



Attorney General Rules that Unlawful Entrants Generally Must Remain Detained While Asylum Claims Are Considered

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Non-U.S. nationals (aliens) apprehended by immigration authorities when attempting to unlawfully enter the United States are generally subject to a [streamlined, expedited removal process](#) and must be detained while awaiting removal. But in the event that an alien is found to have a “credible fear” of persecution if returned to his or her home country, the alien will be placed in full-scale, “formal removal” proceedings where that alien may seek asylum or similar relief from removal. For many years, immigration authorities had construed governing statutes and regulations to provide that, when an alien apprehended between ports of entry and initially screened for expedited removal was placed in formal removal proceedings following a credible fear determination, that alien could seek bond and potentially be released from custody during the pendency of those proceedings. On April 16, 2019 in *Matter of M-S-*, however, Attorney General (AG) William Barr reversed this position, ruling instead that aliens apprehended between ports of entry and placed in formal removal proceedings following a credible fear determination remain ineligible for bond. (Though responsibility for administering federal immigration laws is divided among multiple agencies, the AG’s rulings with respect to questions of law are [controlling](#) upon those agencies.) The AG based his ruling, in part, on the Supreme Court’s 2018 decision in *Jennings v. Rodriguez*, which interpreted provisions of the Immigration and Nationality Act (INA) to mandate the detention without bond of aliens initially screened for expedited removal who are placed in formal removal proceedings following a credible fear determination. Despite the AG’s ruling, the Department of Homeland Security (DHS) retains the [authority](#) to release, in its discretion, such aliens on [parole](#) pending the outcome of their formal removal proceedings.

This Sidebar explores the relevant statutes and regulations governing expedited removal and the detention of aliens placed in formal removal proceedings, including how the AG’s ruling in *Matter of M-S-*

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modified immigration authorities' prior interpretation of these legal authorities. The Sidebar further discusses the impact of the AG's decision, and the relevance of the AG's decision to Congress.

Statutory and Regulatory Framework

Expedited Removal under INA § 235(b)(1)

INA § 235(b)(1) requires the [expedited removal](#) of aliens arriving in the United States at designated ports of entry ("arriving aliens") who lack valid entry documents or have attempted to gain their admission by fraud or misrepresentation. The [statute](#) also authorizes the Secretary of Homeland Security to apply this process to "certain other aliens" present in the United States who have not been admitted or paroled by immigration authorities, and who have been in the country less than two years. Based on that authority, DHS has [designated for expedited removal](#) aliens who are apprehended in the United States within 100 miles of the border within 14 days of entering the country, who have not been admitted or paroled. (DHS [reportedly](#) plans to expand the use of expedited removal to aliens nationwide who have not been admitted or paroled and who have been in the country less than two years—as INA § 235(b)(1) authorizes—but has not yet finalized a rule implementing that expansion.)

INA § 235(b)(1) provides that an alien subject to expedited removal shall be [ordered removed](#) without a hearing *unless* the alien indicates an intention to apply for asylum or a fear of persecution if removed to a particular country, in which case the alien is referred to DHS's U.S. Citizenship and Immigration Services (USCIS) to determine whether the alien has a "[credible fear](#)" of persecution. The [statute](#) instructs that, if the alien is found to have a credible fear of persecution, "the alien *shall be detained* for further consideration of the application for asylum" in formal removal proceedings before an immigration judge (IJ) within the Department of Justice's (DOJ's) Executive Office of Immigration Review (EOIR). Although detention is mandatory for an alien who is found to have a credible fear of persecution, [INA § 212\(d\)\(5\)\(A\)](#) authorizes DHS, in its discretion, to [parole](#) the alien "for urgent humanitarian reasons or significant public benefit." There is no administrative or judicial review of DHS's parole decision.

General Discretionary Detention Authority under INA § 236(a)

While INA § 235(b)(1) provides specific detention requirements for aliens screened for expedited removal, INA § 236(a) addresses, more generally, the detention of aliens placed in other removal proceedings. Under [INA § 236\(a\)](#), DHS's Immigration and Customs Enforcement (ICE) "may" detain an alien pending the removal proceedings, *or* release the alien on bond or the alien's own recognizance. If ICE decides to maintain custody, the alien may request review of ICE's custody determination at a bond hearing before an IJ.

In some cases, though, detention is *mandatory* for an alien placed in formal removal proceedings (e.g., in the case of aliens convicted of specified crimes), and the alien may not be released from custody except in limited circumstances. The alien also may not contest his detention at a bond hearing before an IJ. A DOJ [regulation](#) enumerates certain classes of aliens who are ineligible for bond hearings because they are subject to mandatory detention, including "[a]rriving aliens in formal removal proceedings." The regulation, however, is silent as to whether "certain other aliens" who are initially screened for expedited removal after entering the United States without inspection are also ineligible for bond pending their formal removal proceedings.

The Board of Immigration Appeals' Decision in *Matter of X-K-*

As noted above, two categories of aliens are subject to expedited removal: arriving aliens and "certain other aliens" who recently entered the United States without inspection. In 2005, EOIR's Board of

Immigration Appeals (BIA), the highest administrative body charged with the interpretation and application of federal immigration laws, determined whether both categories of aliens are subject to mandatory detention under INA § 235(b)(1) upon being transferred to formal removal proceedings following a positive credible fear determination. In *Matter of X-K-*, the BIA observed that, while “arriving aliens” fall within the specific classes of aliens [enumerated by DOJ regulations](#) to be ineligible for bond hearings, that list does not include “certain other aliens” who are placed in formal removal proceedings after being initially screened for expedited removal. In addition, the BIA observed, although DOJ regulations state that “arriving aliens” who are placed in formal removal proceedings “shall be detained” during those proceedings, there is no “parallel provision” for “certain other aliens” who are initially subject to expedited removal and later transferred to formal removal proceedings. Thus, the BIA concluded that “certain other aliens” who are initially subject to expedited removal after unlawfully entering the United States, and subsequently placed in formal removal proceedings after establishing a credible fear of persecution, are eligible for bond under INA § 236(a).

The Supreme Court’s Decision in *Jennings v. Rodriguez*

In 2018, the Supreme Court in *Jennings v. Rodriguez* reviewed a [decision](#) by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) that had construed various INA detention provisions, including INA § 235(b)(1), as containing implicit six-month time limitations on the duration of detention, after which an alien would be entitled to a bond hearing and possible release from custody (the decision is discussed in greater detail in [this Sidebar](#)). The Supreme Court rejected as “implausible” the Ninth Circuit’s construction of INA § 235(b)(1), declaring that the statute “unequivocally” requires the detention of covered aliens until the conclusion of removal proceedings. Further, the Court noted, INA § 212(d)(5)(A) only authorizes the release of aliens detained under INA § 235(b)(1) if they are granted parole by DHS, “impl[ying] that there are no *other* circumstances under which aliens detained under [§ 235(b)] may be released” (emphasis in original). The Court [thus concluded](#) that INA § 235(b)(1) mandates the detention, without bond, of aliens initially screened for expedited removal who are transferred to formal removal proceedings after being found to have a credible fear of persecution (the Court, however, did not decide whether the indefinite detention of aliens pending removal proceedings would be unconstitutional).

The Attorney General’s Decision in *Matter of M-S-*

Under DOJ regulations, the AG has the “[unfettered](#)” authority to direct the BIA to refer a case to him for review. In *Matter of M-S-*, AG Barr reviewed a BIA decision upholding an IJ’s order to release an alien on bond pending his formal removal proceedings. The alien, an Indian national initially screened for expedited removal after entering the United States without inspection, had been placed in formal removal proceedings after demonstrating a credible fear of persecution. The AG [exercised his appellate authority](#) in order to address whether the BIA’s decision in *Matter of X-K-* should be overturned in light of the Supreme Court’s decision in *Jennings v. Rodriguez*.

The AG [ruled](#) that aliens subject to expedited removal who are placed in formal removal proceedings after a positive credible fear determination “remain ineligible for bond, whether they are arriving at the border or are apprehended in the United States.” The AG reasoned that INA § 235(b)(1) clearly mandates that an alien who establishes a credible fear “shall be detained for further consideration of an application for asylum.” The AG read the language of the statute to require detention until the conclusion of the formal removal proceedings. The AG also determined that, even though INA § 236(a) generally authorizes the release of detained aliens on bond, that provision serves as “an independent ground for detention” that does not undercut DHS’s “separate authority” to detain aliens initially screened for expedited removal who are placed in formal removal proceedings. In short, the AG concluded, INA §§ 235(b)(1) and 236(a) “apply to different classes of aliens.”

The AG [noted](#), moreover, that to the extent aliens seeking admission (which would include those screened for expedited removal) are released from custody, INA § 212(d)(5)(A) provides that they can only be released on parole. The AG reasoned that, “[i]n light of that express exception to mandatory detention” for parole, “the [INA] cannot be read to contain an implicit exception for bond.” The AG also cited the Supreme Court’s decision in *Jennings v. Rodriguez*, which had interpreted the INA “in the exact same way” and concluded that aliens detained under INA § 235(b)(1) are ineligible for bond and may only be considered for parole. Further, the AG observed, [DHS regulations](#) concerning the transfer of aliens from expedited to formal removal proceedings mention the availability of parole, not bond.

Finally, the AG [determined](#), although [8 C.F.R. § 1003.19\(h\)\(2\)\(i\)](#) expressly bars “arriving aliens” from bond during formal removal proceedings, but does not address other categories of aliens subject to expedited removal, the BIA in *Matter of X-K-* had failed to consider INA § 235(b)(1)’s overall mandatory detention scheme and its interplay with INA § 236(a). The AG thus concluded that the DOJ regulation “does not provide an exhaustive catalogue of the classes of aliens who are ineligible for bond.”

Accordingly, the AG [ruled](#) that “all aliens transferred from expedited to full proceedings after establishing a credible fear are ineligible for bond,” and overturned the BIA’s decision in *Matter of X-K-*. However, because the AG’s ruling would likely have “an immediate and significant” impact on DHS’s detention operations, the AG delayed the effective date of his decision for 90 days (i.e., until July 15, 2019).

Considerations for Congress

The AG’s ruling in *Matter of M-S-* modifies existing policies so that *all* aliens initially screened for expedited removal who are placed in formal removal proceedings after establishing a credible fear of persecution are ineligible for release on bond. The AG’s decision has implications for “a [sizable population of aliens](#)” who have entered the United States without inspection, and who [previously](#) could secure their release on bond pending consideration of their asylum applications. In light of the AG’s ruling, these aliens can no longer obtain administrative review of their custody status and—like aliens screened for expedited removal who had arrived at ports of entry—may only be released under DHS’s parole authority.

[Reportedly](#), the AG’s decision is part of a broader effort to deter aliens from unlawfully entering the United States and to end the “catch and release” of asylum seekers. [Critics](#) of the AG’s decision [contend](#) that it may lead to [thousands](#) of aliens being detained indefinitely pending their removal proceedings, and that there is no reason to detain aliens who have demonstrated a credible fear of persecution, and who, they contend, usually appear at their hearings (DOJ [statistics](#) indicate that between approximately 60% to 70% of released aliens appeared at their hearings from FY2013 to FY2017). In addition, some commentators [argue](#) that the AG’s ruling will be “severely limited” because ICE lacks sufficient detention space. Consequently, the AG has [delayed](#) the effective date of his ruling for until July 15, 2019, so that DHS may “conduct necessary operation planning.”

Several advocacy groups have recently [challenged](#) the AG’s decision, arguing that INA § 235(b)(1)’s mandatory detention scheme applies only to arriving aliens, and not to those who entered the United States without inspection and who are placed in formal removal proceedings following a positive credible fear determination. The lawsuit also contends that denying bond hearings to aliens who entered the United States without inspection, and who are transferred to formal removal proceedings, violates their constitutional right to due process.

The legal challenge may face hurdles to the extent that it turns upon matters of statutory authorization, particularly in light of the Supreme Court’s ruling in *Jennings*. [INA § 235\(b\)\(1\)](#) plainly states that an alien initially screened for expedited removal who shows a credible fear of persecution “shall be detained” pending consideration of the asylum application. Furthermore, the *Jennings* Court held last year that DHS has the statutory authority to detain aliens potentially indefinitely pending their removal proceedings, and

construed INA § 235(b)(1) as [mandating](#) the detention of covered aliens without bond. The Court, however, has not yet decided whether such indefinite detention may, at some point, raise constitutional concerns (though the Court [recognized](#) nearly two decades ago that such concerns exist with respect to admitted aliens who are indefinitely detained *after* being ordered removed, it has not addressed whether constitutional considerations apply to non-admitted aliens being held during removal proceedings). After *Jennings*, some [lower courts](#) have ruled that the prolonged detention of aliens pending their removal proceedings violates due process. Notably, some [courts applied](#) these constitutional constraints to the detention of aliens seeking admission into the United States, even though such aliens typically have [more limited constitutional protections](#) than aliens within the country.

In any case, despite the AG's ruling in *Matter of M-S-*, DHS retains the [authority](#) to parole aliens initially screened for expedited removal who are placed in standard removal proceedings. DHS [regulations](#) list certain classes of aliens who would be [eligible for parole](#), including those “whose continued detention is not in the public interest” because they present neither a security nor flight risk. Unlike bond determinations, DHS has sole discretion whether to grant parole, and that decision is generally [not subject to review](#). (Some courts, though, [have ruled](#) that DHS must adhere to its parole procedures and may not use generalized deterrence considerations as a factor in denying parole.)

In addition, DHS's ability to detain families remains constrained in light of the “[Flores Settlement](#),” which generally requires the release of alien minors to a qualifying adult or a non-secure, licensed facility. Thus, the AG's ruling likely will have little impact on existing detention policies relating to arriving families.

Therefore, while the AG's ruling widens the scope of asylum seekers who are subject to mandatory detention pending consideration of their applications, the decision does not foreclose the possibility of release in some circumstances. Ultimately, Congress has the power to clarify whether aliens who establish a credible fear of persecution may be released on bond pending consideration of their claims, or whether they should remain in custody throughout their formal removal proceedings. For instance, the [Dignity for Detained Immigrants Act of 2019](#) would repeal INA § 235(b)(1)'s mandatory detention scheme, require DHS to make custody determinations for aliens who establish a credible fear, and permit such aliens to promptly challenge their detention at bond hearings. The [Protect Kids and Parents Act](#) of 2018, on the other hand, would have overridden the *Flores* Settlement to effectively extend § 235(b)(1)'s mandatory detention scheme to family units.