From:	(b)(6);
To:	OPLA HQ Personnel; OPLA Field Personnel
Subject:	Implementation of the Modified Nationwide Preliminary Injunction in Padilla v. ICE, No. 18-928, 2019 WL 2766720 (W.D. Wash. July 2, 2019)
Date:	Tuesday, July 23, 2019 12:12:18 PM

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Disseminated on behalf of Kenneth Padilla and Adam V. Loiacono…

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), ECF No. 149, *appeal docketed*, No. 19-35565 (9th Cir. July 3, 2019), ordering the Department of Justice's Executive Office for Immigration Review (EOIR) to conduct bond hearings within seven days of a bond hearing request by a class member, and to release such aliens if a bond hearing is not conducted within seven days. The preliminary injunction further requires that EOIR: (1) place the burden of proof on the U.S. Department of Homeland Security (DHS) in those bond hearings to demonstrate why the class member should not be released on bond, parole, or other conditions; (2) record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and (3) produce a written decision with particularized determinations of individualized findings at the conclusion of the bond hearing.

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 [section 235(b) of the Immigration and Nationality Act (INA)], 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." Aliens pending a credible fear determination or who have received a negative credible fear determination are not part of the class. Arriving aliens are not part of the class, even if they have been found to have a credible fear. To reiterate, the preliminary injunction applies only to non-arriving aliens processed through expedited removal who are determined to have a credible fear of persecution or torture.

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. *Padilla v. ICE*, No. 19-35565 (9th Cir. July 12, 2019), ECF No. 14. Yesterday, however, the Ninth Circuit lifted the temporary stay of the entire preliminary injunction and issued a stay pending appeal with regard to only part of the preliminary injunction. *Padilla v. ICE*, No. 19-35565 (9th Cir. July 22, 2019), ECF No. 18. The Ninth Circuit declined to stay the district court's ruling that class members must continue to receive bond hearings before EOIR, even though the Attorney General held in *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) that the expedited removal statute gives no jurisdiction to EOIR to conduct such hearings. The Ninth Circuit did, however, stay the procedural requirements of the preliminary injunction, including that EOIR: (1) conduct bond hearings within seven days of a bond hearing request by a class member, and to release such aliens if a bond hearing is not conducted within seven days; (2) place the burden of proof on DHS; (3) record the bond hearing and produce the recording or verbatim transcript of the hearing upon appeal; and (4) produce a written decision at the conclusion of the bond hearing.

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Yesterday evening, Enforcement and Removal Operations (ERO) issued guidance titled, UPDATED GUIDANCE: Implementation of the Modified Nationwide Preliminary Injunction in *Padilla v. ICE*, No. 18-928, 2019 WL 2766720 (W.D. Wash. July 2, 2019), addressing the procedures and mechanisms for release applicable to all aliens subject to expedited removal who are transferred to full removal proceedings under section 240 of the INA. OPLA attorneys should also familiarize themselves with the ERO guidance.

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From: (b)(6); (b)(7)(C)
Sent: Monday, July 15, 2019 4:10 PM
To: OPLA Field Personnel (b)(7)(E) @ice.dhs.gov>; OPLA HQ Personnel (b)(7)(E) @ice.dhs.gov>
Subject: Implementing Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019)
Importance: High

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Disseminated on behalf of Kenneth Padilla and Adam V. Loiacono…

On April 16, 2019, the Attorney General issued *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), holding that "[a]n alien who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond. Such an alien must be detained until his or her removal proceedings conclude, unless he or she is granted parole." The Attorney General expressly overruled *Matter of X-K-*, 23 I&N Dec. 731, 736 (BIA 2005), which previously authorized immigration judges to conduct custody redetermination hearings ("bond hearings") for inland expedited removal cases—those aliens designated under INA § 235(b)(1)(A)(iii) who are subject to expedited removal, found to have a credible fear of persecution or torture, and referred for removal proceedings pursuant to 8 C.F.R. § 208.30(f).

In *Matter of M-S-*, consistent with *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the statutory

text of INA § 235(b)(1)(B)(ii), and the implementing regulations, the Attorney General concluded that whether arriving at the border or apprehended in the interior of the United States, "all aliens transferred from expedited to full proceedings after establishing a credible fear are ineligible for bond." *Matter of M-S-*, 27 I&N Dec. at 515, 518-19. Moreover, unless paroled by the Secretary of Homeland Security pursuant to INA § 212(d)(5)(A), transferred aliens must remain detained until the completion of removal proceedings. *Id*. at 510. Importantly, such authority belongs exclusively to the Department of Homeland Security; Executive Office for Immigration Review (EOIR) adjudicators do not have parole authority. *See Matter of Arrabally*, 25 I&N Dec. 771, 777 n.5 (BIA 2002) ("parole authority is now exercised exclusively by the DHS"); *Matter of Singh*, 21 I&N Dec. 427, 434 (BIA 1996) ("neither the Immigration Judge nor th[e] Board has jurisdiction to exercise parole power"). In order to accommodate operational planning by DHS, the Attorney General delayed the effective date of the decision for 90 days to July 15, 2019. The decision can be found here.

In light of *Matter of M-S-*, OPLA attorneys should consider the following practice pointers:

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Should you have any questions about this case or its application, please contact the ILPD East or West mailboxes (b)(7)(E) @ice.dhs.gov or (b)(7)(E) @ice.dhs.gov).

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