

From: [ERO Taskings](#)
Subject: CORRECTED: Interim Guidance for Implementation of Matter of M-S, 27 I&N Dec. 509 (A.G. 2019) During the Stay of the Modified Nationwide Preliminary Injunction in Padilla v. ICE, No. 18-928, 2019 WL 2766720 (W.D. Wash. July 2, 2019): Parole of Aliens
Date: Monday, July 15, 2019 7:54:41 PM
Attachments: [Interim Notice Authorizing Parole \(Final 7.15.19\).docx](#)
[Interim Notice Declining Parole \(Final 7.15.19\).docx](#)

The following message is sent on behalf of Nathalie R. Asher, Executive Associate Director for Enforcement and Removal Operations:

To: Assistant Directors, Deputy Assistant Directors, Field Office Directors, and Deputy Field Office Directors

Subject: *Interim Guidance for Implementation of Matter of M-S, 27 I&N Dec. 509 (A.G. 2019) During the Stay of the Modified Nationwide Preliminary Injunction in Padilla v. ICE, No. 18-928, 2019 WL 2766720 (W.D. Wash. July 2, 2019): Parole of Aliens Who Entered Without Inspection, Were Subject to Expedited Removal, and Were Found to Have a Credible Fear of Persecution or Torture*

THIS IS A CORRECTED COPY – REFERENCE TO 8 C.F.R. § 235.1(h)(2) IN THE BODY OF THE MESSAGE AND ATTACHMENT: *INTERIM NOTICE AUTHORIZING PAROLE*

Please immediately distribute this interim guidance, which is effective immediately, to your employees.

Background

On April 16, 2019, the Attorney General issued a decision in *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), in which he overruled the Board of Immigration Appeals decision in *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005), and concluded that all aliens subject to expedited removal (including those encountered between the ports-of-entry and in the interior of the United States), who are referred for full removal proceedings under section 240 of the Immigration and Nationality Act (INA) after being found to have a credible fear are ineligible for release on bond. The Attorney General recognized that although these aliens must be detained and have no right to bond or a bond hearing, they may be released on parole by the Department of Homeland Security under section 212(d)(5) on a case-by-case basis “for urgent humanitarian reasons or significant public benefit.” The decision of the Attorney General is effective today.

On July 2, 2019, the U.S. District Court for the Western District of Washington issued a nationwide preliminary injunction in *Padilla v. ICE*, No. 18-928, 2019 WL 2766720 (W.D. Wash. July 2, 2019), ordering the Department of Justice’s Executive Office of Immigration Review (EOIR) to conduct bond hearings within seven (7) days of a bond hearing request by a class member, and to release such aliens if a bond hearing is not conducted within seven (7) days. The class of aliens to whom the preliminary injunction applies includes: “All detained asylum seekers who entered the United States without inspection, were initially subject to expedited removal proceedings under [INA § 235(b)], were determined to have a credible fear of persecution, but are not provided a bond hearing with a verbatim transcript or recording of

the hearing within seven days of requesting a bond hearing.” However, on Friday, July 12, 2019, the U.S. Court of Appeals for the Ninth Circuit granted a temporary stay of the district court’s preliminary injunction.

While ICE intends to issue a formal policy directive applicable to all aliens processed for expedited removal and found to have a credible fear, pending developments in *Padilla* ERO is issuing this interim guidance.

Interim Parole Guidance

Certain Other Aliens Subject to Expedited Removal: For all aliens subject to expedited removal who: (i) are not arriving aliens; (ii) have established a credible fear of persecution or torture; and (iii) have been referred for full removal proceedings under section 240 of the INA, the following interim guidance is applicable until further notice. Such aliens may request consideration for parole at any time. ERO personnel are not required to consider such aliens for parole absent an affirmative written request but ERO is not precluded from exercising its discretionary authority to do so at any time absent a request by the alien.

Because the Attorney General has held that these aliens are not detained pursuant to section 236 of the INA, effective today (July 15, 2019), ERO must **not release these aliens:** (i) on an order of release on recognizance (OREC), including on a bond issued by ERO based upon section 236(a) of the INA, or (ii) under an order of supervision (OSUP). Any alien subject to expedited removal may only be released from custody **on discretionary parole authorized by ERO**, pursuant to section 212(d)(5)(A) of the INA and 8 C.F.R. § 212.5, and subject to reasonable conditions.

The applicable regulations describe five categories of aliens for whom parole would generally be justified only on a case-by-case basis. Before considering whether an alien falls within one of these five categories, however, the alien must first satisfy the ERO officer that he or she does not present a security risk nor a flight risk. Of course, in assessing flight risk, ERO officers have discretion to consider the degree to which the risk may be mitigated by appropriate conditions of parole (such as a monetary bond, GPS monitoring). The five parole categories identified in the regulations are: (1) aliens who have serious medical conditions in which continued detention would not be appropriate; (2) women who have been medically certified as pregnant; (3) certain alien juveniles; (4) aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; and (5) aliens whose continued detention is not in the public interest. Although the first four categories are relatively self-explanatory, the term “public interest” is not amenable to a single, standard definition, and the discretionary decision must be based on a case-specific justification.

Parole on public interest grounds requires careful consideration of whether, consistent with ICE’s mission, a specific alien’s case is appropriate for parole. Based upon an individualized review of the facts of a particular case, detention may not be in the public interest in the following non-exhaustive list of circumstances, including where: (1) the alien is the sole caretaker of a minor child, elderly family member, or family member with a serious illness; (2) the alien has established that he or she will serve as an organ donor in the near future; (3) the alien has a disability rendering detention inappropriate or has been the victim of sexual abuse or assault; or (4) where, in light of available detention resources, detention of the subject alien would limit the ability of ICE to detain another alien whose release may pose a greater

risk of flight or danger to the community.

In exercising the Secretary's delegated parole authority, Field Office Directors should remain mindful of the need to properly manage the agency's limited detention resources and appropriately prioritize the utilization of detention beds. Without question, ICE has insufficient detention resources to detain throughout removal proceedings all aliens amenable to detention under the immigration laws. As of July 6, 2019, in Fiscal Year 2019, ERO has released more than 233,000 aliens pursuant to its discretionary authority. Maintaining custody of an alien subject to this interim guidance would likely not be in the public interest where doing so would render a detention bed unavailable for another alien who poses a greater potential danger to public safety or a greater risk of flight that would need to be mitigated with burdensome release conditions (e.g., GPS monitoring or recurring reporting). In light of finite detention resources, it is expected that a significant number of these individuals will ultimately need to be paroled from custody.

If ERO releases such an alien on parole, ERO Field Personnel and ERO Supervisors must not utilize Form I-220A, Order of Release on Recognizance, which applies only to releases pursuant to section 236 of the INA, but instead must utilize the attached *Interim Notice Authorizing Parole*. The letter is issued in lieu of Form I-94, Arrival-Departure Record. See 8 C.F.R. § 235.1(h)(2). If ERO declines to parole such an alien when requested, ERO Field Personnel and ERO Supervisors must utilize the attached *Interim Notice Declining Parole*.

Special Rule for Family Units: Members of family units detained together who are subject to expedited removal and who have been found to have a credible fear of persecution or torture shall be considered for parole regardless of whether any member of the family unit requests such consideration. As soon as practicable, but not more than two business days after learning that the alien has been found to have a credible fear of persecution or torture, ERO Field Personnel shall begin parole consideration for all associated family unit members who are detained together and promptly elevate to an ERO Supervisor their recommendation whether the family unit should be authorized for parole. If a member of the family unit is subject to reinstatement of a final removal order (rather than expedited removal) and it is necessary to release them, that family member should instead be considered for release under an OSUP.

Re-detention of Aliens Previously Released on OREC: Given representations made to the district court in *Padilla*, ERO should not re-detain aliens who were released from immigration detention prior to July 15, 2019, solely on account of the Attorney General's decision in *Matter of M-S-*. However, if an alien previously released on bond or other conditions violates the terms of his or her release (e.g., by engaging in criminal activity), the original custody determination is revoked and cancelled based on an intervening event and ICE may re-detain the alien pursuant to detention authorities and legal precedents which are in effect on the date of the encounter.

Arriving Aliens: Arriving aliens subject to expedited removal who are found to have a credible fear must continue to be considered for parole according to the processes and standards set forth in ICE Directive No. 11002.1, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (Dec. 8, 2009). As explained above, efforts to issue consistent, unified ICE parole policy and procedures are on hold pending developments in the *Padilla* litigation.

EARM Update: Effective July 15, 2019, all expedited removal cases with a positive credible fear determination must be accurately recorded in EARM using the new *8K Case Category: Expedited Removal Terminated due to Credible Fear Finding/NTA Issued*. It is imperative that cases be accurately recorded in EARM to enable appropriate tracking and statistical reporting, including to ensure the availability of reliable information to defend against the *Padilla* litigation. Five (5) new Actions and Decisions codes (A/Ds) were created to track parole requests and determinations. Training on these changes will be forthcoming.

EARM Release Code: If an alien is paroled by ICE, the correct release code is: **Paroled**. This code should be used for all cases where ICE grants a parole release, including where ERO sets a bond or any other condition of release on parole.

If you have any questions concerning this guidance, please contact your ERO Field Operations Headquarters point of contact.

Limitation on the Applicability of this Guidance. This guidance is not intended to limit the appropriate exercise of discretion in other contexts. Moreover, this message provides only internal guidance to ICE and does not, is not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal.

NOTICE: This communication may contain privileged or otherwise confidential information. If you are not an intended recipient or believe you have received this communication in error, please do not print, copy, retransmit, disseminate, or otherwise use this information. Please inform the sender that you received this message in error and delete the message from your system.

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

Date:

In Reference to: A #

INTERIM NOTICE AUTHORIZING PAROLE

This letter is to inform you that U.S. Immigration and Customs Enforcement (ICE) has decided to parole you from its custody pursuant to its authority under section 212(d)(5)(A) of the Immigration and Nationality Act. This notice is being issued to you in lieu of Form I-94, *Arrival-Departure Record*, see 8 C.F.R. § 235.1(h)(2), and you should maintain a copy of this letter in your possession at all times.

Your parole authorization is valid for one year beginning from the date on this notice and will automatically terminate upon your departure or removal from the United States or at the end of the one-year period unless ICE provides you with an extension at its discretion. ICE may also terminate parole on notice prior to the automatic termination date. Parole is entirely within the discretion of ICE and can be terminated at any time and for any reason. Your parole is not valid for work authorization and is not an admission in lawful status.

Parole is conditioned on you complying with the terms and conditions of your release. You must notify ICE and the immigration judge of any address correction or address change. You must report for every scheduled hearing before the immigration court and every appointment as directed by ICE (including for removal from the United States should you become subject to a final removal order). You must not violate any local, State or Federal laws or ordinances. You must comply with any other specified conditions if identified separately.

I certify that I received a copy of this notice.

Alien Name

Alien Signature

Date

CERTIFICATE OF SERVICE

I certify that on today's date, I served the respondent a copy of this parole notice by the following method (as checked):

In person Other: _____

ICE Official Name

ICE Official Signature

Date

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

Date:

In Reference to: A #

INTERIM NOTICE DECLINING PAROLE

This letter is to inform you that U.S. Immigration and Customs Enforcement (ICE) has decided not to parole you from custody at this time. The decision to authorize parole is discretionary. As part of its parole determination, ICE reviewed immigration records and any supplemental documentation that you provided. After reviewing all available information, ICE has determined that parole is not appropriate in your case at this time based on the following reason(s):

- You have not established your identity to the satisfaction of ICE.
- You have not established to ICE's satisfaction that you are not a flight risk.
- You have not established to ICE's satisfaction that you are not a security risk or a danger to the community.
- You have failed to demonstrate that you are: (1) an alien who has a serious medical condition such that continued detention would not be appropriate; (2) an individual who has been medically certified as pregnant; (3) an alien juvenile; (4) an alien who will be a witness in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or (5) an alien whose continued detention is not in the public interest.
- Other: _____

Re-Determination

You may request re-determination of this decision in writing, based upon changed circumstances in your case. Such changed circumstances or documentation should relate to the reason(s) indicated above why ICE is not paroling you from custody at this time. If there are multiple grounds checked above, you should try to provide further evidence addressing each of them.

If you request re-determination of this decision, please direct your written request to your designated ERO officer. Such a re-determination request should include a copy of this letter and any other ICE written decision declining to authorize parole, and clearly explain what changed circumstances and relevant documents you would like considered.

- ICE previously provided you with a written decision declining to authorize parole, and you have failed to provide additional documentation or to demonstrate any significant changed circumstances which would alter ICE's previous determination.

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I certify that I received a copy of this notice.

Alien Name

Alien Signature

Date

I WISH TO REQUEST A RE-DETERMINATION OF MY PAROLE DECISION. MY SUPPORTING DOCUMENTATION IS ATTACHED.

CERTIFICATE OF SERVICE

I certify that on today's date, I served the respondent a copy of this parole notice by the following method (as checked):

In person Other: _____

ICE Official Name

ICE Official Signature

Date