IMMIGRATION DETAINERS AND UNLAWFUL DETENTION: A Guide for Criminal Attorneys

By: Erich C. Straub, Davorin J. Odrcic and Steve Laxton
Dated: January 5, 2011

I. INTRODUCTION

In 2008, Immigration & Customs Enforcement ("ICE") launched a new program to investigate whether individuals arrested and booked into local jails are in the United States without lawful immigration status. The program is called Secure Communities.

Secure Communities aims to strengthen communication and cooperation between ICE and local law enforcement regarding noncitizens suspected to be in the U.S. unlawfully. As a consequence, the program has dramatically increased the number of ICE detainers being lodged at local jails on individuals with pending criminal charges. Unfortunately, there has been widespread confusion over the purpose and scope of ICE detainers throughout Wisconsin jails, which has often resulted in defendants being unlawfully detained.

The goal of this practice advisory is to assist defense counsel with clients who are subject to ICE detainers. Although a jail's absolute refusal to release an individual on an ICE hold constitutes unlawful detention, in certain circumstances a noncitizen with a complicated immigration history may want to remain in local custody rather than trigger an ICE detainer.

II. WHAT IS AN ICE DETAINER?

Unlike detainers normally associated in criminal proceedings, an ICE detainer does not constitute an indefinite hold on an individual. It does not mean that a person is concurrently in ICE's custody while also being detained at a local jail on a criminal charge. Nor is a detainer an arrest warrant. Rather, an ICE detainer is simply a notification from the federal agency to a local jail in which ICE requests that an individual be temporarily kept in detention in order to give the immigration authorities sufficient time to assume custody. As the regulations clearly state, a detainer is only "temporary detention" at ICE's request. *See* 8 C.F.R. §287.7(d).

An ICE detainer is submitted to a local jail on Form I-247. (*See* Appendix A). The I-247 expressly states that it is "for notification purposes only." It further requests that a local jail "detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien." *Id*. In most circumstances, the I-247 is submitted when "[a]n investigation has been initiated to determine whether this person is subject to removal from the United States."

Id. In other words, an ICE detainer is not evidence that a person is in the U.S. unlawfully, or will be eventually deported. It usually connotes the first step in ICE's investigation into the immigration status of a detained individual.

The statutory authority for ICE detainers is found at 8 U.S.C. §1357(d). The statute limits the use of detainers only when a noncitizen has been arrested "for a violation of any law relating to controlled substances." The statute further states that a detainer is only issued after the local law enforcement agency first requests that ICE take custody of the noncitizen. In this respect, 8 U.S.C. §1357(d) expressly contemplates that a detainer will only issue if a jail, not ICE, first initiates the process.

The regulations governing immigration detainers exceed the plain language of 8 U.S.C. §1357(d) in two important respects. First, 8 C.F.R. §287.7 does not limit the issuance of detainers to arrests relating to controlled substances violations. In practice, detainers are lodged irrespective of the underlying criminal charge, including relatively minor cases such as operating without a license. Second, the regulations state that a "detainer serves to advise another law enforcement agency that [ICE] seeks custody of an alien presently in custody of that agency, for the purpose of arresting and removing the alien." This is in stark contrast to the express language contained in 8 U.S.C. §1357(d), which states that the detainer process is first initiated by the law enforcement agency that arrested the individual. Although it is beyond the scope of this practice advisory, there are compelling arguments that the regulation is *ultra vires*, or "beyond the powers" delegated to ICE by Congress.

III. WHEN IS AN ICE DETAINER TRIGGERED?

It must be emphasized that an ICE detainer is only a request, not a command, that a local law enforcement agency temporarily detain an individual that ICE suspects is present in the U.S. without lawful immigration status. Even if it was framed as a command, the Tenth Amendment likely precludes ICE from ordering a local law enforcement agency to detain an individual without a valid arrest warrant. Arguably, a local jail could simply choose to disregard an ICE detainer and release the defendant without first notifying the federal agency.

If a local jail decides to honor a detainer request, then in practice it should immediately notify ICE once the detainer has been triggered. In most circumstances, an ICE detainer is triggered at the moment bond is posted. In other cases, the detainer is triggered once a signature bond has been executed. If an ICE detainer is lodged at the time of sentencing, then it will be triggered after the sentence has been completed.

The detainer is not triggered at the time the jail notifies ICE. It is triggered at the moment a defendant is "not otherwise detained by a criminal justice agency." *See* 8 C.F.R. §287.7(d). Otherwise, an individual could be subject to indefinite detention purely because a jail fails to contact ICE when the individual has posted bail or the sentence has been completed.

Once the detainer has been triggered, the local jail may continue to hold the defendant for a maximum of 48 hours in order for ICE to assume custody of the individual. *See* 8 C.F.R. §287(d). If ICE fails to take custody within the 48 hour time period, then the local jail must release the individual. *Id*.

> *Example: ICE issued a detainer on John, who is being held at the Milwaukee County Jail on a charge of disorderly conduct. On December 1 at noon, John's wife posted a bond in the amount of $300. Pursuant to the detainer, the jail may keep John in detention until noon on December 3. ICE does not assume custody of John. Therefore, the jail must release John on December 3.*

IV. WHAT HAPPENS WHEN ICE TAKES CUSTODY?

If ICE assumes custody, the defendant should expect to be interviewed and fingerprinted. The agency has broad discretion to detain, permit release upon posting of an immigration bond, or release the person on an order of recognizance. (*See* Appendix B). If the noncitizen has been previously convicted of certain deportable or inadmissible offenses, then that person will be subject to mandatory detention pursuant to 8 U.S.C. §1226(c). A noncitizen may request a custody re-determination before an immigration judge unless he has been previously ordered removed or is subject to summary removal proceedings.

An undocumented immigrant in ICE custody may stipulate to being removed without an immigration hearing. This is generally not advisable. Most individuals can have their case decided by an immigration judge. In removal proceedings, it is the government's burden by clear and convincing evidence to establish removability. More importantly, an individual found to be removable by an immigration judge can pursue relief in court. Thus, an undocumented immigrant who stipulates to removal may be unwittingly giving up a viable defense to deportation in immigration court.

If a person wants her case to be heard by an immigration judge, then ICE must serve that person with a document called a Notice to Appear ("NTA"). (*See* Appendix C). The NTA outlines the allegations and charge(s) of removability. Ordinarily, the individual will answer the allegations and charges contained in the NTA at the first hearing in immigration court.

Not all individuals in ICE custody can have their case decided by an immigration judge. In general, a person who has been previously ordered deported will not be placed in immigration proceedings. Instead, ICE will usually reinstate the prior removal order and effectuate the deportation process immediately. *See* 8 U.S.C. §1231(a)(5). In addition, undocumented immigrants who previously have been convicted of an aggravated felony will be subject to summary removal proceedings unless they have a credible fear of persecution. *See* 8 U.S.C. §1228. In cases of Mexican foreign nationals, summary removal could be accomplished in a matter of a week or two.

V. WHEN IS AN ICE DETAINER IMPROPER?

Defense counsel should not automatically assume that an ICE detainer has been properly issued. It is possible that ICE issued a detainer in error and the person may be a U.S. citizen by birth, naturalization, or through derivative status. There have been several cases of ICE erroneously deporting U.S. citizens, even citizens born in the U.S.

Lawful permanent residents (i.e. "green card" holders) and other foreign nationals with temporary lawful immigration status should not have a detainer lodged against them while charges are pending unless ICE suspects that they have been previously convicted of a deportable offense. In contrast, an undocumented individual could be placed in deportation proceedings irrespective of the outcome of the pending criminal matter.

While lawful permanent residents can be subject to deportation under 8 U.S.C. §1227(a)(2) for convictions of certain criminal offenses, they cannot be deported simply because of an arrest. If a lawful permanent resident has a detainer lodged against him while a charge is pending, it either means ICE mistakenly believes he is undocumented or it believes the lawful permanent resident has been previously convicted of a deportable offense.

With respect to undocumented clients, an ICE detainer usually guarantees either the initiation of removal proceedings or immediate deportation if the person was previously ordered removed or convicted of an aggravated felony. It is therefore crucial for defense counsel to discuss the ICE detainer with the client as soon as practicable. It is also advisable to request a copy of the Form I-247 detainer from the local jail. The I-247 contains a box for individuals whose deportation has already been ordered. The document may therefore shed further light as to the reasons why ICE wants to assume custody of the individual.

Of course, a copy of the I-247 should only be requested when defense counsel is already aware that there is a detainer. Just like cross-examination, it is best never to question jail officials about the existence of an immigration detainer unless the answer to the question is already known. Otherwise, the question itself will alert jail officials that the client may have an immigration issue and ICE is likely to be notified.

VI. WHEN DOES A PROPERLY ISSUED ICE DETAINER RESULT IN UNLAWFUL DETENTION?

Unfortunately, there is widespread confusion over the scope and purpose of an ICE detainer. Instead of viewing it as a request for temporary detention, many local jails mistakenly conclude that an ICE detainer automatically precludes them from releasing a defendant. Thus, an individual with an ICE detainer is often unable to secure release during the pendency of a criminal case.

In some cases, a jail may simply refuse to accept a bond payment. A jail may also dissuade a bond payment by wrongly stating that the bond money will be forfeited, or claiming that the defendant will not be released by ICE. Again, a person may seek a bond before an immigration judge, so an ICE detainer does not necessarily mean a person will be kept in immigration detention.

A jail's refusal to release an individual in these circumstances constitutes unlawful detention under the Fourth Amendment. Furthermore, Article I, Section 8(2) of the Wisconsin Constitution plainly states that "[a]ll persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses." A jail has no legal authority to unilaterally disregard a bond order because an ICE detainer has been lodged.

Unfortunately, there is scant case authority on this issue as of the date of this practice advisory. However, the Oklahoma Court of Appeals ruled in *Ochoa v. Bass*, 181 P.3d 727, 733 (Ok. App. 2008) that once the 48 hour period under 8 C.F.R. §287.7(d) "had lapsed without ICE taking any action on its detainers, the State no longer had authority to continue to hold Petitioners."

In other cases, courts have held that since an ICE detainer is only an intention to seek future custody of a defendant, ICE does not hold a defendant in "concurrent custody" while the defendant awaits trial on the pending criminal matter. Hence, an ICE detainer does not affect a defendant's right to a speedy trial. *See, State of Kansas v. Montes-Mata*, 208 P.3d 770 (Kan. App. 2009); *State v. Sanchez*, 110 Ohio St. 3d 274 (2006). These cases further demonstrate that a defendant cannot be indefinitely detained if an ICE detainer has been lodged.

VII. LEGAL REMEDIES FOR UNLAWFUL DETENTION

The case law, along with the express language of the regulations, supports a defendant's right to be released on bail pending a criminal charge. If a jail refuses to accept bond, or otherwise fails to release an individual after the 48 hour period, there are four possible legal options: (1) educate officials at the jail about the law; (2) raise the issue with the criminal judge who ordered the defendant released on bond; (3) file a Writ of Habeas Corpus in state court; or (4) do nothing at all because a transfer to ICE custody may have adverse consequences to either the criminal case, the immigration case, or both.

A. Educating the Jail on the Law

As stated above, often unlawful detention occurs because officials at the jail do not understand the legal nature of an ICE detainer. Thus, the path of least resistance may be to educate the jail on the law. Attached is a sample letter that defense counsel may use if a jail refuses to release an individual after bond has been posted. (Appendix D). Given problems such as overcrowding and the lack of correctional resources, the jail might

actually be very amenable to releasing the defendant once it is understood that the detainer is merely a request from ICE and is temporary in duration.

B. Involving the Criminal Judge

If a letter to the jail does not resolve the problem, defense counsel may also want to raise the issue with the judge who ordered the client released on bond. Defense counsel, however, should approach the judge carefully with this issue. As a practical matter, it could prejudice the client's case if immigration status is disclosed to the judge and the prosecutor. In exercising this strategy, knowledge of how the judge and prosecutor may react to the immigration issue is critical. It may also be helpful for defense counsel to emphasize that an ICE detainer is not evidence that a defendant lacks immigration status but is merely a request for temporary detention where ICE has initiated an investigation.

C. Filing for a Writ of Habeas Corpus

Habeas Corpus is a civil writ governed by Chapter 782 of the Wisconsin statutes. Under Wis. Stat. §782.01, a person restrained of personal liberty may prosecute a Writ of Habeas Corpus to obtain relief provided the person is not: (1) subject to a final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution of such order or judgment, or (2) a prisoner subject to the post-conviction procedures under Wis. Stat. §974.06. The petition should be filed within the county where the client is detained. *See*, Wis. Stat. §782.04.

Under §782.04, the petition's contents must state the following:

- That the person is restrained of personal liberty;
- The name of the custodian and place where the person is imprisoned;
- That the person is not imprisoned by virtue of any judgment, order or execution specified in Wis. Stat. §782.02;
- The cause or pretense of such imprisonment according to the best of the petitioner's knowledge and belief;
- A copy of any order or process causing the imprisonment must be attached. A copy is <u>not</u> required if a fee of $1 is offered and the custodian refuses to provide a copy. A copy is also <u>not</u> required if it could not be obtained because the prisoner is being removed or concealed.
- A description of why the imprisonment is illegal

Once filed, the court is required to grant the writ "without delay" unless it appears the person applying is prohibited from doing so. *See*, Wis. Stat. §782.06. The statutes require that the writ not be disobeyed based on a technical defect in the name of either the custodian or the person imprisoned. *See*, Wis. Stat. §782.08. The respondent is required to produce the prisoner at the time and place specified in the writ and state whether the prisoner is in respondent's custody and by what authority. *See*, Wis. Stats. §§782.13 and 782.14.

Habeas Corpus Checklist - Preparation of Documents:

- Affidavit of indigence and petition for fee waiver for the client to sign;
- Order for waiver of fees;
- Petition for Writ of Habeas Corpus; and,
- Writ of Habeas Corpus.

Habeas Corpus Checklist – Filing Procedure:

- The client signs affidavit and petition for waiver of filing fee due to indigence.
- The intake judge approves the waiver of the filing fee.
- The petition for Writ of Habeas Corpus and the Writ of Habeas Corpus, along with the approved order for waiver of fees are filed with the clerk handling civil cases. A civil case number will be assigned, but it is not the criminal case number.
- Depending on the jurisdiction, the clerk will assign the duty judge or a random judge to hear the writ.
- The file and petition are forwarded to the assigned judge.
- The judge will consider the writ, and if sufficient, will sign it.
- The judge's clerk will schedule a hearing on the writ.
- Copies of the signed writ must be served on the sheriff and district attorney. Arguably, the district attorney may not be a party if the client's criminal cases are dismissed or jail time is served, but Wis. Stat. §782.27 requires notice to the district attorney where the prisoner is detained upon any criminal accusation.

Once the court has signed the writ, defense counsel should schedule the habeas hearing as soon as possible because ICE may work quickly. In practical terms, a faster hearing makes it less likely that ICE will take your client into custody. In some instances, the district attorney may attempt to delay the proceedings to give ICE more time. To combat this tactic, defense counsel should stress the continuing Constitutional violation and the express language of Wis. Stat. §782.06, which requires that court to grant the writ "without delay." While quickly scheduling a hearing may make it less likely that ICE will assume custody, there is no legal impediment to ICE appearing and taking custody at the conclusion of the habeas hearing or at a later hearing in the underlying criminal matter. While this is not common, it is still a possibility and should be discussed with the client before a final decision is made on whether to pursue the writ.

Because habeas is civil action, the district attorney or corporation counsel may attempt to call your client adversely to testify and ask questions about immigration status, prior immigration violations, or fraudulent conduct with possible immigration and criminal consequences. Defense counsel should make the client aware of this possibility and carefully prepare the client for testimony, including exercising her right to remain silent. If an attempt is made to call the client adversely, defense counsel should object based on relevance and argue that questioning is limited to whether there is an ICE detainer and whether ICE complied with the 48-hours allowed under 8 C.F.R. §287.7(d).

D. Reasons to Remain in State Custody and Not Trigger the ICE Detainer

There are circumstances where the defendant may not wish to trigger the detainer and remain in local custody because there will be negative criminal or immigration consequences. Although counterintuitive, it may be better for the client to avoid ICE custody in the following circumstances: (1) there will be a negative impact on the criminal case; (2) precluding a motion to reopen a prior deportation order or a post-conviction motion; (3) the client will become ineligible for cancellation of removal in immigration court; or (4) the client is subject to mandatory immigration detention. For these reasons, it is critical that defense counsel discuss the ramifications of an ICE detainer with the defendant prior to a making an argument for bond in the criminal case.

1. Negative Impact on the Criminal Case

A transfer into ICE custody could adversely affect the outcome of the pending criminal charge. An individual who has been previously ordered removed or was previously convicted of an aggravated felony will likely be physically deported before the pending charge is resolved. This will usually result in a bench warrant in the criminal case, which will greatly complicate any future attempt by the client to return to the U.S. lawfully.

If the person is referred to immigration court, then he may be kept in ICE detention. Although there are ICE detention facilities in Wisconsin, it is not uncommon for a defendant to be moved to an ICE detention facility that is out of state. For example, recently a group of ICE detainees in Wisconsin were transferred to a detention facility in Jena, Louisiana for removal proceedings. Such a transfer will make it especially difficult for the defendant to be transported back to Wisconsin for further proceedings in the criminal case, and will likely result in a bench warrant for failure to appear. Even when a bench warrant is avoided, defense counsel's ability to properly prepare the criminal case can be adversely affected because access to the client may be very limited.

If criminal charges are dismissed, there also may be circumstances where a prosecutor re-files the charges if ICE custody does not result. Sometimes a prosecutor will dismiss charges with the understanding, whether implicit or explicit, that the client will be placed into ICE custody and deported. The prosecutor may re-file charges upon learning the expected immigration consequence did not occur.

2. Precluding the Reopening of a Prior Deportation Order or a Post-Conviction Motion

Triggering an ICE detainer could also cut-off an undocumented immigrant’s ability to reopen and rescind a prior deportation order or pursue post-conviction relief for conviction that is causing an adverse immigration consequence. This is especially true for Mexican foreign nationals, who can be physically removed to Mexico within a week or two of being taken into ICE custody. Ordinarily, it takes several weeks, if not a few

months, to pursue a motion to reopen in immigration court or to seek post-conviction relief in a Wisconsin court. Once ICE assumes custody, it is more than likely that a foreign national will be physically removed before a prior deportation order or a conviction can be reopened. Remaining in local custody could give an undocumented immigrant sufficient time to pursue these avenues of relief.

3. Ineligibility for Cancellation of Removal

An undocumented immigrant may want to remain in local custody because it actually improves her chance to avoid removal before an immigration judge. The most common form of relief for undocumented immigrants is called cancellation of removal. Among other criteria for cancellation, the individual must establish that she has resided in the U.S. continuously for a period of ten years before service of the Notice to Appear (NTA). Again, the NTA is the charging document that ICE serves on a person to initiate removal proceedings. Going into ICE custody will initiate service of the NTA and "stop the clock" on continuous residency. Thus, a person who is just short of the ten years may want to stall initiation of removal proceedings by remaining in local custody because it preserves eligibility for cancellation of removal.

> *Example: John is undocumented but has resided in the U.S. continuously for nine years and eleven months. When he is arrested for driving without a license, an ICE detainer is placed on him. If the detainer is triggered and ICE assumes custody, then John will be served immediately with a Notice to Appear, thereby cutting off his continuous residency before the ten year mark.*

4. Mandatory Immigration Detention

In some cases, the triggering of an ICE detainer will simply result in mandatory detention under 8 U.S.C. §1226(c) if the noncitizen was previously convicted of certain inadmissible or deportable offenses. Specifically, convictions for multiple crimes involving moral turpitude, aggravated felonies, controlled substance violations, and firearms offenses will all render a noncitizen subject to mandatory detention once placed into deportation proceedings.

In this respect, the posting of a criminal bond will not result in release of the client. Rather, the client will remain in immigration detention once the detainer is triggered and ICE assumes custody. Too often, the client and his family painstakingly raise the money for bond in a criminal case, only to discover that the client will not be released from immigration custody due to mandatory detention. The client may be better off remaining in local custody and exploring post-conviction options for any conviction that will result in mandatory detention. In many situations, successfully vacating a conviction based on a constitutional or statutory defect is the only way to avoid mandatory detention.

VIII. CONCLUSION

The rise in issuances of ICE detainers on noncitizen defendants presents new challenges for criminal defense counsel. It is imperative that defense counsel discuss with the client his or her legal options at the beginning of representation. Although an ICE detainer may result in unlawful detention if the local jail refuses to release the individual, in certain cases a defendant may want to avoid triggering the detainer and remain in local custody.

ABOUT THE AUTHORS

Erich C. Straub, Marquette 1994, is an attorney concentrating in family and business immigration and deportation defense. He also handles post conviction matters for immigrants and advises criminal defense attorneys on the immigration consequences of convictions. He is listed in the 2006-2010 editions of *Best Lawyers in America* and the 2009 and 2010 editions of *Super Lawyers* in the area of immigration law. Prior to focusing his practice on immigration, Mr. Straub was a criminal defense attorney for almost a decade. During that time, he successfully defended hundreds of cases in state and federal courts. Because of this prior experience, he has a unique combination of experience in criminal and immigration law. Mr. Straub co-authored an article in the August 2010 *Wisconsin Lawyer* regarding defense counsel's Sixth Amendment duty to warn clients regarding the immigration consequences of their pleas under *Padilla v. Kentucky*. He can be reached at erich@straubimmigration.com

Davorin J. Odrcic, Notre Dame 2001, practices immigration law exclusively and focuses in deportation defense, family-based immigration, and post-conviction relief in Wisconsin courts for noncitizen clients. Mr. Odrcic co-authored an article in the August 2010 *Wisconsin Lawyer* regarding defense counsel's Sixth Amendment duty to warn clients regarding the immigration consequences of their pleas under *Padilla v. Kentucky*. He has also guest lectured at the University of Wisconsin-Milwaukee for the past three years regarding immigration detention. Mr. Odrcic can be reached at davorin@straubimmigration.com.

Steve Laxton, DePaul 2005, is an attorney concentrating in family immigration law and deportation defense as well as criminal defense. Mr. Laxton worked with the National Immigrant Justice Center in Chicago from 1998-2007 as an accredited representative, attorney and supervisory attorney. During those years Mr. Laxton successfully handled hundreds of immigration court cases and litigated immigration matters before the federal courts. At NIJC, Mr. Laxton did outreach with the Defender's Initiative, a program to assist Illinois criminal defense attorneys in understanding the immigration consequences of criminal convictions. Mr. Laxton worked for approximately two years with the Wisconsin State Public Defender and is now doing criminal and immigration law in private practice. He can be reached at laxton-matousek@centurytel.net

APPENDICES

Appendix A: Blank ICE Detainer on Form I-247

Appendix B: Sample ICE custody determination sheet

Appendix C: Sample Notice to Appear

Appendix D: Sample Letter to local jail

Appendix E: Sample Petition for Writ of Habeas Corpus

Appendix F: Sample Fee Waiver for Writ of Habeas Corpus

Appendix G: Sample Writ of Habeas Corpus

Appendix H: Statute and regulations governing ICE detainers

US. Department of Justice

Immigration and Naturalization Service

Immigration Detainer - Notice of Action

File No.
Date:

To: (Name and title of institution)	From: (INS office address)

Name of alien: _____

Date of birth: _____ Nationality: _____ Sex: _____

You are advised that the action noted below has been taken by the Immigration and Naturalization Service concerning the above-named inmate of your institution:

☐ Investigation has been initiated to determine whether this person is subject to removal from the United States.

☐ A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____ (Date).

☐ A warrant of arrest in removal proceedings, a copy of which is attached, was served on _____ (Date).

☐ Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments, or other treatment which he or she would otherwise receive.

☐ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien. You may notify INS by calling _____ during business hours or _____ after hours in an emergency.

☐ Please complete and sign the bottom block of the duplicate of this form and return it to this office. ☐ A self-addressed stamped envelope is enclosed for your convenience. ☐ Please return a signed copy via facsimile to _____ (Area code and facsimile number).

Return fax to the attention of _____ (Name of INS officer handling case), at _____ (Area code and phone number).

☒ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☒ Notify this office in the event of the inmate's death or transfer to another institution.

☐ Please cancel the detainer previously placed by this Service on _____.

_____ (Signature of INS official)

_____ (Title of INS official)

Receipt acknowledged:

Date of latest conviction: _____ Latest conviction charge: _____

Estimated release date: _____

Signature and title of official: _____

Form I-247 (Rev. 4-1-97)N

U.S. Department of Homeland Security

Notice of Custody Determination

Event No:
File No:
Date: 01/10/2008
FIN#:

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

☐ detained in the custody of the Department of Homeland Security.
☑ released under bond in the amount of $ 3,000
☐ released on your own recognizance.

☑ You may request a review of this determination by an immigration judge.
☐ You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.

JOHN A. HARTEN
(Signature of authorized officer)

SDDO
(Title of authorized officer)

Milwaukee, Wisconsin
(Office location)

☐ I do ☑ do not request a redetermination of this custody decision by an immigration judge.
☑ I acknowledge receipt of this notification.

(Signature of respondent)

1-15-08
(Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ DHS Official ☐ Board of Immigration Appeals

The results of the redetermination/reconsiderationare:
☐ No change - Original determination upheld.
☐ Detain in custody of this Service.
☐ Bond amount reset to _____
☐ Release - Order of Recognizance
☐ Release - Personal Recognizance
☐ Other: _____

(Signature of officer)

Form I-286 (Rev. 08/01/07)

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID : FIN #:

File No: _ _ _ _ _ _ _ _

Event No:

In the Matter of:

Respondent: _____ currently residing at:

_____

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☒ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of MEXICO and a citizen of MEXICO;
3. You arrived in the United States at or near Arizona, on or about 1992;
4. You were not then admitted or paroled after inspection by an Immigration Officer;

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

55 East Monroe Street Suite 1900 Chicago ILLINOIS US 60603 To be set

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set *(Date)* at a time to be set *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

JOHN A. MARTEN SDDO

(Signature and Title of Issuing Officer)

Date: January 10, 2008

Milwaukee, Wisconsin

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

Appendix C

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before _____

_____
(Signature of Respondent)

Date: _____

_____
(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on January 10, 2008, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

- [X] in person
- [ ] by certified mail, returned receipt requested
- [ ] by regular mail
- [ ] Attached is a credible fear worksheet.
- [ ] Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the Spanish/English language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

AURORA M. BANDA IEA

_____
(Alien if Personally Served)

_____
(Signature and Title of officer)

Dear Sheriff XXXXX:

I am writing to you about my client, John Doe, who is presently detained at your jail regarding a pending criminal charge. Mr. Doe posted bond one week ago, but has not been released yet. Despite having posted bail, I was informed that Mr. Doe will not be released because of a detainer issued by Immigration & Customs Enforcement ("ICE").

Respectfully, there has been a misunderstanding at your jail regarding the scope and purpose of an ICE detainer. An immigration detainer is only a request to temporarily keep an individual in local detention in order to give ICE sufficient time to assume custody should ICE choose to do so. In particular, the regulations governing detainers clearly state that it is only "temporary detention" for a period "not to exceed 48 hours to provide adequate time for INS to assume custody of the alien." *See* 8 C.F.R. §287.7(d) (attached). The form I-247 detainer notice issued on Mr. Doe contains the same language from the regulations. (attached). If ICE does not assume custody within the 48 hour time period, then the defendant must be released as a matter of law.

The ICE detainer was triggered one week ago when Mr. Doe posted the cash bond. Since more than 48 hours has elapsed since posting of the bond, the jail has no legal authority to maintain custody of Mr. Doe. The Wisconsin Constitution plainly states that "[a]ll persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court . . ." *See* Article I, Section 8(2).

Upon receipt of this letter, I am requesting the immediate release of Mr. Doe. If you have any questions regarding the attached materials, please do not hesitate to contact me. I would be happy to answer any questions regarding the law and regulations governing ICE detainers.

On the other hand, if the jail continues to hold Mr. Doe, then I will have no option but to file a writ of habeas corpus and advise Mr. Doe of other legal remedies available concerning unlawful detention. I am confident, however, that we will reach an understanding without the need of a habeas action or any other action.

Sincerely,

Attorney

STATE OF WISCONSIN CIRCUIT COURT BRANCH COUNTY

STATE OF WISCONSIN, ex rel.
The Client,
Petitioner

Petition for Writ of Habeas Corpus

Matt Dillon,
County Sheriff,
his agents, employees, or those acting by his direction, or on his behalf,
Respondent.

Case No. 10 CV 0000,

The, by his attorney, petitions the court for a writ of habeas corpus requiring the respondent to show cause why the petitioner ought not to be released from custody. The petition brings this petition pursuant to chapter 782 of the Wisconsin Statutes and 8 C.F.R.§ 287.7(d); 8 U.S.C. § 1357(d); INA § 287(d). Petitioner asks that this writ be granted without delay pursuant to Wis. Stat. § 782.06.

Defense Attorney, attorney for the petitioner, alleges and shows to the court the following facts in support of this petition:

1. I am an attorney licensed to practice law in the state of Wisconsin, and I represent and appear for the petitioner in this action.
2. The petitioner is currently incarcerated by the respondent in County Jail.
3. The petitioner is not imprisoned by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution of such order or judgment.
4. The petitioner is not imprisoned in state prison.
5. Petitioner was arrested by the Monroe County Sheriff's Department for Identity Theft – Financial Gain pursuant to sec 943.201(2)(a), 939.50(3)(h) of Wis. Stats.
6. An immigration detainer was placed on Petitioner by Immigration and Customs Enforcement, 310 E. Knapp, Milwaukee, WI 53202 to determine whether Petitioner was subject to removal from the United States.
7. A $500 cash bond was ordered for Petitioner by Judge on Monday , 2010
8. At approximately 2:00 p.m. on Monday , 2010, the $500 cash bond was posted with the Clerk of County Court in Town, Wisconsin.
9. Pursuant to 8 C.F.R.§ 287.7(d); 8 U.S.C. § 1357(d); INA § 287(d), criminal custody of a suspected alien cannot be maintained beyond 48 hours unless the criminal justice agency has some other basis to detain the suspected alien as follows:

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department. 8 C.F.R. § 287.7(d).

Because Petitioner posted a cash bond more than 48 hours ago, his further confinement is illegal under the foregoing federal and state law.

WHEREFORE, the petitioner requests that this court issue writ of habeas corpus commanding the respondent to show cause why the petitioner's imprisonment should not be declared unlawful, and why the petitioner should not be discharged from custody for the reasons set forth in this petition and for those reasons to be presented in a hearing on this petition.

_____
Defense
Attorney for Petitioner
WI Bar. No. 0000000

Signed and sworn to before me
on , 2010,
by Notary Name

_____
Notary Public
Commission Permanent

STATE OF WISCONSIN CIRCUIT COURT BRANCH COUNTY

STATE OF WISCONSIN, ex rel.
The Client,

Petitioner

Writ of Habeas Corpus
Petition of Waiver of Filing Fees
Affidavit of Indigency

Matt Dillon,
County Sheriff, Case No.10 CF 0000,
his agents, employees, or those
acting by his direction, or on his behalf,

Respondent.

STATE OF WISCONSIN)

COUNTY)

I, The client , under oath state that because of poverty, I am unable to pay the filing fees of the above action and request waiver of those fees. I am indigent as determined by the State Public Defender on .

I have been incarcerated without work since -----

I understand that if my financial situation changes, I must notify the court immediately.

Signed and sworn before me _____

On_____ Client

Notary Public_____

COURT FINDINGS AND ORDER

This petition is granted because the court finds the person is indigent. The action may be commenced without payment of filing fees.

Dated this _____ of

BY THE COURT

_____

Hon. Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH COUNTY

STATE OF WISCONSIN, ex rel.
The Client,
Petitioner

Writ of Habeas Corpus

Matt Dillon,
County Sheriff,
his agents, employees, or those
acting by his direction, or on his behalf,
Respondent.

Case No. 10 CV 0000

You are hereby commanded to have The Client, by whatever name the petitioner shall be called or charged, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment, before the Honorable , at the County Courthouse, Address, Town, Wisconsin, on _____, 2010, at _____ o'clock, to do and receive what shall then and there be considered concerning the petitioner.

This motion is pursuant to 8 C.F.R.§ 287.7(d); 8 U.S.C. § 1357(d); INA § 287(d) providing as follows:

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department

8 C.F.R. 287.7(d)

Dated: _____

WITNESS MY HAND AND SEAL

_____
Circuit Court Judge

8 U.S.C. §1357(d)

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official) -

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,

the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

8 C.F.R. §287.7

§ 287.7 Detainer provisions under section 287(d)(3) of the Act.

(a) *Detainers in general.* Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I–247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(b) *Authority to issue detainers.* The following officers are authorized to issue detainers:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Immigration inspectors;

(5) Adjudications officers;

(6) Immigration enforcement agents;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the BCIS.

(c) *Availability of records.* In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

(e) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

[68 FR 35279, June 13, 2003]