

## **Habeas Corpus for People Originally Detained Near the Border Then Released**<sup>1</sup>

Many people in immigration detention today were originally detained near the border, released, and then redetained. Many people in this situation are eligible for habeas corpus relief. The details of what happened at the border affect the theories and relief that are available. This practice pointer will summarize the arguments that have worked.

### Pre-2025 Consensus

Before 2025, there was a consensus that people who entered the U.S. without inspection were detained under INA § 236. Section 236 authorizes DHS to detain a person “pending a decision on whether the alien should be removed” and allows immigration judges to release the person on bond or conditional parole. By contrast, people who applied for admission at a port of entry were considered “arriving aliens” and ineligible for bond, though in some jurisdictions they might be eligible for a bond hearing after prolonged detention. However, Trump-era precedents upended this status quo: *Matter of M-S-*, 27 I&N Dec. 509 (2019), *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025) and *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). As a result of this shakeup, there has been an unprecedented volume of habeas decisions issued by district judges, including new approaches to detention for people who were originally detained near the border.

### Release on Recognizance = INA § 236 and Bond Eligible

Many noncitizens were released from border detention under an Order of Release on Recognizance (“ROR”), ICE form I-220A. This document contains one page with a list of conditions of release and a second page with a reporting record to note every ICE check-in. An ROR looks similar to an Order of Supervision (“OSUP”), but it applies earlier in the removal process. An ROR is for a person in removal proceedings, while an OSUP is for a person who has a final removal order.

Courts have found that release under an ROR is a grant of “conditional parole” under INA § 236(a)(2)(B). *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 747 (BIA 2023); *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115 (9th Cir. 2007). Conditional parole must be distinguished from humanitarian parole under INA § 212(d)(5), which serves a different purpose.

Several decisions take the view that once a person has been released on an ROR, their detention is governed by INA § 236(a). Courts have reasoned that since DHS released the person under § 236, their detention is still governed by § 236, and any border detention authority that *might* have been available under § 235 has dissipated. *Gomes v. Hyde*, 804 F. Supp. 3d 265, 274 (D. Mass. 2025); *Rosado v. Figueroa*, No. CV 25-02157, 2025 WL 2337099, at \*7 (D. Ariz. Aug. 11, 2025), *R&R adopted* 2025 WL 2349133 (D. Ariz. Aug. 13, 2025).

Anyone previously released on an ROR has a strong argument that they are entitled to a bond hearing under INA § 236.

### Due Process Violation in ROR Revocation

Several court decisions have found that DHS violated Due Process by revoking release on an ROR and redetaining someone. Courts have found that being released on an ROR confers a

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liberty interest that deserves protection under the Due Process clause of the Fifth Amendment. Applying the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), judges have found that people who had their ROR revoked were entitled to additional process, such as notice, an opportunity to be heard, and individualized assessment of flight risk and danger to the community. As relief, petitioners have been granted release from detention and/or a bond hearing. *Valdez v. Joyce*, 803 F. Supp. 3d 213, 219 (S.D.N.Y. 2025); *Lopez-Arevelo v. Ripa*, 801 F. Supp. 3d 668, 687 (W.D. Tex. 2025); *Tumba v. Francis*, 813 F. Supp. 3d 394, 405 (S.D.N.Y. 2025). However, a court might find the detention justified if the petitioner violated a condition of release, committed a crime, or if some new fact justifies revoking the ROR.

#### Difficulties for People Who Received Parole Under INA § 212(d)(5)

Many people detained near the border were released on a grant of parole under INA § 212(d)(5). This includes Biden-era programs such as CBP One, Operation Allies Welcome, and U4U. The statute allows DHS to parole someone “into the United States...for urgent humanitarian reasons or significant public benefit.” INA § 212(d)(5)(A). The statute provides that “when the purposes of such parole shall...have been served,” the person shall “be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.” *Id.*

Although people who receive parole under § 212(d)(5) are allowed to enter the U.S. legally, they are not in the same position as someone admitted on a visa. They “are treated for due process purposes as if stopped at the border.” *DHS v. Thuraissigiam*, 591 U.S. 103, 139 (2020) (quotation marks and citation omitted). The consequences of this “entry fiction” doctrine for detention authority are unsettled. Court decisions denying habeas relief to paroled arriving aliens are common. *See, e.g., Aslanturk v. Hott*, 459 F. Supp. 3d 681, 694 (E.D. Va. 2020).

#### Parole Under § 212(d)(5) = INA § 236 and Bond Eligible

However, several recent decisions have found 212(d)(5) parolees subject to detention under INA § 236 and granted relief on that basis. The best example, and the most exhaustive treatment of the subject, is the 70-page opinion in *Rodriguez-Acurio v. Almodovar*, 811 F. Supp. 3d 274, 309 (E.D.N.Y. 2025). The judge reasoned that since parole is a form of lawful entry into the U.S., a person granted parole has already entered the U.S. and is not seeking admission (which involves a spatial component of seeking entry into the U.S.). Three other decisions likewise found a parolee subject to detention under INA § 236, though with less explanation. *Alghananim v. Figueroa*, No. 5:26-cv-69 (W.D. Okla. March 2, 2026); *Bakuradze v. Adams*, No. 5:26-cv-18 (N.D.W. Va. March 2, 2026); *Obando v. Bondi*, No. 3:26-cv-133 (W.D. Pa. March 9, 2026).

#### Expired Parole Under § 212(d)(5) = INA § 236 and Bond Eligible

Where a grant of parole under § 212(d)(5) has expired, some courts have found that the “entry fiction” doctrine does not apply. The person should be treated the same as someone who entered without inspection. *See, e.g., Matkarimov v. Noem*, No. CV 26-48-DLB, 2026 WL 700072, at \*2 (E.D. Ky. Mar. 12, 2026) (“This Court joins numerous other district courts in finding that the expiration of parole does not return the undocumented immigrant to the status of an ‘arriving alien’ at the threshold of the border... [O]nce Petitioner’s parole expired, yet he remained in the country undetected, he would have similar status to any

other undocumented immigrant who entered the United States without inspection..."); see also *Qasemi v. Francis*, No. 25-CV-10029 (LJL), 2025 WL 3654098 (S.D.N.Y. Dec. 17, 2025).

#### Due Process Violation in Revocation of Parole Under § 212(d)(5)

"The government...does not have the authority to arrest a noncitizen who has been granted parole without properly terminating that parole." *Mata Velasquez v. Kurzdorfer*, 794 F. Supp. 3d 128, 145 (W.D.N.Y. 2025). If parole has not expired, a person may wish to assert a right to Due Process in revocation of parole.

Parole may be revoked when "the purposes of such parole shall, in the opinion of the Secretary of Homeland Security, have been served." INA § 212(d)(5)(A). The implementing regulation expands on this, providing that revoking parole is permitted when the purpose of parole has been accomplished, humanitarian reasons are no longer served, or there is no longer a public benefit in parole, but only "upon written notice to the alien." 8 CFR § 212.5(e)(2)(i).

Courts have granted habeas relief where DHS did not follow the statute or regulation or otherwise failed to provide Due Process in revoking parole. *Mata Velasquez*, 794 F. Supp. 3d at 145; *Kenzhebaev v. Noem*, 820 F. Supp. 3d 647 (W.D. Mich. 2025); *Y-Z-L-H v. Bostock*, 792 F. Supp. 3d 1123, 1145 (D. Or. 2025).

#### Conclusion

In the past, the details of a border encounter often didn't matter because clients would receive a bond hearing one way or another. But in the current environment, practitioners need to understand the details of border encounters and leverage the facts in support of claims for relief.