

PRESENTED AT

A Practical Guide to Immigration Removal Proceedings

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Immigration Bonds

Joseph A. Vail

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I) **Introduction**

One of the common experiences for an immigration practitioner is to receive the urgent phone call from a frantic wife, sister or mother that her husband, brother or sister has been detained by the Department of Homeland Security (DHS, formerly INS), and she wants you to find him and obtain his release. There are a series of questions that immediately come to mind. Where is he detained? Has he been charged or issued an Notice to Appear (NTA)? Has bond been set? If so, how much? Can it be lowered? If no bond has been set, can a bond be set?

The following is a brief outline on the arrest authority of the DHS and procedures to be used in attempting to obtain or re-determine an immigration bond. The basic questions to be addressed in obtaining the release of an alien are:

- a. Is the person subject to mandatory detention? (If so, only DHS can set release conditions).
- b. Is the individual a security threat or a threat to the community?
- c. Is the individual a flight risk?
- d. What evidence or witnesses can be obtained to prove the above?

II) **Arrest and Custody Procedures**

a) **Authority for arrest and detention – INA § 236 and INA § 287¹**

An individual may be arrested and detained on a warrant from the Attorney General, pending a decision on whether the individual is to be removed from the country.² A DHS officer may without a warrant:

- 1) Interrogate any alien, or person believed to be an alien, as to her right to be or remain in the U.S.³
- 2) Arrest any alien in her view entering or attempting to enter the U.S. in violation of law.⁴
- 3) Arrest any alien in the U.S. if she has “reason to believe” that the alien is in the country in violation of law and is likely to escape before a warrant can be obtained for her arrest.⁵
- 4) Board and search any vessel within the territorial waters of the United States to prevent the unlawful entry of aliens into the U.S.⁶
- 5) Search aircraft, railway cars or other vehicles within a reasonable distance from the

1. *See also*, 8 C.F.R. § 287.5(c).

2. INA § 236(a).

3. INA § 287(a)(1); S. 1906, 108th Cong. (2003) (providing for state and local law enforcement agencies to enforce the immigration laws of the U.S.).

4. INA § 287(a)(2).

5. *Id.*

6. INA § 287(a)(3).

border to prevent the unlawful entry of aliens into the U.S.⁷

- 6) Have access to private lands (not dwellings) within 25 miles of the border to patrol and prevent the unlawful entry of aliens into the United States.⁸
- 7) Make arrests for any felony regulating the admission, exclusion, expulsion, or removal of aliens if there are reasonable grounds to believe that the person arrested committed the offense, and if there is a possibility of escaping before a warrant can be issued.⁹
- 8) Make arrests for any offense against the U.S. committed in her presence.¹⁰
- 9) Make an arrest for any felony under U.S. law if there are reasonable grounds to believe that the person to be arrested committed or is committing an offense.¹¹

In short, a DHS officer can arrest someone without a warrant if there are reasonable grounds to believe that the person is in the country in violation of law.

In order to stop someone for questioning, an officer must be “aware of specific particularly facts, together with rational inferences from those facts that reasonably warrant suspicion.”¹²

Whether the stop is justified, i.e. whether there is a reasonable basis for an arrest depends on the totality of the circumstances.¹³ An alien’s ancestry, race, or ethnicity may be relevant factors, but standing alone, are insufficient to establish reasonable grounds for a stop.¹⁴ Furthermore, Hispanic appearance alone is not sufficient to establish probable cause for a search and seizure.¹⁵

b) Procedures for “processing” detained aliens - 8 C.F.R. § 287.3

The procedures for “processing” non-citizens arrested without a warrant are outlined in the regulations at 8 C.F.R. § 287.3. The officer who interviews the individual should not be the arresting officer unless no other officer is available.¹⁶ The officer must advise the individual of the following:¹⁷

- 1) Reasons for the arrest;
- 2) Right to be represented at no expense to the government;
- 3) Availability of free legal services (a list of those agencies should be given);
- 4) Any statement made may be used against him in subsequent proceedings.

The officer must also advise the individual that a decision on custody status will be made within 48 hours, i.e. whether the individual is to be detained or released on bond, and whether a

7. *Id.*

8. *Id.*

9. INA § 287(a)(4).

10. INA § 287(a)(5)(A).

11. INA § 287(a)(5)(B). *See generally*, U.S. v. Cantu, 519 F.2d 494 (7th Cir.) (the Court stated that “the words of the statute ‘reason to believe’ are properly taken to signify probable cause.”).

12. U.S. v. Brignoni-Ponce, 422 U.S. 873, 884 - 885 (1975).

13. U.S. v. Cortez, 449 U.S. 411, 417 (1981).

14. Brignoni-Ponce at 885 - 887. *See* case Footnote 12.

15. U.S. v. Ramos, 753 F. Supp. 75 (W.D.N.Y.1990).

16. 8 C.F.R. § 287.3(a).

17. 8 C.F.R. § 287.3(c).

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