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HOW TO FIGHT DEPORTATION IN IMMIGRATION COURT

By Christopher Kerosky

Last year, the federal government deported more people than at any time in history. As in many counties, here in Sonoma County a great number of undocumented immigrants are put into ICE custody and deportation proceedings because they are simply stopped for minor traffic violations or driving without a license. Many of these people believe that if they are undocumented and arrested, then they have no choice but to go home. That is simply not the case. With skillful and thoughtful representation, many undocumented immigrants can successfully avoid deportation.

It is very important that undocumented immigrants and their families know what to do in this situation. The next several articles will cover what an immigrant can do if they or their family member is arrested and put into deportation proceedings.

The first thing that is important to know is that ICE has only 48 hours to pick up an immigrant once his criminal case is completed. That means that once one is finished with his sentence or stay in the jail, the immigration authorities have to pick him up within 2 days, or he should be released by the police or Sheriff's office. If your relative is not picked up by ICE within 48 hours, you should demand that the law enforcement authorities release your relative. We have successfully obtained several clients release on these grounds and they completely avoided being in either custody or deportation proceedings by this timely move.

How does one get a family member out of ICE custody once they've been taken? The answer to this question depends upon the situation. The government is required to hold non-citizens in jail if they were convicted of certain criminal charges. If he was not convicted of any crime, then usually the person can be "bonded" out of jail if the bond set by the court is paid. The amount of the bond varies significantly depending upon the judge and the facts of the case. The best thing is to get your relative out of jail, if you can, and then hire a lawyer to protect his rights in court.

Even if the relative is bonded out of jail, he will be required to go to immigration

court and explain to the judge will he should not be deported. If you ignore the court case once he is bonded out, a deportation order will be issued by the court, the bond money will be lost, and he will probably lose any chance of ever becoming legal in the United States.

It is often possible to proceed with a claim for relief in court, such as cancellation of removal, asylum, adjustment of status, or other claims. These arguments apply in many situations where the undocumented person arrested has family here legally or has been a victim of a crime, or a victim of domestic violence, or can prove that he would be harmed if he is returned to his home country.

How is the bond set.

If a person is detained but eligible for bond, the government will often set an initial bond amount. Many times this is a higher amount than the amount set by a judge. The Department of Homeland Security (DHS) usually sets the bond at \$5000 or higher; sometimes it can be up to \$15,000, even for persons without any criminal record.

If it's possible to post this bond set by the DHS, the person will be released. If you cannot afford the bond, you can ask the immigration court and ask for a bond re-determination hearing. This usually requires the help of legal counsel. The immigration court will set a hearing upon request and consider the arguments relating to what bond should be set for your brother.

In setting the amount of bond, the judge will look at a number of criteria. The most important criteria is whether the person is a "flight risk"; that is, whether he would likely come back to court if released. In making that decision, the judge will consider factors which tend to show good moral character on the part of the individual held. These factors include:

- Relatives in the United States: does the person have relatives here who are in legal status? Does he have a citizen or permanent resident spouse or child?
- Employment: does the person have a regular job and income?
- A residence: does the person have a place to live if you are released?
- Immigration Court History: Has the person ever failed to go to court on any of his criminal or immigration cases? Can he show the judge that he was reliable when he had to go to court in the past?
- Tax Records: has the person paid his taxes in the U.S.?
- Eligibility for Relief: What immigration status does the person qualify for? Does he have an immigrant petition filed by a relative? Does he have a credible argument that he qualifies for asylum or cancellation of removal under the immigration law? Does he qualify for some other status here?

Amount of the Bond.

The immigration judge is not allowed to set a bond below \$1,500. Typically, when an individual held has not committed a crime, judges in San Francisco will set the bond between \$2000 and \$5000 – especially if the person is entitled to some

immigration relief. In cases where the individual has a criminal history or has a record of not showing up for prior hearings, the bond will likely be higher.

If you pay the bond directly to the government, the bond money will be returned to your family only when your court case is completed and only if you have complied with the court's order, even if that order is to leave the country.

Bond Appeal.

If you disagree with the judge's determination of your bond request, you may file a bond appeal with the Board of Immigration Appeals (BIA). However, this is not very practical as the cost of preparing such an appeal may be more than the bond. Also, the immigration judge may decide to order the person deported before you receive a decision from the BIA on the question of your bond. The Government may also appeal the judge's decision if the government believes that the judge should not have set bond or set the bond too low.

Cancellation of Removal.

This segment will discuss a status you can apply for in deportation court which applies to people who have been in the country for more than 10 years known as Cancellation of Deportation.

If a person in deportation proceedings has been here more than 10 years and they have a U.S. citizen or permanent resident relative, they can apply for this status and this would at least keep them here legally while their case goes forward. With appeals, one can often stay here legally up to 5 years while an application is considered by the courts. If the case is granted, they get a green card.

The eligibility for Cancellation of Removal is as follows:

First, a person must prove "continuous presence in the United States for 10 years"; this means that you must prove that the person came to the U.S. over 10 years ago and never left for any extended period. This can be done with various documents from your past which show your entry to the U.S. and your life here. For example, you need to gather things like medical records of you and your children, wage and employment records, pay stubs, tax records, school records for your children, rent receipts or leases, cancelled checks, other banking records, even traffic violations. These are then presented to an immigration judge to show you have been here more than 10 years.

The 10 year period must be without any one trip outside the country of more than 90 days and together less than 180 days outside the country.

Second, a person must prove that they have "good moral character". What this means is that, according to the standards of the government, the person would make a good citizen. Most importantly, a person needs to show that he has not committed any crimes or if so, they were of a minor nature. If he does volunteer

work or other community service, you need to tell the judge about this. You also can submit statements from your priest or minister, friends and family members about his character.

The third and most difficult thing is that you need to prove that he has a parent, spouse or child who is a U.S. citizen or a permanent resident and that being removed would cause your U.S. citizen or permanent resident relative “exceptional and extremely unusual hardship”. If you have children born here, you need to show that your children would suffer such hardship if you are returned to your home country.

This is not easy to do because the immigration law requires you to show very unusual circumstances to qualify for this. The normal problems that would be caused to a young child or elderly parent by your deportation is not enough. Certainly, the best arguments are that your relative has “special needs” – for example, their physical problems or illnesses would not receive adequate medical treatment in the home country. In this case, if you can show that your child has special medical or psychological needs, that will increase your chances of winning this status and staying in the U.S.

Other factors such as your relative’s age, language skills, acculturation, and the conditions in your home country can also be used to strengthen your arguments, but are not usually enough by themselves to win the case.

Asylum and Withholding of Deportation.

Immigrants can apply for Asylum and Withholding of Deportation in Immigration Court when they are facing deportation but are afraid of returning to their home countries.

Immigrants in deportation proceedings can obtain asylum in the United States (and eventually permanent residency) if they are able to prove to the Immigration Judge that they have a “well founded fear” that they will be persecuted in case they were forced to return to their countries of origin. To obtain Withholding of Deportation, they need to prove they have a “clear probability” of persecution if they go back home.

The applicant needs to demonstrate that he would be subject to persecution or has a fear of future persecution on account of race, religion, nationality, political opinion or membership to a particular social group. To obtain such protection from United States authorities, the immigrant should present an application known as I-589, and file it in open court before an Immigration Judge. In addition to providing information as to why the applicant fears returning to his home country, all of the information that serves as part of the request for asylum should be true and correct. Otherwise, the immigrant can be accused of presenting a “frivolous” application, which carries serious penalties.

It is also important to remember that the possibility of obtaining asylum is greater if the application is filed within one year (365 days) from the applicant's entry into the United States. If this is not possible, then the applicant needs to demonstrate that the delay in the filing was due to extraordinary circumstances or that the application was filed within a reasonable time after a change of circumstances that make the applicant eligible for asylum.

Withholding of deportation does not have a one year deadline and can be filed at any time.

The asylum and withholding of deportation process could take approximately from three months to two years, depending on the judge's calendar. At the end of the case, a hearing is held before a judge where the applicant will be able to give testimony and present evidence favorable to his or her case. After the applicant presents its case, the government's attorney will be given the opportunity to present evidence and arguments to convince the judge that the applicant is not eligible for asylum in the United States. Normally, the judge will render a decision at the end of such hearing.

If the judge denies the request for asylum, the applicant may appeal the decision with the Board of Immigration Appeals (BIA) and thereafter before the Ninth Circuit Court of Appeals. These appeals are usually denied but the process can last for more than five years. During this time, the applicant can remain in the United States legally, without being in violation of any immigration laws. If the judge decides to grant asylum, the applicant can remain in the United States and can also apply to obtain asylum status for their immediate family members (i.e. husband/wife and/or children under the age of 21). One year after being granted asylum, the applicant and the qualified relatives can apply for Permanent Residency.

The possibility of obtaining asylum depends on the case as well as the amount and quality of the evidence presented before the Judge. The asylum process is very complex and requires the legal advice of an immigration attorney.

CHRISTOPHER A. KEROSKY of the law firm of KEROSKY PURVES & BOGUE has practiced law since 1984 and has been recognized as one of the top immigration lawyers in Northern California for the last six years by San Francisco Magazine "Super Lawyers" edition (2006-2011). He graduated from University of California, Berkeley Law School and was a former counsel for the U.S. Department of Justice in Washington D.C.

WARNING: The foregoing is an article discussing legal issues. It is not intended to be a substitute for legal advice. We recommend that you get competent legal advice specific to your case. If you would like such advice from our office, call (415) 777-4445 (San Francisco); (916) 349-2900 (Sacramento) or (707) 433-2060 (Santa

Rosa).