

EXHIBIT 2

Hernandez v. Garland

Instructions and Guidelines to Immigration Judges

On October 25, 2021, the Executive Office for Immigration Review (EOIR) and Immigration and Customs Enforcement (ICE) entered into a Settlement Agreement (the “Settlement”) with Plaintiff Class Members in a civil action in *Hernandez v. Garland*, United States District Court for the Central District of California, Case No.5:16-cv-00620-JGB-KK. The Settlement applies to a class of “all individuals who are or will be detained pursuant to [section 236(a) of the Immigration and Nationality Act (INA)] on a bond set by an U.S. Immigration and Customs Enforcement officer or an Immigration Judge in the Central District of California.” The Settlement therefore applies to both initial bond hearings held under section 236(a) as well as bond hearings for cases of prolonged detention authorized pursuant to, *Rodriguez v. Marin*, CV-07-03239 (C.D. Cal. Aug. 6, 2013) (as modified by *Rodriguez v. Martin*, CV 07-03239 (C.D. Cal. May 28, 2020), *Franco-Gonzalez v. Holder*, CV-10-02211 (C.D. Cal. Apr. 23, 2013), and *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008), to the extent these cases remain good law, to assess an alien’s dangerousness, threat to national security, and flight risk.

Pursuant to the Settlement, ICE officials and Immigration Judges, when setting, re-determining, and/or reviewing the terms of any class member’s release, must: (1) consider the alien’s financial circumstances and financial ability to pay a bond; (2) not set bond at a greater amount than necessary to ensure the alien’s appearance at all future immigration proceedings, including for removal if so ordered; and (3) consider whether the alien may be released on alternative conditions of release, alone or in combination with a lower bond, that are sufficient to mitigate flight-risk.

The following are guidelines for Immigration Judges to apply in light of the Settlement:

1. The Settlement continues the rule that Immigration Judges should only set a bond or consider alternative conditions of release if the Immigration Judge finds the alien is not a danger to persons or property or a threat to national security. *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009); *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006).
2. Immigration Judges may continue to rely on the non-exclusive list of factors set forth in *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006), and any other provision of law as appropriate, to assess an alien’s dangerousness and flight risk.
3. The alien continues to bear the burden of proving that his or her flight risk can be mitigated by an appropriate bond or conditions for release.¹
4. If the Immigration Judge determines that the alien is not a threat to national security and not a danger to persons or property, the Immigration Judge will then consider whether the individual is a flight risk, and if not, consider whether the alien may be released on his or her own recognizance. If the alien is determined to be a flight risk, the Immigration Judge will then consider whether the alien can be released on:
 - alternative conditions of release without a bond; a bond; or

¹ The government bears the burden of proving the individual is a flight risk or danger by clear and convincing evidence at hearings held pursuant to *Rodriguez*, *Franco-Gonzalez*, and *Casas-Castrillon*, to the extent these decisions remain good law.

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- alternative conditions of release alone or in combination with a lower bond.

An Immigration Judge has the authority to grant the alien's release on alternative conditions of release alone or in combination with a lower bond.

5. When an Immigration Judge decides that an alien is eligible for release on bond, he or she must affirmatively inquire into the alien's financial circumstances and make an individualized assessment of the alien's current ability to pay the bond amount to be set.
6. In assessing an alien's ability to pay, Immigration Judges should consider all relevant evidence in the record,² including any information solicited by ICE.³ Immigration Judges may also inquire into any additional evidence presented relevant to an alien's ability to pay, including but not limited to:
 - The alien's individual income and employment history;
 - Income of the alien's spouse or domestic partner;
 - Assets available to pay a monetary bond amount, including personal or real property in the United States or abroad;
 - Other expenses, debts, or circumstances that would impair ability to pay.
7. An Immigration Judge may assess an alien's financial circumstances based on the alien's sworn testimony alone or, where necessary, the Immigration Judge may require the alien to provide corroborative evidence concerning the alien's financial circumstances.

In addition to the alien's sworn testimony, other relevant evidence may include, but is not limited to:

- Documentation concerning the alien's (or the alien's spouse's or domestic partner's) wages, salary, or other earnings, including pay stubs, bank records, tax returns, or similar documents;
 - Evidence of monthly mortgage or rental payments;
 - Evidence of debts such as medical expenses and child-support or care expenses;
 - Evidence of any other assets in the United States or abroad.
8. When setting, re-determining, and/or reviewing the terms of any Class member's release, the Immigration Judge must not set a bond at a greater amount than needed to ensure the alien's appearance. The Immigration Judge must also consider whether alternative conditions of

² By regulation, information collected pursuant to the Settlement to determine a class member's financial ability to pay a bond "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding." 8 C.F.R. § 1003.19(d).

³ Pursuant to the Settlement, ICE has instructed its Enforcement and Removal Operations officers to assess ability to pay when conducting an initial custody determination with regard to an individual detained under INA § 236(a).

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supervision, alone or in combination with a lower bond, may be sufficient to mitigate flight risk.

9. The Agreement does not require an Immigration Judge to set a bond that the alien can afford. There may be limited circumstances in which the bond amount necessary to mitigate flight risk, alone or in combination with conditions of release, is more than the Class Member can afford.
10. When rendering a decision in which a bond is set, if the parties have not stipulated to the bond amount or conditions of release, the Immigration Judge should explain why, whether orally or in writing, the bond amount is appropriate in light of any evidence of the alien's financial circumstances. The Immigration Judge should also explain why he or she did or did not order alternative conditions of supervision.
11. All bond hearings conducted pursuant to the Agreement shall be recorded and made available on the same terms as any other immigration court hearing pursuant to agency policies and practices for requesting records and subject to the rules and regulations under the Privacy Act, the Freedom of Information Act, and any other law as applicable.
12. The immigration judge is not required to release any § 1226(a) detainee for whom he or she has determined that no bond or alternative conditions of release would be sufficient to ensure the alien's appearance.
13. Nothing in the Agreement changes the requirement that if an Immigration Judge sets a bond, the bond cannot be less than the amount set by statute at 8 U.S.C. § 1226(a)(2), which is currently \$1,500. *See* 8 U.S.C. § 1226(a)(2).
14. Nothing in the Agreement changes the provisions at 8 C.F.R. § 1003.19(e), which permit, after an initial bond redetermination, an alien to request in writing a subsequent bond redetermination hearing if the alien can show that his or her circumstances have changed materially since the prior bond redetermination.
 - An alien may request a subsequent bond redetermination under 8 C.F.R. § 1003.19(e), if there has been a material change in his or her financial circumstances. Nothing in the agreement requires the immigration judge to find that any change in financial circumstances constitutes a "material" change for the purpose of 8 C.F.R. § 1003.19(e).
15. Nothing in the Agreement changes the provisions at 8 C.F.R. § 1236.1(d)(1), (d)(2) for the amelioration of terms of release from an immigration judge or the ICE Enforcement and Removal Operations district director.

Please contact your Assistant Chief Immigration Judge with any questions or concerns.