4
First	4	4	0	0.0
Fifth	28	28	0	0.0
All circuits:	1126	1026	100	8.9

The numbers by type of case on appeal for the first 3 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	611	555	56	9.2
Other Relief	210	190	20	9.5
Motions	305	281	24	7.9

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Supreme Court:

Padilla v. Kentucky, 130 S. Ct. 1473 (2010): The Court held that a lawyer representing an alien in a criminal prosecution has a constitutional duty to advise his client of the immigration consequences of a guilty plea. The case involved a long-term lawful permanent resident who pled guilty to transporting a large quantity of marijuana after being advised by counsel that he need not worry about his immigration status. The Supreme Court of Kentucky held that such advice was not covered by the Sixth Amendment's right to effective counsel because the immigration issue was merely a "collateral" consequence of the criminal conviction. The Supreme Court reversed, holding that counsel has a duty to correctly advise of the consequences where (as in the present case) they are "succinct and straightforward" (i.e., the plea would result in almost certain deportation); where the consequences are less obvious, counsel need only advise the client of the possibility of adverse immigration consequences. The matter was remanded for a determination as to whether the alien could demonstrate prejudice from his attorney's actions.

First Circuit:

Mejilla-Romero v. Holder, __F.3d__, 2010 WL 1293818 (1st Cir. Apr. 6, 2010): The First Circuit denied the petition for review of a now 18-year-old asylum seeker from Honduras, who had been denied asylum by an Immigration Judge 4 years earlier. The alien left Honduras at the age of 11 out of fear arising from a combination of factors, including an angry and apparently dangerous neighbor; a gang of older boys who would occasionally attack the alien outside of school and take his money; and the murder of his uncle when the alien was 5 years old. After joining his mother in Boston, he was the victim of traumatic violence during his time in the U.S. In a split decision, the court upheld as reasonable the Immigration

Judge's determinations that the alien had not established either past persecution or a well-founded fear of future persecution on account of a protected ground and that he had further failed to establish that the Government of Honduras was unwilling or unable to control either the neighbor or the group of older boys. Furthermore, although the latter group had not been found by the Immigration Judge to have been engaged in efforts to recruit the alien, the court noted that such claim would nevertheless fail under the Board's decisions in *Matter of E-A-G-* and *Matter of S-E-G-*.

Second Circuit:

Shabaj v. Holder, __F.3d__, 2010 WL 1427511 (2d Cir. Apr. 12, 2010): The Second Circuit denied the alien's petition for review following a removal order issued by DHS. The alien, an Albanian national, attempted to enter the U.S. under the Visa Waiver Program ("VWP") by using a fraudulent Italian passport. Under the terms of the VWP, the alien was afforded an "asylum only" hearing before an Immigration Judge, whose denial of that application was affirmed by the Board. The alien subsequently married a U.S. citizen and filed two applications for adjustment of status that were denied by DHS, after which he was ordered removed. The court rejected the alien's argument on appeal that he should not be bound by the terms of the VWP (which affords no right to challenge a removal order other than asylum) because, as a citizen of Albania, he was not eligible for the program. The court concluded that the alien was properly treated as a VWP applicant and thus that he "received all the removal process to which he was entitled, and was properly determined to be removable."

Third Circuit:

Kaplun v. Att'y Gen., __F.3d__, 2010 WL 1409019 (3d Cir. Apr. 9, 2010): The Third Circuit denied in part and granted in part the petition for review of the Board's order of removal. In doing so, the court reversed the Board's decision in *Matter of V-K-*, finding that the Board erred in holding that an Immigration Judge's prediction of the likelihood of torture was subject to the Board's de novo review as a mixed question of fact and law. The court upheld the Board's separate rulings that the alien's conviction for securities fraud rendered him removable as an aggravated felon under section 101(a)(43)(M) of the Act and ineligible for withholding of removal as one who had committed a particularly serious crime. However, as the Board had employed de novo review in reversing the Immigration Judge's grant of CAT relief, the court

remanded the record for the Board to reconsider that issue under the “clearly erroneous” standard when reviewing the Immigration Judge’s factual determination of what is likely to happen to the alien if removed (which the court distinguished from the separate legal question whether what is likely to happen meets the legal definition of “torture”).

Zegrean v. Att’y Gen. of U.S., __F.3d__, 2010 WL 1443197 (3d Cir. Apr. 13, 2010): The Third Circuit denied the alien’s petition for review of an Immigration Judge’s decision (affirmed by the Board) denying his motion to terminate proceedings where he had failed to establish prima facie eligibility for naturalization. The court acknowledged the irresolvable conflict between 8 C.F.R. § 1239.2(f) (allowing an Immigration Judge under certain circumstances to terminate removal proceedings to allow the alien to proceed on a naturalization petition), and 8 U.S.C. § 1429 (forbidding consideration of a naturalization petition where removal proceedings are pending). In spite of what it termed the “prevailing muddle,” the court deferred to the Board’s conclusion in *Matter of Acosta Hidalgo* that it lacked jurisdiction to consider the alien’s prima facie eligibility to naturalize, finding that decision to be neither arbitrary or capricious, nor plainly erroneous or inconsistent with the regulation.

Fifth Circuit:

Toora v. Holder, __F.3d__, 2010 WL 1385113 (5th Cir. Apr. 8, 2010): The Fifth Circuit ruled that the departure bar for motions to reopen under 8 C.F.R. § 1003.23(b)(1) applies where the alien left the U.S. after being placed in deportation proceedings but before being ordered deported. (The court previously held that the departure bar applies where the alien left the U.S. after being ordered deported.) 8 C.F.R. § 1003.23(b)(1) states that a motion to reopen “shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States.” Here, the alien was placed in deportation proceedings but left the U.S. while the proceedings were pending. He was subsequently ordered deported in absentia. He later reentered the U.S. under another name and was granted asylum by INS. When DHS informed the alien it intended to revoke the asylum grant, the alien filed a motion to reopen with the Immigration Judge to rescind the in absentia order. The Immigration Judge ruled that he lacked jurisdiction to consider the motion under the departure bar and that, even if jurisdiction existed, he

would deny the motion as untimely. The Board ruled that the Immigration Judge had jurisdiction to consider the motion, but affirmed the decision to deny it. In reversing the Board’s jurisdictional ruling and stating that the departure bar applied to the alien, the court held that “the plain language of the departure bar supports the view that it applies to an alien who departs the country after removal proceedings are initiated against him.”

Ninth Circuit:

Delgado-Ortiz v. Holder, __F.3d__, 2010 WL 1435068 (9th Cir. Apr. 6, 2010): The Ninth Circuit denied the petition for review of the denial of a motion to reopen. The Board had found that the motion: (1) was untimely and numerically barred; (2) failed to demonstrate changed country conditions; and (3) failed to establish prima facie eligibility for the requested reliefs of asylum, withholding of removal, and CAT protection. In upholding the failure to show prima facie eligibility, the court rejected the alien’s proposed particular social group of “returning Mexicans from the United States,” which the court found too broad to qualify as a cognizable social group.

Joseph v. Holder, __F.3d__, 2010 WL 1462373 (9th Cir. Apr. 14, 2010): The Ninth Circuit ruled that “an IJ may not consider her notes from a petitioner’s bond hearing in that petitioner’s removal hearing.” Here, the alien, a Haitian citizen, filed a pre-REAL ID Act application for asylum, withholding of removal, and protection under the CAT. He alleged that played in a musical group in support of President Aristide, and that, in retaliation, he was threatened, and his family harmed, by Aristide’s opponents. The Immigration Judge denied the applications based on an adverse credibility finding. In support of the adverse credibility finding, the Immigration Judge referenced her notes from the alien’s bond hearing and stated that, given that the alien provided detailed testimony at his removal hearing, she “would have expected . . . a more thorough explanation, during the bond hearing, with respect to [the alien’s] fear, his past persecution.” However, the court ruled that an Immigration Judge is precluded “from considering evidence from a bond hearing, in this case the IJ’s notes, in determining a petitioner’s credibility at a removal hearing.” The court also rejected the other bases of the adverse credibility finding, which were: “1) [the alien’s] failure to provide [his persecutor’s] last name; 2) [the alien’s] lack of understanding of the complex political situation in Haiti; 3) [his] failure to depart Haiti sooner; and 4) [his] failure to submit sufficient corroborating evidence.”

Singh v. Holder, ___F.3d___, 2010 WL 1529405 (9th Cir. Apr. 19, 2010): The court denied the petition for review of an asylum seeker from India whose application was denied by an Immigration Judge. The court found that the alien's testimony must be construed as credible because the Immigration Judge made no adverse credibility finding. However, the court found that under the REAL ID Act, the Immigration Judge properly concluded that, without corroboration, the alien's credible testimony was insufficient to meet his burden of proof as to his date of entry. In light of the 1-year filing requirement for asylum, the court found the date of entry to be a material fact that was central to the alien's claim and was easily subject to verification. The court found that the REAL ID Act, which states that corroborating evidence may be required, places aliens on notice of the need for such evidence. The court further concluded that because the alien admitted a lack of corroboration but failed to provide a reasonable explanation for his failure to corroborate, the Immigration Judge did not err in barring the asylum application as untimely.

BIA PRECEDENT DECISIONS

In *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010), the Board considered specific evidence submitted in support of an asylum claim based upon China's coercive population control policies. The respondents, a husband and wife, were natives and citizens of China who had two United States citizen children. The respondents did not claim to have suffered past persecution but asserted that if returned to China, and particularly to Huang Qi Town, Lian Jiang County, in Fujian Province, the female respondent had a well-founded fear of persecution as a result of the birth of her two children in the United States. In support of their claim, they submitted an affidavit from the respondent's mother, which indicated that the family planning office informed her that a Chinese national returning to the town who violated the family planning policies would be sterilized and fined. The respondents also submitted affidavits from other friends and relatives. The Immigration Judge granted the respondents asylum.

In reversing the asylum grants, the Board first noted that State Department reports on country conditions, including the Profiles of Asylum Claims and Country Conditions, are highly probative evidence and are usually the best source of information on conditions in foreign nations. In this case, the State Department

country report specific to Fujian Province observed that U.S. officials in China had no evidence of an official policy or practice of forced abortions or sterilization in Fujian in the last 10 years. The newspaper and internet articles submitted by the respondent likewise did not establish a policy of forced sterilization of parents who return to China with children born abroad. The Board found that the documents from Lian Jiang County were entitled to minimal weight because they were unsigned, unauthenticated, and failed to identify the writers, and they did not specify the penalties for refusing to undergo sterilization. Also, the State Department reports indicated that any certificate issued by the Village Committees of Lian Jiang County should be deemed ineffective because such committees have no authority to make family planning decisions. The Board found that the affidavits were entitled to little weight, did not articulate the penalty for refusing to undergo sterilization, and did not reflect the experience of individuals similarly situated to the respondents. Moreover, the Board determined that any economic penalty would not amount to persecution. Thus, the Board concluded that the respondents did not establish a reasonable possibility that the female respondent would be subject to forced sterilization or would face any penalties or sanctions so severe that they would rise to the level of persecution.

In *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), the Board found that an alien who entered without inspection but then adjusted status under section 245 of the Act, 8 U.S.C. § 1255, has "previously been admitted to the United States as an alien lawfully admitted for permanent residence" and therefore must meet the 7-year continuous residence requirement for purposes of establishing eligibility for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). After entering without inspection, the respondent adjusted his status in 2001 to that of a lawful permanent resident. The respondent conceded removability under section 212(a)(2)(A)(i)(I) of the Act based on his 2004 conviction for organized fraud in Florida and sought a section 212(h) waiver. The Immigration Judge found that the respondent had been "admitted" when he adjusted his status and was therefore required to show 7 years of continuous residence to be eligible for a waiver, which he could not do.

The respondent argued that he did not have to show 7 years of continuous residence because he was never admitted when he adjusted his status. In rejecting this argument, the Board reasoned that adjustment of status is

essentially a proxy for inspection and permission to enter at the border. The Board noted the language of sections 245(a) and (i), which authorize the Attorney General to adjust an alien's status "to that of an alien lawfully admitted for permanent residence." (Emphasis added.) Relying on *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999), and *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), *vacated*, *Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006), both of which addressed the question in the deportability context, the Board pointed out that a contrary interpretation would mean that an alien who previously entered without inspection would never have been "admitted" for permanent residence and would be ineligible for relief that requires admission, such as cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). Further, the Board noted that section 245(b) instructs the Attorney General to "record the alien's lawful admission for permanent residence as of the date" that adjustment of status was granted. Thus the Board concluded that when Congress amended section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13), it did not intend to differentiate between adjustment of status and an admission after inspection at the border. Noting that the critical concern is the alien's length of residence in lawful permanent residence status, rather than the mechanism by which he or she as "admitted" to that status, the Board affirmed the Immigration Judge's decision.

In *Matter of Richardson*, 25 I&N Dec. 226 (BIA 2010), the Board interpreted the term "conspiracy" in section 101(a)(43)(U) of the Act. The respondent, who was admitted as a lawful permanent resident in 1988, was convicted in 2004 of conspiracy to commit robbery in violation of New Jersey law, for which he was sentenced to 7 years of imprisonment. The Immigration Judge found the respondent removable as an alien convicted of an aggravated felony, namely, a theft offense under section 101(a)(43)(G) of the Act and conspiracy under section 101(a)(43)(U). The respondent argued that proceedings should have been terminated because he was not convicted of the underlying crime of robbery and the New Jersey conspiracy statute did not require the commission of an overt act.

The Board agreed with the respondent that he was not convicted of a theft offense under section 101(a)(43)(G) of the Act, but it held that the charge under section 101(a)(43)(U) of the Act was properly sustained. The Board concluded that the term "conspiracy" in section

101(a)(43)(U) is not limited to conspiracies in which an overt act must be established, finding support in Supreme Court decisions upholding convictions under Federal money laundering and controlled substances conspiracy statutes that do not require an overt act. See *Whitfield v. United States*, 543 U.S. 209 (BIA 2005); *United States v. Shabani*, 513 U.S. 10 (1994). As further support, the Board noted that the common law meaning of "conspiracy" does not require the commission of an overt act and that the Model Penal Code § 5.03(5) contains no overt act requirement for a felony of the first or second degree.

Alternatives to Detention *continued*

236(a) of the Act by section 303 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-585. Referencing legislative history, the Board stated that "Congress did not intend any meaningful change to the scope of the Attorney General's previous authority under new section 236(a) of the Act," and that "Congress used the terms 'custody' and 'detain' interchangeably and did not intend for them to be afforded different meanings." *Matter of Aguilar-Aquino*, 24 I&N Dec. at 751-52.

The Board noted that in finding that the ESR program was a form of "custody," the Immigration Judge had relied on Federal habeas corpus decisions interpreting "custody" broadly to include restraints that are milder than actual physical confinement. However, the Board stated, "[W]e find that Congress did not intend the term 'custody' in section 236 of the Act to be afforded the broad interpretation employed in the Federal habeas corpus statute," given that, with respect to habeas corpus, "custody" "is interpreted expansively to ensure that no person's imprisonment or detention is illegal." *Id.* at 752.

Because the alien's release into the ESR program constituted "release[] from custody" under 8 C.F.R. § 1236.1(d)(1) and he waited more than 7 days after his release to file his request for custody redetermination, the Board ruled that the request was untimely and the Immigration Judge therefore lacked jurisdiction under 8 C.F.R. § 1236.1(d)(1) to "ameliorat[e] the terms of release."

The Board's decision in *Matter of Aguilar-Aquino* begged a follow-up question: If, 7 days or less after being released into an ADT program, an alien filed a request

for bond redetermination, could an Immigration Judge order the alien to be taken out of the program? The Board subsequently addressed this question in *Matter of Garcia-Garcia*.

Matter of Garcia-Garcia

In *Matter of Garcia-Garcia*, 25 I&N Dec. 93, the Board held that when an alien files a request for custody redetermination within 7 days of being placed in an ATD program, an Immigration Judge has authority to review the alien's placement the program, because this placement is a "term[] of release" under 8 C.F.R. § 1236.1(d)(1). Here, DHS had released the alien into ISAP, under which he was required to wear an electronic monitoring device on his ankle and follow reporting requirements. Six days after his release, the alien filed a motion for a custody redetermination hearing before the Immigration Judge, requesting to be taken out of ISAP and allowed to post a bond instead. The Immigration Judge found that her authority to ameliorate the conditions of release under 8 C.F.R. § 1236.1(d)(1) "afforded her broad jurisdiction to consider more than just the appropriate amount of bond." *Id.* at 94. However, she denied the alien's request, ruling that the alien did not satisfactorily show that he should be relieved of the conditions of release.

DHS appealed to the Board, pointing out that 8 C.F.R. § 1236.1(d)(1) only authorizes Immigration Judges "to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the alien may be released." Advocating for a narrow reading of this language, DHS contended that the regulation "does not give the Immigration Judge authority to ameliorate" in other respects "the conditions placed by the DHS on an alien's release from custody." *Id.* at 94.

However, the Board affirmed the Immigration Judge's jurisdictional determination and ultimate decision, reasoning that 8 C.F.R. § 1236.1(d)(1) "suggests that the Immigration Judge has broad authority to review and modify the terms imposed by the DHS on an alien's release from custody." *Id.* at 96. The Board further stated that "an interpretation limiting the Immigration Judge's authority to ameliorate the terms of release imposed by the DHS would be inconsistent with the language of section 236(a) of the Act." *Id.*

In addition, the Board found its conclusion to be consistent with the plain language of section 236(a) of

the Act, which "gives the Attorney General the authority, which is shared with the Secretary of Homeland Security, to place conditions on an alien's release from custody when setting a monetary bond of at least \$1,500." *Id.* at 97. "We read the authority to place conditions on an alien's release on bond as conversely conferring the authority to order the removal of a condition placed on an alien's release by the DHS." *Id.* The Board also noted its conclusion in *Matter of Toscano-Rivas*, 14 I&N Dec. 532 (BIA 1972, 1973; A.G. 1974), that under previous regulatory provisions, an Immigration Judge "had authority to review *and modify* the conditions of a bond imposed by a District Director in a deportation proceeding." *Matter of Garcia-Garcia*, 25 I&N Dec. at 97 (emphasis added).

Therefore, in this case the Board ruled that the Immigration Judge had the authority "to review and consider whether to modify the conditions of release imposed by the DHS," namely placing the alien in ISAP. *Id.* at 98. According to the Board, however, because the alien did not appeal the Immigration Judge's decision denying his "request for removal of the electronic monitoring device upon payment of a minimal bond, the respondent remains subject to ISAP and its reporting requirements." *Id.*

Conclusion

With its decisions in *Matter of Aguilar-Aquino* and *Matter of Garcia-Garcia*, the Board has ruled that participation in an ADT program is not a form of custody and that Immigration Judges have the authority to review placement in such programs as a term of release from custody. In the wake of these decisions, Immigration Judges may increasingly be called on to review such placement, particularly if these programs continue to expand. There may be additional legal questions to address in the future, such as whether an Immigration Judge may order that an alien be placed into an ATD program as a condition of his release from DHS custody. In the meantime, a thorough familiarity with DHS's alternatives to detention will become increasingly necessary.

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1. See ICE, DHS, Fact Sheet, *2009 Immigration Detention Reforms* (Aug. 6, 2009), available at <http://www.ice.gov/pi/news/factsheets/2009immigrationdetentionreforms.htm>; News Release, ICE, Secretary Napolitano and ICE Assistant Secretary Morton announce new immigration detention reform initiatives (Oct. 6, 2009), available at <http://www.ice.gov/pi/nr/0910/091006washington.htm>.

2. ICE, DHS, Fact Sheet, *ICE Office of Detention and Removal* (Nov. 2, 2006), available at <http://www.ice.gov/pi/news/factsheets/dro110206.htm>.

3. See Donald Kerwin and Serena Yi-Ying Lin, Migration Policy Institute, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* 22-23 (Sept. 2009), available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>; see also ICE, DHS, Fact Sheet, *Detention Management* (Nov. 20, 2008), available at http://www.ice.gov/pi/news/factsheets/detention_mgmt.htm (“The . . . Office of Detention and Removal Operations (DRO) maintains custody of one of the most highly transient and diverse populations of any correctional or detention system in the nation.”).

4. See *Oversight of the Department of Homeland Security: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (May 6, 2009) (testimony of Janet Napolitano, Secretary of the Department of Homeland Security, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3803&wit_id=7873).

5. See Fact Sheet, *supra* note 1.

6. See *id.*

7. See ICE, DHS, Fact Sheet, *Alternatives to Detention for ICE Detainees* (Oct. 23, 2009), available at <http://www.ice.gov/pi/news/factsheets/alternativestodetention.htm>.

8. See *id.*

9. See Dora Schriro, ICE, DHS, *Immigration Detention Overview and Recommendations* 20 (Oct. 6, 2009), available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

10. See Fact Sheet, *supra* note 7.

11. See Kerwin and Lin, *supra* note 3, at 31.

12. See Schriro, *supra* note 9, at 20.

13. See Kerwin and Lin, *supra* note 3, at 32.

14. See Schriro, *supra* note 9, at 20.

15. See *id.* at 6.

16. Fact Sheet, *supra* note 7.

17. See *id.*

18. Section 236(a) of the Act was last amended by section 303 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-585, before DHS was created. With the creation of DHS,

that agency, and not the Department of Justice, is responsible for arresting aliens and making initial custody determinations under section 236(a). See *Matter of D-f-*, 23 I&N Dec. 572, 574 n.3 (A.G. 2003). DHS’s initial custody determinations can be then reviewed by Immigration Judges in certain instances, as described in this article.

19. In general, an Immigration Judge’s decision whether to release an alien on bond requires an initial determination whether the alien poses a danger to property or persons. *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009) (“Only if an alien demonstrates that he does not pose a danger to the community should an Immigration Judge continue to a determination regarding the extent of flight risk posed by the alien.”). If the alien demonstrates that he or she is not a danger to society, then the Immigration Judge assesses the amount of bond necessary to secure the alien’s appearance. The Federal regulations provide that the Immigration Judge’s bond determination may be based on “any information that is available to the Immigration Judge or that is presented to him or her by the alien or the [Government].” 8 C.F.R. § 1003.19(d). Under Board case law, the following factors, among others, can be considered by Immigration Judges in making bond determinations: “(1) whether the alien has a fixed address in the United States; (2) the alien’s length of residence in the United States; (3) the alien’s family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien’s employment history; (5) the alien’s record of appearance in court; (6) the alien’s criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien’s history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien’s manner of entry to the United States.” *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006); see also *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000); *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994); *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987); *Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974).

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