SPECIAL CONSIDERATIONS WHEN REPRESENTING DETAINED APPLICANTS FOR ASYLUM, WITHHOLDING OF REMOVAL AND RELIEF UNDER THE CONVENTION AGAINST TORTURE

A Supplement to NIJC's Basic Procedural Manual for Asylum Representation

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Please Note: This manual is a brief guide to asylum practice in the detained context and is a supplement to NIJC's Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings. It does not purport to discuss all aspects of immigration practice related to asylum proceedings. Additional sources should be consulted when more complex questions regarding current law and procedure arise. Many of these resources are referenced in NIJC's Basic Procedural Manual.

FIRST STEPS

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NIJC recommends *pro bono* attorneys take the following steps upon receipt of a detained asylum case:

Contact the client. NIJC advises the client when her case has been assigned to a *pro bono* attorney, but the attorney should make special efforts to contact the client directly after accepting a case. Attorneys should also keep in mind that detained individuals cannot regularly communicate with family or friends while in detention, so it is important that the attorney remain in regular, frequent communication with her client from the start. Unlike with a non-detained client, the attorney will be responsible for arranging most, if not all communication because detained individuals are limited in their ability to make outgoing calls. *See infra* COMMUNICATING WITH DETAINED CLIENTS.

Prepare for the fast pace of a detained case. Unlike non-detained asylum cases, cases that are on the detained docket move much more quickly, usually resolving about two months after the initial master calendar hearing. To accommodate this pace, *pro bono* attorneys need to minimize the initial start-up time for a case. Attorneys should therefore ask their firms to address the issues surrounding conflicts and opening a new matter on an expedited basis.

Enter an appearance with both the Immigration Court (EOIR) and with the Office of Detention and Removal Operations (DRO). EOIR is part of the Department of Justice, while DRO is part of the Department of Homeland Security (DHS). *Pro bono* attorneys should fax their client a Form G-28[1] at the detention facility and request that the client be allowed to sign the documents and fax back a signed copy to your office.[2] After the client faxes the signed G-28 back to the attorney, the attorney should sign it and then fax it to the deportation officer assigned to the client's case, along with a fax cover sheet stating that the attorney is the attorney of record.[3] The attorney should save the fax confirmation as proof that she has entered her appearance with DRO. The attorney will also need to file a Form E-28 appearance form with the Immigration Court. This form does not require a client's signature, so the attorney should file an E-28 immediately upon case acceptance. Unlike the G-28, the E-28 cannot be faxed. The attorney should hand-file it with the Immigration Court.

Review the file in full. In addition to reviewing the file that NIJC provided to the *pro bono* attorney, the attorney should request to review the immigration court file as soon as possible. The form required for requesting a file review can be found at Appendix C of NIJC's Basic Procedural Manual for Asylum Representation.

Review the Notice to Appear and any documents already in the court file. When NIJC refers a detained asylum case to a *pro bono* attorney, the client is usually already in immigration court proceedings and the Immigration and Customs Enforcement (ICE) trial attorney will likely have filed documents, including the charging document known as the Notice to Appear (NTA), with the Court. The judge will require a response to the NTA at the initial hearing. The *pro bono* attorney should carefully review the allegations and charges on the NTA with the client to ensure accuracy. Errors on the NTA can be extremely detrimental and should

[1] Attorneys can download Form G-28 from www.uscis.gov and Form E-28 from www.usdoj.gov/eoir.
[2] *See* Appendix C for templates of fax cover pages for detention facilities.
[3] *See* Appendix A for a docket assignment list to determine the deportation officer assigned to the client's case.

be discussed with the trial attorney and the judge at the hearing. If the client does not have a copy of the NTA, the attorney can obtain a copy of this document after conducting a file review at the Immigration Court.

Review any pre-existing asylum applications. If the client applied for asylum affirmatively with the Asylum Office and was referred to the Immigration Court, or has already filed an asylum application at some other point, the attorney should be sure to review the existing application carefully with the client. Often, language barriers and the absence of counsel at the affirmative stage result in the inclusion of erroneous information in the first application. The immigration court record will contain any previously filed asylum application and errors in the application may generate problems in the court adjudication. Minor corrections can be made to the application in the form of written or oral amendments. If the original application contains significant errors, the *pro bono* attorney may wish to request leave from the court to file a superseding application. Bear in mind that any inconsistent information contained in a previous application will need to be explained to the court and may be included in the judge's credibility assessment.

Determine needed resources and begin collecting documents. NIJC attempts to obtain relevant documentation from clients prior to case acceptance and will share these documents when assigning a case to a *pro bono* attorney. Upon review of the file, *pro bono* attorneys will likely identify additional documents that would be useful in supporting the protection claim and should begin immediately working with the client, any friends or relatives, or through any other possible avenues to obtain these documents. Just as with a non-detained asylum case, corroborating evidence in the form of affidavits and documentary evidence will be critical to proving a case. The difference, however, is that the process of getting these documents is often complicated by the client's detention and the speed of the detained docket. *Pro bono* attorneys should therefore start brainstorming with the client right away about potential corroboration and get permission to contact friends and family to obtain this evidence. Requests for affidavits from country experts should also be made quickly. In addition, if an attorney believes a mental health or medical evaluation would benefit the client's case, the attorney should contact NIJC immediately to determine if an evaluation will be possible.

Review the Court Practice Manuals. The Immigration Court Practice Manual, available at www.usdoj.gov/eoir, describes the procedures and requirements for immigration court practice. The Practice Manual is binding on all parties who appear before the Immigration Court, unless the immigration judge directs otherwise in a particular case. If an attorney's case is before the Board of Immigration Appeals, review the BIA Practice Manual, also available at www.usdoj.gov/eoir.

Review NIJC's Asylum Manual. This manual is intended to supplement NIJC's main asylum text, the Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings, which is available on NIJC's website at http://immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers. All attorneys representing NIJC asylum clients should review this manual immediately upon accepting the case for representation.

IMMIGRATION DETENTION OVERVIEW

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How Do Asylum-seekers End Up in Immigration Detention?

Asylum-seekers in immigration detention come from a wide range of backgrounds and are in detention for a variety of reasons. Asylum-seekers who request protection at a U.S. port of entry are mandatorily detained and cannot be released from detention until they pass a credible fear interview. *See* INA § 235(b)(1)(B)(iii)(IV). Other asylum-seekers are detained because of a criminal conviction, even though these individuals have already served their sentence for that conviction. Although some asylum-seekers with criminal histories may be eligible for release from immigration detention on bond, many criminal convictions result in mandatory custody, meaning the asylum-seeker must be detained throughout the duration of her case. Other asylum-seekers end up in immigration detention even though they have no criminal history, because they were brought to the attention of ICE during a routine traffic stop or an immigration raid. Finally, some asylum-seekers end up in immigration detention because they were previously ordered removed from the United States, but reentered the country without inspection and later found themselves back in immigration custody. .

Where are Asylum-seekers Detained?

Immigrant detainees, including asylum-seekers, are primarily detained in three types of facilities: Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and Intergovernmental Service Agreement Facilities (IGSAs). SPCs are owned and operated by ICE. CDFs are operated by private companies under contract with ICE. IGSAs house most immigrant detainees and are facilities like county jails that ICE uses under contract with state or local governments. ICE contracts with about 250 local jails to detain immigrants and asylum-seekers.[4]

Although immigration detention is considered civil detention, it is rooted in correctional practices. According to Dr. Dora Schriro, former director, DHS Office of Detention Policy, "the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards . . . and on correctional principals of care, custody and control."[5]

The Chicago Enforcement and Removal Operations Field Office covers 26 facilities across Illinois, Wisconsin, Indiana, Kentucky, Missouri, and Kansas. The Chicago and Kansas City Immigration Courts adjudicate proceedings for immigrants and asylum-seekers detained in these states.[6] Of these facilities, the six largest detention centers – McHenry County Detention Center (Illinois), Dodge County Jail (Wisconsin), Tri-County Detention Center (Illinois), Kenosha County

[4] "Not too Late for Reform: A Report from the Midwest," National Immigrant Justice Center (Dec. 2011) at 3.
[5] Dr. Dora Schriro, former director of U.S. Dep't of Homeland Security's (DHS) Office of Detention Policy and Planning, *Immigration Detention Overviews and Recommendations*, 2 (2009).
[6] NIJC primarily represents detained individuals with cases before the Chicago Immigration Court.

Detention Center (Wisconsin), Jefferson County Jail[7] (Illinois), and Boone County Jail (Kentucky) – hold an average of almost 200 individuals daily.[8]

Why is *Pro Bono* Representation Important?

As with all non-citizens in immigration proceedings, detained asylum-seekers do not have the right to appointed counsel, so they must pay for an attorney, rely on *pro bono* representation, or proceed *pro se*. Although numerous studies have found that asylum-seekers are much more likely to be granted asylum if they are represented, financial challenges, communication difficulties, and geographic limitations make it extremely difficult for most detained asylum-seekers to obtain representation.[9] For example, because ICE frequently detains immigrants and asylum-seekers in remote detention facilities far from their families, social service providers, and attorneys, it is exceedingly difficult for most detained immigrants to retain counsel. One of the main detention facilities within the Chicago Area of Responsibility, Boone County Jail, is located 300 miles from Chicago and access to the jail via public transportation would take approximately 14 hours.

In addition, NIJC is the only non-profit organization consistently serving the immigrants who are detained within the Chicago Area of Responsibility every day. Given the high volume of cases and the logistical complications of representing detained individuals, without *pro bono* support NIJC is unable to ensure that all detained asylum-seekers are able to obtain legal services.

How Does Detention Affect Asylum Applicants?

In addition to the logistical complications that detention can pose on an asylum applicant's ability to prepare her immigration case, *pro bono* attorneys should also bear in mind some of the emotional tolls that detention can place on an asylum-seeker. Asylum-seekers are often in need of counseling to deal with the persecution that they experienced abroad, and the being detained in a county jail often exacerbates this need. For many detained asylum-seekers, the injustice of immigration detention often resembles some of the same exact mistreatment that they endured in their home countries. In NIJC's experience, this feeling of injustice tends to breed feelings of desperation and hopelessness. Detained asylum-seekers often repeatedly state that they want to give up on their cases because they cannot bear the thought of remaining in detention any longer.

NIJC recommends that *pro bono* attorneys respond to these feelings of desperation in the following ways. First, the attorney should reassure the client that her case will be completed soon. In most cases, the immigration judge will issue a decision on the same day that the merits hearing takes place. Second, the attorney should remind the client of what is at stake in her home country. Some detained asylum-seekers have been in the United States for several years and are therefore out of touch with the reality on the ground in their home countries. Reminding clients of the situation they face at home will both help them stay patient while in detention and make them more credible witnesses at their merits hearings. Third, attorneys can recommend that clients write letters to them or

[7] Due to extremely poor conditions at Jefferson County Jail, ICE evacuated all immigrant detainees from that facility at the end of November 2012 and does not currently detain immigrants there. Immigrants may be returned to the Jefferson facility in the near future.
[8] "Not too Late for Reform: A Report from the Midwest," National Immigrant Justice Center (Dec. 2011) at 4.
[9] *See e.g.*, Jaya Ramji Nogales, Andrew Schoenholtz and Philip Schrag, *Refugee Roulette: Disparities in asylum adjudication*. 60 Stan. L. Rev. 295, 340 (2007).

to friends and family, so that they have some outlet for their feelings. Finally, attorneys should remind clients of the consequences of giving up. If an asylum-seeker abandons an application and returns home, their ability to return to the United States later on and seek protection is extremely limited.

REQUESTING PROTECTION-BASED RELIEF IN DETENTION

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Most asylum-seekers in detention will request relief in the same way a non-detained asylum-seeker would request relief before the Immigration Court – by filing Form I-589, with supporting documentation, and testifying at a merits hearing. More information about this process can be found in NIJC's Basic Procedural Manual for Asylum Representation.

Some asylum-seekers, however, need to first pass an initial screening with the Asylum Office before they can seek asylum before the Immigration Court. For some asylum-seekers, this initial screening is the Credible Fear Interview. Other asylum-seekers must pass a different screening called a Reasonable Fear Interview.

It is important to note that many individuals in immigration detention are barred from asylum due to prior removal orders, criminal history, and for failure to file their applications prior to the one-year filing deadline. These individuals are, however, still eligible for other, similar protection-based relief such as withholding of removal and relief under the Convention Against Torture (CAT) or, in some cases, are only eligible for deferral of removal under CAT. More information about withholding of removal and CAT relief can be found in NIJC's Basic Procedural Manual for Asylum Representation. For the sake of clarity, this document will refer to all of the individuals as "asylum-seekers" even if many of these individuals are not eligible for asylum itself.

The Credible Fear Interview

If an individual arrives at a port of entry and expresses a fear of return to her home country or requests asylum, she must pass a "credible fear interview" with an Asylum Officer before she can be placed in removal proceedings and present her case before an immigration judge. Pursuant to INA § 235(b)(1)(B)(iii)(IV), ICE must detain her during this time.

The credible fear interview usually takes place within about one week of the date when ICE took the individual into custody and typically occurs at the DHS building located on 101 W. Congress Parkway in Chicago. To establish a credible fear of persecution, the individual must demonstrate "that there is a significant possibility . . . that the alien could establish eligibility for asylum." INA § 235(b)(1)(B)(v). If the asylum officer issues a positive credible fear determination, ICE will issue a NTA placing the individual in removal proceedings and the individual will be able to file an application for asylum before the Immigration Court. If the asylum officer issues a negative credible fear determination, the individual has the right to a review of the determination by an immigration judge. This review must take place within seven days of the negative credible fear determination and involves a short hearing in which the judge questions the individual about her fear of persecution and considers any relevant country condition documentation. INA § 235(b)(1)(B)(iii)(III). If the immigration judge determines that the individual has not established a credible fear of persecution, the individual will remain detained and DHS will remove her from the United States.

In most case, NIJC will refer a case to *pro bono* attorneys after the credible fear process is complete. Attorneys should receive a copy of the credible fear interview and address any significant inconsistencies or omissions. Keep in mind, however, that these interviews take place very early on

and many applicants are afraid of disclosing certain aspects of their story to the government without fully understanding the purpose of the interview.

Parole

If the asylum officer or immigration judge determines that the individual has a credible fear of persecution or torture, ICE may release the individual on parole. *Pro bono* attorneys should note that in this context, "parole" has a different definition than in the criminal sentencing context and is not a form of punishment. Asylum applicants seeking parole from detention must provide evidence to support a grant of parole, including: proof of identification or a credible explanation about why such documentation is not available; proof of a sponsor (an individual with lawful immigration status with whom the asylum-seeker can reside) or secured housing (a long-term shelter or faith-based home); proof of legal representation; proof that the asylum-seeker is not a flight risk or a danger to the community; and any other humanitarian factors. Certain criminal convictions will prevent ICE from releasing an asylum-seeker on parole.

The Reasonable Fear Interview

If an individual has a prior removal order and subsequently comes into ICE custody and expresses a fear of return to her home country, she is entitled to a reasonable fear interview with an asylum officer. 8 C.F.R. § 208.31(b). The reasonable fear process is very similar to the credible fear process, but the burden of proof is higher for the reasonable fear determination than for the credible fear determination. To establish a reasonable fear of persecution, the individual must demonstrate "a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal." 8 C.F.R. § 208.31(c). The bars to relief are not considered during the reasonable fear interview. *Id*. If the asylum officer makes a positive reasonable fear determination, the individual will be referred to the immigration judge to apply for withholding of removal or relief under CAT. Under current interpretation of the regulations, individuals who pass the reasonable fear interview are not eligible for asylum or other relief besides withholding of removal and relief under CAT. 8 C.F.R. § 208.31(g)(2). If the asylum officer makes a negative determination after the reasonable fear interview, the individual has the right to a review of the determination by the immigration judge within 10 days of the asylum officer's decision. 8 C.F.R. § 208.31(g) If the immigration judge determines that the individual has not established a reasonable fear of persecution or torture, the individual will remain detained and DHS will remove her from the United States.

In addition to the higher burden, there is one additional logistical difference between a reasonable fear interview and a credible fear interview. While credible fear interviews happen quickly after a person arrives and expresses a fear, there is frequently a delay in obtaining a reasonable fear interview and an additional delay in receiving the result. NIJC will advise *pro bono* attorneys in advance if their client is eligible for a reasonable fear interview. In those cases, *pro bono* attorneys should submit a G-28 to the Asylum Office as soon as possible and request that the reasonable fear interview be scheduled. Once an attorney requests an interview on behalf of a client, the Asylum Office will often schedule the applicant for the interview within two weeks. Reasonable fear interviews, like credible fear interviews, take place in person in Chicago.

Because the standard for reasonable fear is higher than the standard for credible fear, attorneys should spend additional time preparing the client for her testimony and should also consider submitting some information regarding country conditions. Attorneys do not need to prepare a full asylum application or affidavit, but they should be aware of the basis for the client's fear and should explain to the client what information should be emphasized in the interview. Attorneys are allowed to be present at reasonable fear interviews and they may question the client after the officer finishes asking questions. At the close of a reasonable fear interview, the client will be asked to review and sign a transcript, which will be passed on to the immigration judge.

After an applicant completes a reasonable fear interview, she can expect to wait three to six weeks for a decision from the Asylum Office. Once the Asylum Office issues the decision, however, the client will be scheduled for a master calendar hearing before the immigration judge, often within a week or two. Attorneys should operate under the presumption that their client will pass reasonable fear and begin preparing a skeletal I-589 asylum application even before the Asylum Office has issued a finding. This will ensure that the attorney will be able to submit the asylum application (without an affidavit or additional supporting documentation) at that first master calendar hearing, so that the immigration judge will be able to set a merits hearing date. The judge cannot schedule a merits hearing unless the applicant submits the I-589, so filing the I-589 at the first Master Calendar hearing avoids causing additional delays in case processing and prolonging detention.

Detained Asylum Hearings: Video Teleconferencing

Attorneys should be aware that most Master Calendar hearings for detained immigrants are held via Video Teleconferencing (VTC). Some merits hearings may also held via VTC unless the respondent or the attorney request otherwise. When a hearing is held via VTC, the client is not physically present in the court room. Instead, the client participates in the hearing from the detention center's VTC room. If the client requires an interpreter, the court-provided interpreter will either be in person in the court room or will be telephonic. The VTC hearings occur at the Chicago Immigration Court, 525 W. Van Buren Street, Suite 500. If a client's hearing is proceeding via VTC, the attorney should always be sure to check in with the client at the beginning of the hearing to confirm that she can hear properly through the VTC equipment.

If a detained client's merits hearing is scheduled to occur via VTC, the *pro bono* attorney should file a Motion for an In-Person Hearing.[10] All in-person hearings for detained individuals are held at the Chicago Detained Immigration Court at 101 W. Congress Parkway. Whether the client's hearing is held at the Chicago Detained Court or the Non-Detained Court, all case documents should be filed at the Chicago Non-Detained Immigration Court, 525 W. Van Buren Street, Suite 500, with a copy served on the ICE trial attorneys at 525 W. Van Buren Street, Suite 701.

In some cases, the client will appear in-person, but the judge will appear via VTC from another Immigration Court location. As with other in-person detained hearings, these hearings also occur at 101 W. Congress Parkway. If an attorney is unsure whether a client's hearing will occur in-person or via VTC, the attorney can call the Chicago Immigration Court at 312-697-8200 or contact NIJC.

[10] Attorneys who have registered on NIJC's website can download a sample Motion to Hold an In-Person Merits Hearing from NIJC's Motions Bank, http://immigrantjustice.org/attorney-resources-registered-users.

THE IMPACT OF A CRIMINAL HISTORY

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As explained in NIJC's Basic Procedural Manual for Asylum Representation, certain criminal convictions – specifically aggravated felonies and crimes determined to be "particularly serious" – can bar individuals from protection-based relief, such as asylum and withholding of removal. Although NIJC screens all clients for criminal issues, *pro bono* attorneys should be sure to examine the client's immigration court file regarding the client's criminal history and verify all information with the client. *Pro bono* attorneys should also note that the types of crimes that constitute aggravated felonies and "particularly serious crimes" are constantly changing and are subject to many legal challenges. Moreover, whether a conviction will bar an individual from relief may depend significantly on the statute under which the individual was convicted and the particular facts of her case. Therefore, even if a client has been convicted of a crime that may appear to be an aggravated felony or a particularly serious crime, it is important that the *pro bono* attorney contact NIJC to discuss strategy for challenging that determination in court.

Below is a brief and non-exhaustive overview of aggravated felonies and "particularly serious crimes." *Pro bono* attorneys should be sure to conduct their own legal research and speak with NIJC about their client's specific convictions.

Aggravated Felonies

Under INA § 208(b)(2)(A)(ii), an individual is barred from asylum if she has been "convicted of a particularly serious crime." For asylum purposes, an aggravated felony is a *per se* particularly serious crime. INA § 101(a)(43) contains a list of crimes that Congress has determined to be "aggravated felonies." In addition to this list, case law has established a number of other offenses to be aggravated felonies as well. These include

- Certain offenses relating to firearms, such as trafficking in firearms or possessing explosive devices
- Felony alien smuggling (unless the smuggling involved a spouse, child, or parent)
- Fraud or income tax evasion, if the victim lost more than $10,000
- Money laundering over $10,000
- Rape
- Sexual abuse of a minor
- Drug trafficking, including transportation, distribution, importation, and sale and possession for sale

Case law has also established that the following offenses constitute aggravated felonies if the individual received a sentence of imprisonment of one year or more (whether or not the time was actually served):

- Theft (including receipt of stolen property)
- Burglary
- A crime of violence (including anything with a risk that force will be used against a person or property, even if no force was used)
- Document fraud (including possessing, using, or making false papers, unless it was the first time and was only to help a spouse, child, or parent)

- Obstruction of justice, perjury, and bribing a witness
- Commercial bribery, counterfeiting, forgery, and trafficking in stolen vehicles with altered identification numbers

Particularly Serious Crime Bar for Withholding of Removal

Although all aggravated felonies constitute particularly serious crimes for asylum purposes, not all aggravated felonies constitute particularly serious crimes for purposes of withholding of removal. Under INA § 241(b)(3)(B), a conviction of an aggravated felony (or felonies) for which the individual has been sentenced to an aggregate term of imprisonment of at least five years constitutes a *per se* particularly serious crime.[11] For other criminal offenses, the court must balance four factors to conduct a case-by-case analysis as to whether the conviction was for a particularly serious crime. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). Under the *Frentescu* analysis, the court should consider the following factors; (1) the nature of the conviction; (2) the circumstances and underlying facts of the conviction; (3) the type of sentence imposed; and (4) whether the type and circumstances of the crime indicate that the individual is a danger to the community.

Convictions under statutes that involve the intentional use of significant force are likely to constitute particularly serious crimes. *See Matter of N-A-M*, 24 I&N Dec. 336 (BIA 2007); *Matter of L-S-J*, 21 I&N Dec. 973 (BIA 1997); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986).

Convictions for drug trafficking-related offenses are presumed to be particularly serious crimes. *Matter of Y-L-*, 23 I&N Dec. 270 (BIA 2002). However, in *Matter of Y-L*, the Board outlined six factors that, when all present, would help rebut the presumption that a conviction for a drug trafficking offense constitutes a particularly serious crime: (1) a very small quantity of a controlled substance; (2) a very modest amount paid for the drugs in the offending transaction; (3) merely peripheral involvement by the individual in the criminal activity; (4) the absence of any violence or threat of violence, implicit or otherwise associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles. 23 I&N Dec. at 276-77. Therefore, *pro bono* attorneys with clients who have drug trafficking-related convictions should contact NIJC to strategize whether any argument can be made to overcome the presumption that the client was convicted of a particularly serious crime.

If a client has been convicted of a crime that may constitute a "particularly serious crime," there are numerous strategic considerations regarding how and when to address the issue. *Pro bono* attorneys should contact NIJC to strategize about whether to affirmatively brief the issue in the client's pre-hearing filing. In some cases, NIJC may recommend that attorneys not argue the issue affirmatively in the client's pre-hearing brief because the ICE trial attorney may not otherwise raise it in the case.

[11] The language in this provision regarding an applicant's aggregate term of imprisonment has been the subject of litigation. *See Delgado v. Holder*, 648 F.3d 1095, 1097 (9th Cir. 2011) (en banc). *Pro bono* attorneys should take the position that separate offenses resulting in separate sentences cannot be aggregated to reach a total of five years' imprisonment to find a particularly serious crime. If a client's case involves this fact pattern, the attorney should be sure to strategize with NIJC about how to present this issue.

DETENTION PROCEDURES

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Communicating with Detained Clients

As explained *supra*, the Chicago ERO Field Office detains individuals at seven main facilities throughout Wisconsin, Illinois, and Kentucky. These facilities are county jails with whom ICE contracts to detain immigrants and asylum-seekers. *Pro bono* attorney should note that the staff at these facilities do **NOT** work directly for DHS or ICE and therefore attorneys should not ask the staff at the detention facilities any questions about a client's case.

As previously noted, while individuals in immigration custody are in civil detention, the structure and staff at the facilities are intended for individuals in criminal custody, and many of the facilities also house criminal inmates. NIJC has established agreements with DHS and ICE so that the facilities allow private attorney conference calls and the faxing of legal documents between attorneys and clients. However, each facility has a separate and different procedure for arranging attorney calls. A list of each facility and the procedure for arranging calls can be found in Appendix B. It is important to review the specific procedures for your client's facility when scheduling a call, but *pro bono* attorneys should keep in mind that several of the facilities limit the duration of the calls, generally to half an hour, and that the jails will not automatically approve the time slot requested. Attorneys should also remember that they can arrange in-person attorney visits and should call the facility at least 48 hours in advance to do so. When visiting a detention center, attorneys must remember to bring proper identification, a bar card, and a copy of the client's signed G-28. If an attorney encounters any problems communicating with a detained client or with staff at one of the detention facilities, the attorney should contact NIJC.

When a *pro bono* attorney first accepts a detained case for representation, NIJC recommends establishing a communication plan with the client. For example, attorneys might tell the client that the attorney will call her several times at the beginning to prepare the case and then every week after that, at a fixed time. In NIJC's experience, having a fixed time for attorney calls can serve to ease the client's anxiety about being in detention. It is very difficult for detained clients to reach their attorneys from detention, so it is important that attorneys schedule times to directly contact them.

Finally, *pro bono* attorneys should be aware that at times, DHS moves individuals between the facilities without warning, usually due to concerns regarding bed space. If DHS has moved a client or an attorney cannot find a client at the facility where she was previously detained, the attorney can try to locate her through the ICE Online Detainee locator System at https://locator.ice.gov. Attorneys can also call the deportation officer assigned to their client and the officer should be able to advise the attorney regarding the client's location. Please see Appendix A for the current deportation officer docket assignment list.

Detention Conditions

If a client expresses a complaint or concern regarding conditions in immigration detention, such as a lack of proper medical care or mental health care, a failure to comply with dietary needs, obstacles to religious practice, punishment, being placed in segregation, discrimination, or any other

issues, the attorney should contact NIJC. Depending on the nature of the issue, it may be best to contact an official at DHS or it may be better to first try to resolve the issue with supervisory staff at the detention facility. In some cases, additional action, such as litigation, may be needed to address the issue. Since it is common for detained asylum-seekers to experiences problems with conditions in detention, it is important that *pro bono* attorneys maintain regular communication with their clients so the attorneys are aware of any issues with detention conditions that may arise. It is also important for *pro bono* attorneys to affirmatively ask the client questions about the conditions of confinement while preparing for the case and notify NIJC of any issues.

Post-Hearing Release

The *pro bono* attorney should immediately notify NIJC when the immigration judge issues a decision in the client's case. If the immigration judge grants a client asylum and the ICE trial attorney waives appeal, ICE will release the client from custody within about one day. If the immigration judge grants the client withholding of removal or relief under CAT, the judge must first order the client removed before the judge can then "withhold" or "defer" removal. Because the client will have a final order of removal, ICE must release the client under an order of supervision and it may take several days for ICE to complete the necessary paperwork for this form of release.

If the judge grants relief and ICE reserves appeal, the client will initially remained detained. However, under current ICE policy guidance, if the client is pursuing protection-based relief, ICE should release the client even if the ICE trial attorney pursues an appeal of the judge's decision. Please see Appendix D for a sample release request for an individual who has been granted relief, but remains detained. *Pro bono* attorneys should file this request within a few days of the judge's decision and should notify NIJC. If the client remains detained despite the request, the attorney should contact NIJC to discuss next steps.

If ICE has released a client under an order of supervision, she will need to report to ICE for a check-in appointment on designated dates. If the client moves out of the Chicago area, the attorney can request that the check-in location be transferred to the ICE office closest to the client's residence. Before the client moves, the attorney will need to notify the Chicago ICE office and receive approval from the deportation officer to ensure that the client's case is transferred to the new office.

APPENDIX OF RELEVANT INFORMATION AND DOCUMENTS

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Please click here to download the following documents from NIJC's website:

Appendix	Information and Sample Documents
A	DRO Docket List for the Chicago Field Office (October/November 2012)
B	Contact Information for Chicago ICE Detention Facilities (July 2012)
C	Sample Fax Cover Sheet Templates for Correspondence with the Detention Facilities
D	Sample Request for Release Post-Grant
E	March 6, 2012 ERO Field Guidance Reminder, "Reminder on Detention Policy Where an Immigration Judge Has Granted Asylum, Withholding of Removal or CAT."
F	Sample Argument that a Criminal Conviction Does Not Constitute a "Particularly Serious Crime."

In addition, the following sample documents are available on NIJC's website at http://immigrantjustice.org/attorney-resources-registered-users for registered users:

- Sample Motion Requesting an In-Person Merits Hearing
- Sample Motion for Leave to File I-589 with the Court Clerk
- Sample Motion to Advance the Hearing
- Sample Motion to Allow Telephonic Testimony
- Sample Notice of Amendments to I-589
- Sample Country Expert and Medical Expert Affidavits
- Sample Legal Memo/Cover Letter for the Asylum Office
- Sample Pre-hearing Briefing for Court
- Sample Index of Exhibits
- Sample Client Affidavits

NIJC's Basic Procedural Manual for Asylum Representation is available for download at http://immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers