

7.4 What Happens after Your Client is Released into the Custody of ICE

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Once your client has been picked up by ICE officers, he or she will likely be taken to an immigration detention facility in South Carolina or Georgia.

A. Mandatory Detention

If your client is eligible for and able to post an immigration bond, he or she will be released during the removal proceedings. Many clients with criminal convictions, however, are not eligible for release on immigration bond and therefore will be detained pending completion of removal proceedings. The U.S. Supreme Court is considering the constitutionality of mandatory detention. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), *granting cert.*, 804 F.3d 1060 (9th Cir. 2015).

Mandatory detention provisions apply to the following people who are released from physical custody after October 9, 1998 (as set forth in INA § 236(c)(1), 8 U.S.C. § 1226(c)(1)). They apply to people who are:

- inadmissible by reason of having committed any offense covered in the criminal grounds of inadmissibility
- deportable for having committed two or more crimes involving moral turpitude (CMT)
- deportable for an aggravated felony
- deportable for a drug offense
- deportable for a firearm offense
- deportable for security-related crimes
- deportable for having committed a CMT for which the actual sentence of imprisonment is one year or more; and
- involved in terrorist activity.

The mandatory detention provisions do not apply to people who are:

- deportable for having committed one CMT for which the actual sentence of imprisonment is less than one year; and
- deportable for a domestic violence-related offense.

B. Removal Proceedings

There are several procedures for removing noncitizens. Your clients are likely to encounter one of the proceedings described below.

Removal Proceedings in Immigration Court. Many of your clients will have a hearing in immigration court. Removal proceedings for a detained client are to take place expeditiously. At this time, most removal proceedings for detained clients take place in Georgia, where they are detained, and for non-detained clients in the immigration court in Charlotte.

Removal proceedings in immigration court commence when the government files a charging document known as a Notice to Appear (NTA) with the immigration court. The NTA specifies the formal charges, the statutory provisions allegedly violated, and the individual's acts or conduct that allegedly violate the law. *See* INA § 239(a), 8 U.S.C. § 1229(a). A noncitizen has a right to an attorney at his or her own expense in the removal proceedings. A noncitizen does not have a right to a court-appointed attorney because such proceedings are considered civil in nature and not criminal.

The immigration court first determines whether a noncitizen is removable under the grounds of inadmissibility or deportability alleged in the NTA. If the noncitizen is found removable, the court can consider and grant an application for some form of relief from removal, if he or she qualifies, allowing the noncitizen to remain in the U.S. Generally, after the completion of the hearing there will be one of three outcomes: (1) the immigration judge orders the noncitizen removed from the U.S.; (2) the immigration judge grants some form of relief from removal; or (3) the immigration judge terminates the proceedings because removability has not been established by the government. In some cases, the immigration judge may administratively close the case, which means the case is removed from the docket with the possibility of it being re-calendared later by the government. Either party can appeal the decision of the immigration judge to the Board of Immigration Appeals (BIA).

Immigration authorities may remove a person from the U.S. without a formal removal hearing. Those circumstances are discussed below.

Administrative Removal. Administrative removal applies to noncitizens who are not lawful permanent residents of the U.S. and are charged with having been convicted of an aggravated felony. INA § 238(b), 8 U.S.C. § 1228(b). This summary removal process is essentially a paper process without a formal hearing and provides the noncitizen with ten days to rebut the government's charge. There is no opportunity to apply for discretionary relief from removal, though individuals may be able to apply for withholding of removal if they express a credible fear of persecution. A designated immigration officer decides whether the noncitizen's conviction qualifies as an aggravated felony.

Reinstatement. Reinstatement generally applies to noncitizens who return to the U. S. without authorization after having removed under a prior removal order. The government

simply “reinstates” the prior order of removal. Reinstatements generally account for more deportations than any other procedure.

Expedited Removal. Expedited removal currently applies to people who arrive at a port-of-entry or within 100 miles of the border with fraudulent or insufficient documents. Immigration officers patrolling the border are authorized to issue the removal orders in this context. There is limited process and opportunities for appeal, though individuals may be able to apply for asylum if they express a credible fear of persecution.

Stipulation of Removal. A stipulated removal order involves a noncitizen who agrees to accept a removal order and waives his or her right to an immigration court hearing. The immigration court enters the order based on a review of the written stipulation and charging document, often in the absence of the parties. In practice, some clients sign such a stipulation when initially interviewed by an immigration officer, agreeing to removal and waiving their right to a hearing before an immigration judge (sometimes unknowingly). These individuals are processed for immediate removal. You should advise your clients not to waive their rights to a hearing until all of their options are fully evaluated.

C. Order of Removal

If your client is ordered removed, ICE is generally required to physically remove your client from the U.S. within a period of 90 days from the date of a final order of removal. *See* INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). ICE is required to detain your client, without bond or other pre-removal condition of release, during the 90-day period. *See* INA § 241(a)(2), 8 U.S.C. § 1231(a)(2). Not all noncitizens, however, are removed during the 90-day period, particularly those who have meritorious arguments and continue to litigate their cases in the Courts of Appeal.