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PRACTICE ADVISORY

by Marisol Orihuela and Ahilan T. Arulanantham

September 9, 2008

Prolonged Detention and Bond Eligibility: Recent Ninth Circuit Developments

This advisory concerns the Ninth Circuit's recent decision in *Casas-Castrillon v. Department of Homeland Security, et al.*, 535 F.3d 942 (9th Cir. 2008).[1] In this case, the Court addressed whether the government may detain a non-citizen for a prolonged period of time during his or her immigration proceedings without an individualized bond hearing in which the non-citizen may contest the lawfulness of further detention. This practice advisory discusses how certain non-citizens in detention can use the Ninth Circuit's ruling to obtain bond hearings before Immigration Judges. **As a result of *Casas-Castrillon*, non-citizens who were previously ineligible for bond hearings but who have a stay of removal pending a petition for review, or have had their case remanded to the BIA after obtaining judicial review, are now eligible for a bond hearing.**[2]

Background on *Casas-Castrillon*

Luis Felipe Casas-Castrillon became an LPR in 1990. He later obtained two convictions for auto burglary. The Immigration and Naturalization Service arrested him in August 2001 and initiated removal proceedings. At the time of his arrest, the "mandatory detention" statute, 8 U.S.C. § 1226(c) authorized his detention because the government asserted that he had been convicted of two

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[1]That same day, the Ninth Circuit decided another case relating to prolonged detention. *See Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008). In that case, the Ninth Circuit held that 8 U.S.C. § 1226(a), and not 8 U.S.C. § 1231, authorizes the detention of a non-citizen who has appealed his or her case to the court of appeals and obtained a stay of removal. A third case, *Diouf v. Mukasey*, was consolidated with *Casas-Castrillon* and *Prieto-Romero*, and has not yet been decided. The decision in *Diouf* may affect some of the issues discussed in this advisory.

[2]Outside the Ninth Circuit, *Casas-Castrillon* is not binding, but may serve as persuasive authority.

crimes involving moral turpitude. A person detained under this statute is not eligible for a bond hearing before an Immigration Judge ("IJ").[3]

The IJ ordered Mr. Casas-Castrillon removed and ineligible for relief from removal, and the BIA affirmed the IJ's decision on appeal. Mr. Casas-Castrillon then petitioned for review to the Ninth Circuit. The Ninth Circuit granted a stay of removal in June 2006 and in January 2008 granted his petition for review and remanded his case to the BIA.

In August 2005, after almost four years in detention, Mr. Casas-Castrillon filed a petition for habeas corpus under 28 U.S.C. § 2241 arguing that his detention had become indefinite and was not authorized by any statute, and that his prolonged detention without a meaningful opportunity to contest the necessity of continued detention violated both the immigration statutes and the Due Process Clause. The district court denied his petition, and Mr. Casas-Castrillon appealed to the Ninth Circuit.

What did the Ninth Circuit hold?

The Ninth Circuit first held that Mr. Casas-Castrillon's detention was authorized pursuant to 8 U.S.C. § 1226(a), which provides for discretionary authority to detain an immigrant "pending a decision on whether the alien is to be removed from the United States."[4] Even though Mr. Casas-Castrillon had initially been properly classified under § 1226(c) and would normally not be eligible for a bond hearing, he could no longer be subject to § 1226(c) because he had been detained for a *prolonged* period of time.[5]

The Ninth Circuit also held that prolonged detention is prohibited without an individualized hearing to determine whether the person is a flight risk or a danger to the community.[6] The Court ruled that prolonged detention without adequate procedural protections would present serious constitutional concerns, but did not reach the constitutional question. Instead, it

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[3]In many cases, persons placed in removal proceedings come under the purview of 8 U.S.C. § 1226(a), which provides for discretionary detention of people pending a decision in their immigration cases. That section applies to people with little or no criminal history. Non-citizens held under § 1226(a) receive a bond determination by ICE, which can be appealed to an Immigration Judge in a bond redetermination hearing. In contrast, 8 U.S.C. § 1226(c) provides that the Attorney General "*shall take into custody* any alien" with a qualifying criminal conviction, such as an alleged aggravated felony or two crimes involving moral turpitude (CIMT). As such, immigrants held pursuant to § 1226(c) are generally not eligible to be released on bond. It is unclear how *Casas-Castrillon* applies to people subject to prolonged detention under § 1226(a) (e.g., those not subject to removal based on a charged aggravated felony or two CIMTs). We address that issue on page 4.

[4]*Casas-Castrillon*, 535 F.3d at 947.

[5]The Court held that § 1226(c) "was intended to apply for only a limited time" during a removal proceeding, and that the authority to detain Mr. Casas-Castrillon under § 1226(c) ended when his proceedings before the BIA were concluded. After the BIA ruled, the authority to detain him "shifted" to § 1226(a). *See Casas-Castrillon*, 535 F.3d at 948.

[6]*Casas-Castrillon*, 535 F.3d at 951(citing *Tijani v. Willis*, 430 F.3d at 1242). The Court rejected Mr. Casas-Castrillon's argument that his detention had become indefinite and therefore no statute (including § 1226(a)) authorized further detention.

construed § 1226(a) to *require* that a non-citizen in prolonged detention be released on bond unless the government establishes that the person is a flight risk or will be a danger to the community.[7]

Thus, non-citizens who would otherwise be subject to *mandatory detention* under § 1226(c) but who have a stay of removal pending a petition for review, or have had their case remanded to the BIA after obtaining judicial review, are now eligible for a bond hearing. At the bond hearing, the government must justify further detention.

What constitutes "prolonged detention"?

Although no court has explicitly stated how long someone must be detained before detention becomes "prolonged," and therefore impermissible without a bond hearing, a number of cases provide guidance on the issue. The Supreme Court has held that a detention period of about six months is allowed without a bond hearing.[8] The Ninth Circuit has strongly implied that detention would be prolonged *after* a period of six months.[9] The Ninth Circuit has also held that a period of twenty-eight months was prolonged, without establishing what period of detention at a minimum constitutes "prolonged detention."[10]

What types of cases does *Casas-Castrillon* apply to?

Casas-Castrillon requires a bond hearing for the following classes of detained immigrants:

1. Non-citizens, otherwise subject to § 1226(c), who have completed their removal proceedings, filed a petition for review in circuit court, and obtained a stay of removal pending adjudication of the petition for review.[11]

2. Detainees whose cases have been remanded from the Ninth Circuit to the Board of Immigration Appeals (or an Immigration Judge).[12]

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[7]*Casas-Castrillon*, 535 F.3d at 951 ("Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' we hold that § 1226(a) must be construed as *requiring* the Attorney General to provide the alien with such a hearing.") (citing *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (emphasis in original).

[8]*Demore v. Kim*, 538 U.S. 510, 530-31 (2003).

[9]*Nadarajah v. Gonzalez*, 443 F.3d 1069, 1079-80 (9th Cir. 2006).

[10]*Tijani*, 430 F.3d at 1242.

[11]*Casas-Castrillon*, 535 F.3d at 947-48 (holding that 8 U.S.C. § 1226(a) applies to detainees who have filed a petition for review and received a judicial stay of removal, where § 1226(a) provides authority to detain an individual "pending a decision on whether the alien is to be removed from the United States," and judicial review may be considered as part of the process of making a decision on whether an alien is "to be removed").

[12]*Casas-Castrillon*, 535 F.3d at 948 (rejecting government's argument that § 1226(c) applies to "alien[s] whose case is being adjudicated before the agency for a second time").

3. Detainees who sought and lost their petition for review, and are seeking a rehearing from the panel, an en banc rehearing, or review through a writ of certiorari from the United States Supreme Court, as long as they have a stay of removal. For similar reasons, *Casas-Castrillon* also applies to people who have won their petitions for review but remain detained while the government seeks rehearing or certiorari.

Casas-Castrillon arguably also applies to the following types of cases:

4. Non-citizens detained pursuant to 8 U.S.C. § 1225(b) who have been detained for a prolonged period but have never received a bond hearing. Section 1225 applies to non-citizens, including some LPRs, who are detained when seeking admission into the United States.[13] Prior to *Casas-Castrillon*, in *Nadarajah v. Gonzalez*, the Ninth Circuit held that § 1225 must be construed to authorize only "brief and reasonable" detention.[14] Similarly, § 1226(c) was construed by the Ninth Circuit in *Casas-Castrillon* to apply only for a brief period of time. Accordingly, *Casas-Castrillon's* holding also should apply to non-citizens held under § 1225 who have been detained for a prolonged period of time.

5. Non-citizens, otherwise subject to § 1226(c), who have been detained for a prolonged period of time but whose immigration proceedings before an Immigration Judge or the BIA have not been completed.[15]

6. Non-citizens who have been detained for a prolonged period of time pursuant to § 1226(a) and who were denied bond at their initial bond hearing because they, and not the government, bore the burden of proof.[16]

Does my client need to be an LPR to seek relief under Casas-Castrillon?

No. Although the government may argue that this case should only apply to LPRs, there is no support for that position. It is true that Mr. Casas-Castrillon, the petitioner in the case, was an LPR. However, the statutory scheme governing immigration detention does not distinguish

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[13]*See Nadarajah v. Gonzalez*, 443 F.3d 1069, 1077 n.3 (9th Cir. 2006) (noting that some non-citizens who are ultimately determined to be admissible may be detained pursuant to § 1225(b) because of the statutory requirement that persons be detained unless admissibility is "clear[] and beyond [] doubt" to the inspecting immigration officer).

[14]*Nadarajah*, 443 F.3d at 1076-77.

[15]*Casas-Castrillon*, 535 F.3d at 947-48 (holding that "Section 1226(c)'s mandatory detention provision applies only to 'expedited removal of criminal aliens.'"). The Court's reasoning probably requires this result, although the case before the court did not specifically involve someone in this position.

[16]In *Prieto-Romero*, the Ninth Circuit reserved ruling on this question because the petitioner, who had been detained for a prolonged period of time under § 1226(a), had not been denied bond by the Immigration Judge. *See Prieto-Romero*, 534 F.3d at 1066. If the person was *denied* bond by an Immigration Judge, and since then has been detained for a prolonged period of time, *Casas-Castrillon* supports the argument requiring a hearing where the government bears the burden of proof to justify further detention.

between LPRs and other detained immigrants, and the Court's ruling in *Casas-Castrillon* was based on its construction of the immigration detention statutes.[17] The statute which the Ninth Circuit found applicable to Mr. Casas-Castrillon, § 1226(a), does not distinguish between LPRs and other detained immigrants. Neither do the other statutes governing immigration detention, such as § 1226(c) or § 1231(a).

What should I do to obtain a bond hearing for my client under *Casas-Castrillon*?

If *Casas-Castrillon* applies, your client should receive a determination by an Immigration Judge on whether he or she should be released.[18] If detained for a prolonged period of time under § 1226(c), *Casas-Castrillon* allows your client to directly seek a bond hearing before an Immigration Judge. Your client does not need to first seek a bond determination by an ICE officer.[19]

To request a hearing under *Casas-Castrillon*, your client should file an administrative request for a bond hearing in Immigration Court, and attach the *Casas-Castrillon* decision to the request. A sample bond hearing request motion is attached. Your client should also attach copies of filings by the government in similar cases where the government has agreed that a non-citizen initially detained pursuant to § 1226(c) must receive a bond hearing because of *Casas-Castrillon*.[20] The request should be made in writing, but may also be made orally or at the Immigration Judge's discretion, via telephone.[21]

What should my client do if he or she is denied a bond hearing?

It is possible that the Immigration Court will deny your client's request for a bond hearing, either because it is not familiar with the case or for some other reason. If that occurs, your client should appeal to the BIA within 30 days of the denial. Your client should also file a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in federal district court to obtain enforcement of the *Casas-Castrillon* decision. 28 U.S.C. § 2241 provides district courts with the power to grant the writ of habeas corpus in cases where a person is "in custody in violation of the Constitution or laws or treaties of the United States."[22] If the Immigration Court is within the Ninth Circuit, then failure to provide a bond hearing contravenes binding law and can be remedied through a habeas petition.

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[17] *Casas-Castrillon*, 535 F.3d at 950 (declining to rule on an argument that the detention statute violates the Constitution if it is interpreted to permit prolonged detention because there was "no evidence that Congress intended to authorize the long-term detention of aliens such as Casas without providing them access to a bond hearing before an immigration judge").

[18] *See* 8 C.F.R. § 236.1(d). This regulation provides detainees the right to appeal a bond determination by ICE to an Immigration Judge.

[19] *See Casas-Castrillon*, 535 F.3d at 952 (ordering the government to provide petitioner with a bond hearing or show that he has already received one).

[20] Two examples of such government filings are attached to this practice advisory.

[21] 8 C.F.R. § 1003.19(a).

[22] 28 U.S.C. § 2241(c).

If your client is denied a bond hearing, please contact Marisol Orihuela at the ACLU of Southern California, at 213.977.5284, as we may be able to resolve such issues through negotiation with government counsel in *Casas-Castrillon*, or otherwise to assist you or your client in filing the habeas petition.

If my client obtains a bond hearing, what will the bond hearing entail?

If your client obtains a bond hearing, the bond hearing should largely resemble a bond redetermination hearing under § 1226(a), except that the government should bear the burden of proof and the court may consider the length of your client's detention.

At the bond hearing, the IJ should determine whether your client should be released from detention based on at least two factors: (1) whether your client is a flight risk, and (2) whether your client is a danger to the community.[23] The IJ also has discretion to consider any information that your client or the government presents.[24] If the court finds that your client is neither a flight risk nor a danger to the community, the court should set bond.

There are two main differences between an ordinary bond hearing and a bond hearing after your client has been in no-bond prolonged detention. First, at this bond hearing, the government, not your client, *should* bear the burden of proof to justify further detention by clear and convincing evidence.[25] While the government may attempt to argue that your client bears the burden of proof under the regulations, *Casas-Castrillon* states explicitly, and repeatedly, that the government must bear the burden of proof.[26]

Still, the Immigration Judge likely will expect your client to present evidence showing that he or she is not a flight risk or a danger to the community, regardless of whether the government presents any evidence. Your client should be prepared to present testimonial and documentary evidence about the following:

1. Criminal History: detail of criminal history (both arrests and convictions), rehabilitation, including programs during detention, and reasons why your client will not engage in criminal activity if released.

2. Likelihood of Success in Removal Case: the merits of your client's removal case, and why he or she is likely to eventually succeed on their claim for relief or defense to removal.

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[23]*See Tijani*, 430 F.3d at 1242; *see also Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

[24]8 C.F.R. § 1003.19(d).

[25]*See Tijani*, 430 F.3d at 1242 (citing *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)).

[26]Compare *Casas-Castrillon*, 535 F.3d at 952 (quoting *Tijani*, 430 F.3d at 1242) (requiring "the government [to] provide[] Casas with 'a hearing ... before an Immigration Judge with the power to grant him bail unless *the government establishes* that he is a flight risk or will be a danger to the community'") (emphasis added) with 8 C.F.R. § 1236.1(c)(3) (providing that in a regular bond hearing, non-citizen must show by clear and convincing evidence to not be a danger or a flight risk to be released form detention).

3. Activities in Detention: organized activities and positive activities (reading, exercise, attending church, participating in skill programs, etc.) that your client participated in while in detention and any disciplinary infractions.

Second, your client should argue that the length of detention should be taken into account and explain that prolonged detention requires a heightened showing of dangerousness and flight risk. Because non-citizens who obtain such hearings have already been detained for a prolonged period of time, and because the hearing at issue may govern detention for the duration of the petition for review process, which will last far longer than the typical immigration case, the justification for detention arguably must be stronger than in typical bond cases.[27] In any case, your client should make sure to put the length of his or her detention into the record.

My client is held in one state, but his/her immigration case is in another. Where should my client apply for bond?

8 C.F.R. § 1003.19(c) states that applications for bond determinations should be made in the following order: "(1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention; (2) To the Immigration Court having administrative control over the case; or (3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court." Thus, the regulations establish a preference for filing a bond determination request where your client is detained. However, the regulations do not foreclose jurisdiction in the court having administrative control, so arguably, your client can choose to file where his or her immigration proceedings are taking place. In particular, if the location in which your client files is outside of the Ninth Circuit, then an Immigration Judge there is not be bound to follow *Casas-Castrillon*, so there are good reasons for your client to file with an immigration court located in the Ninth Circuit.

What if my client is being detained outside the Ninth Circuit?

Outside the Ninth Circuit, *Casas-Castrillon* is not binding, but may serve as persuasive authority. For further information on filing a habeas petition and assistance in evaluating the merits of a case outside the Ninth Circuit, please contact Marisol Orihuela at the ACLU of Southern California, at 213.977.5284.

Does time *after* the BIA has ruled in my client's immigration case, while it was pending before the Ninth Circuit, count towards determining whether my client's detention is prolonged?

Yes. The government may try to argue that your client is to blame for the time detained after the BIA has ruled because it was your client, and not the government, that sought judicial review from a court of appeals. The Ninth Circuit has never endorsed that argument, and it has now been rejected by *Casas-Castrillon*, just as it was before by the Ninth Circuit in *Tijani*.[28] In both of those cases, the court counted the time spent in detention due to the petitioner's action in seeking judicial review as part of its calculation of the length of detention.

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[27] *Cf. Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (holding that post-order detention ceased to be authorized by statute when it was removal was not reasonably foreseeable, and as length of detention grows, what is "reasonably foreseeable ... conversely shrinks").

[28] *Tijani*, 430 F.3d at 1242; *Casas-Castrillon*, 535 F.3d at 947-48.

What if the government argues that INA § 241, 8 U.S.C § 1231, authorizes detention without a bond hearing, because my client has a final order from the BIA?

In *Casas-Castrillon*, the Ninth Circuit rejected the government's argument that because Mr. Casas-Castrillon's case had become administratively final upon the BIA's decision, his detention was governed by 8 U.S.C. § 1231(a), which normally governs detention during the "removal period," after all proceedings are finished. The Ninth Circuit ruled that where a petitioner has "filed a petition for review ... and received a judicial stay of removal," § 1231(a) does not apply.[29]

My client has had a custody review.[30] How does this affect his/her eligibility for bond?

Under *Casas-Castrillon*, Your client is still entitled to a bond *hearing* before an *immigration judge* where *the government bears the burden of proof.* Custody reviews are conducted by officers of the Immigration and Customs Enforcement (ICE), typically 90 days and 180 days after a person has been ordered removed by the BIA. The government may argue that if your client has received a custody review, he or she is not entitled to a bond hearing before an Immigration Judge. However, custody reviews are *not* the same as bond determinations by an immigration judge, because they are not hearings, do not occur before immigration judges, and place the burden of proof on the detainee rather than the government. In *Casas-Castrillon*, Mr. Casas-Castrillon received a custody review by ICE officers while in detention, and the Ninth Circuit specifically ruled that such custody review was insufficient to justify further detention.[31] The Court held that the procedure necessary to justify further prolonged detention is "a hearing ... before an Immigration Judge with the power to grant [your client] bail unless the government establishes that [your client] is a flight risk or will be a danger to the community."[32] Because custody reviews do not involve "hearings," do not take place before Immigration Judges, and place the burden of proof on the detainee, they are insufficient to justify detention under *Casas-Castrillon*. Therefore, even if your client has received one or multiple custody reviews by ICE officers, he or she is still entitled to a bond hearing in immigration court if your client has been subject to prolonged detention.[33]

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[29]*Casas-Castrillon*, 535 F.3d at 947 (citing *Prieto-Romero v. Clark*, 534 F.3d at 1058-59).

[30]8 C.F.R. § 241.4.

[31]*Casas-Castrillon*, 535 F.3d at 951-52 (ruling that custody reviews "fall[] far short of the procedural protections" provided in bond hearings).

[32]*Casas-Castrillon*, 535 F.3d at 952 (quoting *Tijani*, 430 F.3d at 1242).

[33]The information in this advisory is accurate as of the date of the advisory. Readers are cautioned to check for new cases and legal developments. This practice advisory is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

Summary Chart

Detention Period	Statutory Authority	IJ Bond Hearing/Standard
Initial detention of non-citizen with no triggering convictions[34]	8 U.S.C. § 1226(a) / INA § 236(a)	Bond hearing available / Burden of proof on non-citizen[35]
Initial detention of non-citizen with triggering convictions (e.g., 2 CIMTs or an aggravated felony)	8 U.S.C. § 1226(c) / INA § 236(c)	No bond hearing available[36]
Prolonged detention of non-citizen with case pending at Court of Appeals and stay of removal (regardless of criminal history or any custody reviews)	8 U.S.C. § 1226(a) / INA § 236(a)	Bond hearing available / Burden of poof on the government
Prolonged detention of non-citizen before Immigration Court or the BIA after remand from the Ninth Circuit (regardless of criminal history or any custody reviews)	8 U.S.C. § 1226(a) / INA § 236(a)	Bond hearing available / Burden of poof on the government
Prolonged detention (over six months) of non-citizen whose case has been pending in Immigration Court or BIA[37]	8 U.S.C. § 1226(a) / INA § 236(a)	Bond hearing available / Burden of poof on the government

[34] Triggering convictions are convictions that render 8 U.S.C. § 1226(c) applicable, such as two convictions for crimes involving moral turpitude or an aggravated felony, among others.

[35] *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

[36] However, a *Joseph* hearing is available under *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). In a *Joseph* hearing, a non-citizen can challenge his or her classification under 8 U.S.C. § 1226(c).

[37] The *Casas-Castrillon* court does not explicitly address this issue. However, as discussed on page 3, under the rulings of *Nadarajah*, *Tijani*, and *Casas-Castrillon*, the detention of a non-citizen whose case has been pending for over six months in removal proceedings is likely only authorized by 8 U.S.C. § 1226(a).

ATTACHMENTS

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
[FILL IN CITY AND STATE]

In the Matter of:	)	In Bond Proceedings
	)	
	)	
A#	)	
	)	
Respondent	)	

CASAS-CASTRILLON REQUEST FOR BOND HEARING

I respectfully request that the Immigration Court schedule a bond redetermination hearing for me. My removal case is presently or has at one time reached the Ninth Circuit Court of Appeals, and I have obtained a stay of removal. I was initially detained pursuant to INA § 236(c) based on an alleged conviction(s) for [fill in convictions].

I believe that after the Board of Immigration Appeals completed its first review of my case, the Attorney General's statutory authority to detain me "shifted" from INA § 236(c) to INA § 236(a). See *Casas-Castrillon v. DHS*, 535 F.3d 942, 948 (9th Cir. 2008). Under INA § 236(a) the Immigration Judge may release me on bond or grant conditional parole. At the solicited hearing, I am "entitled to release on bond unless the government establishes that [I am] a flight risk or will be a danger to the community." *Casas-Castrillon*, 535 F.3d at 951 (citations omitted).

At the hearing, I urge the Immigration Court to look to the *In re Guerra*, 24 I. & N. Dec. 37 (BIA 2006), factors to determine whether the government meets its burden of overcoming my presumed "entitle[ment]," to release on bond. *Casas-Castrillon*, 535 F.3d at 951. Under the *Guerra* factors and the Ninth Circuit's decision in *Casas-Castrillon*, the government to overcome my right to release on bond must produce evidence: that I lack a fixed address in the United States, my residence in the United States is short, I lack family ties in the United States, I lack an employment history, I have failed to meet my obligations to a court, my criminal record is extensive, recent, and serious, I have a history of immigration violations, and I have sought to flee prosecution or attempted to escape the authorities.

Finally, I ask that the court grant conditional parole or set a bond amount that is reasonable and proportional to my means and the cost of living, because the Ninth Circuit has correctly suggested that "serious questions may arise concerning the reasonableness of the amount of the bond if it has the effect of preventing an alien's release." *Doan v. INS*, 311 F.3d 1160, 1162 (9th Cir. 2002).

Respectfully submitted this _____ day of _____, 2008,

_____
Respondent, pro se

ATTACHMENTS:

District Judge James L. Robart
Magistrate Judge Mary Alice Theiler

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE

SERGIO ARRIOLA-RIVAS, (A#44-608-313) Petitioner, v. MICHAEL CHERTOFF, Secretary of the Department of Homeland Security, et al., Respondents.	Case No. 08-0509 JLR-MAT NOTICE OF RECENT RELEVANT NINTH CIRCUIT COURT OF APPEALS DECISION

COMES NOW the Respondents ("Government"), by and through their counsel of record, and hereby give notice to the Court of a recently published decision issued by the Ninth Circuit Court of Appeals. *See Casas-Castrillon v. Department of Homeland Security, et al.*, Ninth Circuit Court of Appeals, Case No. 07-56261 (July 25, 2008), attached hereto as Exhibit A. Pursuant to the holding of *Casas-Castrillon*, the Government respectfully asks to withdraw its Objections to the Report and Recommendation, ("Objections"), Dkt. Nos. 21 and 22-2, specifically and only with regard to the Government's position that Arriola-Rivas was detained under Section 236(c) of the Immigration and Nationality Act ("INA"), subsequent to an order of remand from the Ninth Circuit Court of Appeals. *See* Objections at 1-4 (Dkt. Nos. 21 and 22-2); Reply to Objections at 2-3 (Dkt. No. 24). The Government now believes that, consistent with the holding of *Casas-Castrillon* (*see* Exhibit A at 11), Arriola-Rivas became detained

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under Section 236(a) of the INA upon obtaining a remand from the Ninth Circuit Court of Appeals. Consequently, the Government respectfully asks that the Court issue an order remanding Arriola-Rivas' case to an immigration judge for a bond hearing.[1]

DATED this 28th day of July, 2008.

Respectfully submitted,

JEFFREY C. SULLIVAN
United States Attorney

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[1] By making such a request, it should be noted that the Government does not waive or concede its position that if the immigration judge denies bond or sets a bond that Arriola-Rivas is unable to post, the Department of Homeland Security has authority to continue his detention. *See Prieto-Romero v. Clark*, ____ F.3d _____, 2008 WL 2853396, at * 6 (9th Cir. 2008) (holding that, after procedural due process is satisfied, prolonged detention is authorized if a petitioner faces a "significant likelihood of removal in the reasonably foreseeable future because the government can repatriate him to [his native country] if his pending bid for judicial relief . . . proves unsuccessful.").

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

Matt Adams: matt@nwirp.org

I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

- 0 -

DATED this 28th day of July, 2008.

/s/ Priscilla T. Chan
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U.S. DEPARTMENT OF JUSTICE

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July 30, 2008

[redacted]

Re: [redacted]

Dear [redacted],

This letter is to memorialize the government's position regarding the Ninth Circuit's recent decision in *Casas-Castrillon v. Dept. of Homeland Security*, Ninth Circuit docket no. 07-56261 (July 25, 2008). The government agrees that pursuant to *Casas-Castrillon*, [redacted] is entitled to a bond hearing before an Immigration Judge.

Undersigned counsel has conferred with officials from Immigration and Customs Enforcement, who advise that a bond hearing may be obtained by filing a motion before the Immigration Judge in San Francisco. Under 8 C.F.R. § 1003.19(c)(1), because [redacted] is detained at the Lerdo Pre-trial Facility in Bakersfield, San Francisco is the Immigration Court having jurisdiction over the place of detention. ICE officials expect such a motion to be filed in this case, and will ensure that [redacted] is present at the hearing.

Please advise if there are any questions or concerns.

Sincerely,

Audrey Hemesath
Assistant United States Attorney