

EXHIBIT 3

Hernandez v. Garland

Guidance and Instructions to ERO

On October 25, 2021, the Executive Office for Immigration Review (EOIR) and U.S. Immigration and Customs Enforcement (ICE) entered into a settlement agreement (the “Settlement”) with plaintiff class members in *Hernandez v. Garland*, No. 5:16-cv-0620-JGB-KK (C.D.C. April 6, 2016). The Settlement applies to all noncitizens who are or will be detained pursuant to section 236(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1226(a), to be released on a bond set by an ICE officer within the Central District of California.

Pursuant to the Settlement, for all noncitizens detained pursuant to INA § 236(a) in the Central District of California, ICE must, when setting or reviewing the terms of a noncitizen’s release: (1) consider the noncitizen’s financial ability to pay a bond; (2) not set bond at a greater amount than necessary to ensure the noncitizen’s appearance at all future immigration proceedings, including for removal if so ordered; and (3) consider whether the noncitizen may be released on alternative conditions of release, alone or in combination with a lower bond amount, that are sufficient to mitigate flight risk.

The following are guidelines for ICE to apply for custody determinations in light of the Settlement:

1. The Settlement does not alter the existing process for determining whether a noncitizen detained under INA § 236(a) is eligible for release.
 - a. Under the standard process, ICE must first determine whether the noncitizen’s release would pose a danger to persons or property.
 - b. The Settlement does not require ICE to release any INA § 236(a) detainee for whom it has determined that the noncitizen’s release would pose a danger to persons or property. *See* 8 C.F.R. § 236.1(c)(8); *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009).
2. If ICE determines that a noncitizen detained pursuant to INA § 236(a) would not pose a danger to persons or property if released, ICE will then determine whether the noncitizen is a flight risk. ICE may continue to rely on the non-exhaustive 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 a noncitizen’s flight risk.
3. If ICE determines there is a flight risk, ICE will then determine whether there is an amount of bond, other conditions of release, or combination of bond and other conditions that would sufficiently mitigate the risk of flight.
 - a. In making the determination for a noncitizen’s eligibility for release, ICE will consider the noncitizen’s financial ability to pay a bond and consider whether other conditions of release, or a combination of lower bond and other conditions, can sufficiently mitigate the risk of flight.

4. The Settlement also does not require ICE to set a bond if the ICE officer is satisfied that release on recognizance, or on alternative conditions of release, are sufficient to ensure the noncitizen's appearance. However, if ICE sets a bond, with or without alternative conditions of release, the minimum bond amount remains the amount set by statute at INA § 236(a), 8 U.S.C. § 1226(a)(2), which is currently \$1,500.
5. ICE is not required to set a bond that the noncitizen can afford in every case.

Assessing Ability to Pay: Effective immediately, when conducting an initial custody determination for a noncitizen detained pursuant to INA § 236(a) for whom ICE has determined is neither dangerous nor enough of a flight risk to warrant detention without a bond, ICE must consider the noncitizen's financial ability to pay a bond and alternative conditions of release.

At a minimum, the detained noncitizen must be offered an opportunity to explain his or her financial ability to pay a bond. ICE officers have discretion to ask any other questions relevant to the detainee's financial ability to pay a bond. An officer may evaluate a noncitizen's financial circumstances based on testimony alone. However, ICE may ask a noncitizen to produce documentation or other evidence if the officer determines it is necessary to evaluate the noncitizen's financial ability to pay a bond. ICE officers should consider the totality of the circumstances presented when determining the bond amount or other conditions of release.

Any response or refusal to respond to a financial ability to pay inquiry should be documented, in summary format, on the Form I-213, Record of Deportable/Inadmissible Alien, during processing.

Limitation on the Applicability of this Guidance. This guidance is not intended to limit the appropriate exercise of prosecutorial discretion in other contexts. Nor does this guidance impose any limitations on release where it is determined that a noncitizen detained pursuant to INA § 236(a) does not pose a danger or flight risk; release is required by law, such as when a noncitizen receives a final grant of relief or removal proceedings are dismissed or terminated without ICE opposition; a noncitizen is surrendered to another agency pursuant to a criminal arrest warrant; or a court order or legal precedent requires release. Moreover, this message provides only internal guidance to ICE and does not, is not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal, beyond those provided in the Settlement.