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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of PEREZ CRUZ, Isaias In Bond Proceedings	File No. A 240 454 411

UNOPPOSED REQUEST TO APPEAR AS AMICI CURIAE

UNOPPOSED REQUEST TO APPEAR AS AMICI CURIAE

Pursuant to 8 C.F.R. § 1292.1(d), Northwest Immigrant Rights Project and American Immigration Lawyers Association respectfully request permission to appear as amici curiae to file the accompanying brief. Specifically, amici seek to respond to the Board's request for supplemental briefing on "[w]hether the Immigration Judge erred in determining that the respondent was subject to mandatory detention under section 235(b)(2) of the INA § 235(b)(2)." Isaias Perez Cruz, A 240 454 411, Letter to Counsel (BIA July 27, 2023). Respondent Isaias Perez Cruz and the Department of Homeland Security consent to the filing of this brief.

Amici curiae are organizations with substantial expertise and interest in legal issues involving detained noncitizens in removal proceedings. Northwest Immigrant Rights Project (NWIRP) is a nonprofit organization that serves low-income immigrants in Washington state through direct representation, community education, and systemic advocacy. As the largest provider of legal services to persons in immigration proceedings in Washington, NWIRP regularly represents individuals detained at the Northwest Detention Center in Tacoma, Washington, including in custody redetermination proceedings before the Immigration Judge. This case thus has widespread implications for NWIRP's detained clients.

The American Immigration Lawyers Association (AILA), founded in 1946, is a national, non-partisan, non-profit association with more than 16,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice. AILA's members practice regularly before the Department of Homeland

Security, immigration courts and the Board of Immigration Appeals, as well as before the federal courts.

Respectfully submitted this 16th day of August, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2023, I served a copy of this Unopposed Request to Appear as Amici Curiae at the following address by first-class mail:

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s/ Leila Kang Dated: August 16, 2023
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In the Matter of PEREZ CRUZ, Isaias In Bond Proceedings	File No. A 240 454 411

PROPOSED BRIEF OF AMICI CURIAE NORTHWEST IMMIGRANT RIGHTS PROJECT AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT'S BOND APPEAL

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INTRODUCTION

Section 235 of the INA governs the detention of arriving noncitizens and recent arrivals detained at or near the border, and does not apply to persons already residing in the United States, regardless of whether they were admitted when they first entered. Respondent Isaias Perez Cruz correctly argues that he and similarly situated individuals are subject to detention under INA § 236(a) and thus entitled to custody redetermination by an IJ.

The two detention statutes at issue—INA §§ 236(a) and 235(b)(2)—address fundamentally different situations. On the one hand, § 236(a) "generally governs the process of arresting and detaining [deportable noncitizens or those who were inadmissible at time of their entry] pending their removal." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). By contrast, § 235(b) applies only to a specific subset of noncitizens: "primarily [those] seeking entry into the United States ('applicants for admission' in the language of the statute)." *Id.* at 842; *see also Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2290 (2021) ("Section 1225 provides instructions for inspecting [noncitizens], expediting the removal of some, and referring others for a removal hearing. Section 1226 authorizes the arrest and detention of [noncitizens] pending a decision on whether they are to be removed.").

In the decision below, the IJ pointed to the Supreme Court's decision in *Jennings*, noting the "Court interpreted the language of INA § 235(b)(2) as 'quite clear' and 'mandat[ing] detention of [noncitizens] throughout the completion of applicable proceedings and not just until the moment those proceedings begin.'" IJ Bond Memorandum at 2 (citing 138 S. Ct. at 845–46). This interpretation, however, does not address the antecedent question—which is the relevant question in this case: *who* is subject to INA § 235(b)? As demonstrated below, the statutory text, governing Ninth Circuit analysis, legislative history, and longstanding agency practice all make clear that § 235 only applies to those arriving and seeking admission—it does not apply to all

noncitizens like Mr. Perez Cruz, who are residing in the country but were never admitted and thus are subject to the grounds of inadmissibility.

ARGUMENT

I. The text of the statute demonstrates that INA § 235 does not apply to individuals who, like Mr. Perez Cruz, are already residing in the interior.

The INA's text reinforces the basic distinction between those seeking entry, who are subject to § 235, and those already residing in the interior, who are subject to § 236. As the Supreme Court explained, § 235 is concerned "primarily [with those] seeking entry." *Jennings*, 138 S. Ct. at 842. Paragraphs (b)(1) and (b)(2) in § 235 reflect this understanding.

To begin, paragraph (b)(1) encompasses only the "inspection" of certain "arriving" noncitizens and other recent entrants the Attorney General designates, and only those who are "inadmissible under section [212(a)(6)(C)] or [212(a)(7)]." INA § 235(b)(1)(i). These grounds of inadmissibility are for those who misrepresent information to an examining immigration officer or do not have adequate documents to enter the United States. Thus, subsection (b)(1)'s text demonstrates that it is focused only on people arriving at a port of entry or who have recently entered the United States. Indeed, a key purpose of (b)(1) is to make clear that people who are subject to the applicable grounds of inadmissibility are not entitled to admission and can be subject to (b)(1)'s "expedited removal" scheme, allowing for their quick removal after entering, unless they make a claim for protection based on persecution, where they are then placed through the credible fear process.

Paragraph (b)(2) is similarly limited to recent entrants applying for admission, but who do not fall into the specific inadmissibility provisions identified in (b)(1). Critically, the title of the paragraph reinforces this point: "Inspection of other [noncitizens]." INA § 235(b)(2). The title reflects the overall contents of this paragraph—focused on the inspection of recent arrivals,

i.e., those noncitizens who are "seeking admission" but who (b)(1) does not address. INA § 235(b)(2)(A). This is further confirmed as the statutory language does not simply reference "an applicant for admission," but in the same sentence also goes on to limit its reference to "[a noncitizen] *seeking* admission." *Id*. (emphasis added). The specific reference to those who are "seeking admission" is consistent with the statute which is focused on—as the title of INA § 235 indicates—the inspection of recent arrivals. That section does not address noncitizens who are already living in the United States, contrary to what the IJ concluded. Such a reading would put it at odds with § 236, which by its very terms also applies to persons who are inadmissible. *See* INA § 236(c)(1)(A), (c)(1)(D) (requiring Attorney General to detain noncitizens who are inadmissible under INA § 212(a)(2) and (a)(3)(B), respectively); *see also infra* Sec. II.

By limiting § 235(b)(2) to those "seeking admission," Congress confirmed that it did not intend to sweep into this section individuals like Mr. Perez Cruz, who have already entered and are now residing in the United States. Indeed, the Ninth Circuit has explained that an individual submits an "application for admission" only at "the moment in time when the immigrant actually applies for admission into the United States." *Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (en banc). In doing so, the Ninth Circuit rejected the idea that § 235(a)(1) means that anyone who is "present in the United States . . . without having been admitted or paroled" must be "deemed to have made an actual *application* for admission." *Id*. That holding is instructive here too, as only those who take affirmative acts—like submitting an "application for admission"—are those that can be said to be "seeking admission" within the meaning of § 235(b)(2)(A). Indeed, otherwise that language would serve no purpose in § 235(b)(2)(A). *See Shulman v. Kaplan*, 58 F.4th 404, 410–11 (9th Cir. 2023) ("[C]ourt[s] 'must interpret the statute as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that

renders other provisions of the same statute inconsistent, meaningless or superfluous.'" (citation omitted)). The *Torres* court identified as "highly relevant" a precedential Board decision finding that even if a noncitizen who "had unlawfully entered, and thus was physically present in the United States without having ever actually applied for admission" were deemed an "applicant for admission" under INA § 235(a)(1), that status is "distinguishable from 'applying . . . for admission to the United States.'" 976 F.3d at 929 (quoting *Matter of Y-N-P-*, 26 I. &. N. Dec. 10, 13 (BIA 2012)). In *Matter of Y-N-P-*, the Board cast doubt on whether a noncitizen who was placed in removal proceedings while unlawfully present in the United States could properly be deemed an "applicant for admission" because she "[did] not contend that there is any basis for her admission to the United States" and "[i]nstead . . . [was] requesting that the Attorney General exercise his discretion to cancel her removal." 26 I. & N. Dec. 13. Thus, both Ninth Circuit and BIA precedent do not permit the IJ's interpretation of the statute.

Additional aspects of (b)(2) also underscore the limited reach of § 235. For example, subparagraph (b)(2)(B) specifies that (b)(2) does not apply to people to whom (b)(1) applies, reflecting that Congress drafted the statute to focus on the various classes of recent entrants to the United States. Similarly, subparagraph (b)(2)(C) addresses the "[t]reatment of [noncitizens] arriving from contiguous territory," i.e., those who are "arriving on land." INA § 235(b)(2)(C). This language further underscores Congress's focus in § 235 on those who recently entered the United States.

Other contextual features of § 235 also reflect its limited scope. For example, the title of § 235 refers to the "inspection" of "inadmissible arriving" noncitizens. Similarly, the entire statute is premised on the idea that an inspection occurs near the border and shortly after arrival, as the statute repeatedly refers to "examining immigration officers" INA § 235(b)(2)(A), (b)(3),

or officers conducting "inspection[s]" of people "arriving in the United States," INA § 235(b)(1)(A)(i).

Section § 235(a)(1) should also be read in this context. That paragraph defines an "applicant for admission" to include a person who is "present in the United States who has not been admitted or who arrives in the United States." INA § 235(a)(1). However, as the Ninth Circuit has explained, "when deciding whether language is plain, [courts] must read the words in their context and with a view to their place in the overall statutory scheme." *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1240 (9th Cir. 2022) (internal quotation marks omitted). Here, that context underscores that the definition in (a)(1) is limited by other aspects of the statute to those who undergo an initial inspection at or near a port of entry shortly after entry—and that it does not apply to those who are arrested in the interior of the United States years later. But regardless of how broad the application of applicant for admission in (a), the reference to "applicant for admission" in (b)(2)(A) is further qualified by clarifying the subparagraph applies only to those "seeking admission"—in other words, those who have actually applied to be admitted or paroled.

Because § 235(b)(2)(A) is only applicable to those "seeking admission," the IJ's citation to 8 C.F.R. § 1235.6(a)(1)(i) is also misplaced. *See* IJ Bond Memorandum at 4. That regulation simply requires an immigration officer to issue a Notice to Appear to an individual "if, *in accordance with the provisions of section 235(b)(2)(A) of the Act*, the examining immigration officer detains [a noncitizen] . . . ." 8 C.F.R. § 1235.6(a)(1)(i) (emphasis added). Contrary to the IJ's suggestion, Mr. Perez Cruz was not detained "in accordance with" INA § 235(b)(2)(A), and thus is not subject to mandatory detention under that statute.

II. INA § 236 governs the detention of persons who have already been residing in the United States, including those facing charges of inadmissibility.

The limitations in INA § 235 contrast with the language and application of § 236(a). By its own terms, § 236(a) applies to anyone who is detained "pending a decision on whether the [noncitizen] is to be removed from the United States," INA § 236(a), and provides for release under a bond or conditional parole. Read as a whole, the section indicates that subsection (a) applies to people who are subject to grounds of inadmissibility, as subsection(c) carves out from § 236(a) certain groups of individuals who are inadmissible for having committed certain crimes and subjects them to mandatory detention. *See* INA § 236(c)(1)(A), (C); *cf. Barton v. Barr*, 140 S. Ct. 1442, 1451 (2020) (explaining that the mandatory detention provisions under § 236(c) apply, inter alia, to individuals who are inadmissible under the specified criminal grounds).

By operation of the statute, persons subject to these grounds of inadmissibility are those who have not been admitted into the United States, making clear that § 236 applies to individuals who have entered without being admitted or paroled. As such, § 236 further confirms that § 235(b)(2) cannot be read to apply to everyone who is in the United States "who has not been admitted," INA § 235(a)(1), but instead must be limited to only those who are "seeking admission," INA § 235(b)(2)—i.e., those who are arriving. A contrary interpretation would render meaningless § 236's language that specifically addresses inadmissible individuals and subjects a subset of them to mandatory detention. *See Shulman*, 58 F.4th at 410–11. Thus, the statutory text in § 236 further undermines the IJ's holding that "the custody provision under § 235(b)(2)(A) mandates the detention of all inadmissible noncitizens." IJ Bond Memorandum at 2–3.

III. The legislative history of IIRIRA further supports Respondent and amici curiae's reading of INA §§ 235 and 236.

The legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 also supports reading § 235 in this way. That history shows that in passing the Act, Congress was focused on the perceived problem of recent arrivals to the United States who do not have documents to remain. *See* H.R. Rep. No. 104-469 pt. 1, at 157–58, 228–29 (1996); H.R. No. 104-828, at 209 (1996) (Conf. Rep.). Notably, Congress did not say anything about subjecting all people present in the United States after an unlawful entry to mandatory detention if arrested. This is important, as prior to IIRIRA, people like Mr. Perez Cruz were not subject to mandatory detention. *See* INA § 242(a)(1) (1994) (authorizing Attorney General to arrest noncitizens for deportability proceedings, which applied to all persons within the United States). Had Congress intended to make such a monumental shift in immigration law (potentially subjecting millions of people to mandatory detention), it would have explained so or spoken more clearly. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, (2001). But to the extent it addressed the matter when drafting IIRIRA, Congress explained precisely the opposite, noting that § 236(a) merely "restates the current provisions in section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond a[] [noncitizen] who is not lawfully in the United States." H.R. Rep. 104-469 pt. 1 at 229; see also H.R. Rep. 104-828, at 210 (same).

IV. The IJ's determination significantly departs from longstanding agency practices.

For decades, and across administrations, both the Executive Office of Immigration Review (EOIR) and Immigration and Customs Enforcement (ICE) have interpreted INA § 236(a) to apply to individuals who entered the United States unlawfully, but who were later apprehended within the borders of the United States long after their entry. Such a longstanding and consistent interpretation "is powerful evidence that interpreting the Act in [this] way is

natural and reasonable." *Abramski v. United States*, 573 U.S. 169, 202–03 (2014) (Scalia, J., dissenting); *see also Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (relying in part on "over 60 years" of government interpretation and practice to reject government's new proposed interpretation of the law at issue). Agency regulations recognize that people like Mr. Perez Cruz are subject to detention under § 236(a), as nothing in 8 C.F.R. § 1003.19(h)—one of the key regulatory bases for this Court's jurisdiction—provides otherwise. When EOIR promulgated the regulations implementing § 236, the agency expressly recognized: "Despite being applicants for admission, [noncitizens] who are present without having been admitted or paroled (formerly referred to as [noncitizens] who entered without inspection) will be eligible for bond and bond redetermination." Inspection and Expedited Removal of [Noncitizens],62 Fed. Reg. 10312, 10323, (Mar. 6, 1997).

Additionally, ICE issued a Notice of Custody Determination to Mr. Perez Cruz stating that he is detained "[p]ursuant to the authority contained in section 236 of the [INA]." Form I-286, DHS Notice of Custody Determination. Such language reflects the agencies' longstanding interpretation and application of the detention statutes. Indeed, Form I-286 is only specifically referenced by 8 C.F.R. § 236.1, which implements INA § 236, and not by 8 C.F.R. § 235.3(b)(2), the analogous regulation implementing INA § 235. *Compare* 8 C.F.R. §§ 236.1(g) (authorizing immigration official to issue Form I-286), *with* 235.3. Notably, ICE's decision to invoke § 236(a) is consistent with longstanding practice.

To affirm the IJ's expansive interpretation of INA § 235(b)(2) would render a breathtaking shift in immigration law and the effect of interior immigration enforcement. For years, without question, EOIR has properly applied § 236(a) to conduct bond hearings for noncitizens who are present without having been admitted or paroled, and charged as being

inadmissible in § 240 proceedings. *See, e.g.*, *Matter of R-A-V-P-*, 27 I. & N. Dec. 803–804 (BIA 2020) (referencing § 236(a) as detention authority for a noncitizen who unlawfully entered the United States the prior year and detained soon thereafter); *I-F-T-*, A XXX XXX 884 (BIA Jan. 5, 2018 & IJ July 26, 2017) (respondent was "subject to the provisions of INA § 236(a)" where she was residing in the United States after entering without inspection and charged under § 212(a)(6)(A)(i)(I) as being present without being admitted or paroled); *E-L-V-M-*, A XXX XXX 550 (BIA Sept. 10, 2015) (bond granted "pursuant to section 236(a)" where respondent was charged under § 212(a)(6)(A)(i)(I)); *M-B-V-*, A XXX XXX 975 (BIA Feb. 18, 2011 & IJ Nov. 29, 2010) (bond proceedings "governed by section 236(a)" where respondent had entered unlawfully three years prior). At the Northwest Detention Center, where Mr. Perez Cruz is detained, the bond rate sharply declined to three percent around the same time IJs in Tacoma uniformly began applying § 235 to individuals already present in the United States, demonstrating the devastating effect of this seismic change in interpreting the detention statutes. *See* Transactional Records Access Clearinghouse (TRAC), Immigration Bond Hearings and Related Case Decisions (last accessed Aug. 15, 2023), https://trac.syr.edu/phptools/immigration/bond. In fact, this bond rate represents the lowest in the entire country. TRAC, Detained Immigrants Seeking Release on Bond Have Widely Different Outcomes – Overall Bond Grant Rates Have Dropped (July 19, 2023), https://trac.syr.edu/reports/722.

Amici urge the Board to rectify the IJ's interpretation, not just in this case, but by issuing a published decision to ensure that IJs do not apply this mistaken interpretation in other cases. Indeed, amicus NWIRP and members of amicus AILA have represented several other noncitizens who were denied custody redetermination under this same interpretation, but were

unable to bring this matter before the BIA either because they were ordered removed or prevailed in their underlying case, or because ICE subsequently released them on bond or parole before the BIA had an opportunity to address this issue. Many others, especially those who are unrepresented, have similarly been denied bond and remained detained until the conclusion of their cases.

In sum, EOIR and ICE have long applied § 236 to determine the custody of noncitizens like Mr. Perez Cruz. Section 235 applies only to individuals detained upon entry or shortly thereafter who are seeking admission, as specified in the statute, while § 236 applies to those who have previously entered without admission and are now residing in the United States.

CONCLUSION

For all of the foregoing reasons, the Board should find that INA § 236 governs Respondent's decision and vacate the decision of the Immigration Judge.

Respectfully submitted this 16th day of August, 2023.

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ADDENDUM:

CITED UNPUBLISHED BIA DECISIONS

File: [redacted] 884 – Pompano Beach, FL Date: JAN – 5 2018

In re: [redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ana M. Arocha, Esquire

ON BEHALF OF DHS: Shana Belyeu
Assistant Chief Counsel

APPLICATION: Custody redetermination

The respondent, a native and citizen of Brazil who is currently detained by the Department of Homeland Security ("DHS") during the pendency of removal proceedings, appeals the July 11, 2017, denial of her request for a change in custody status based on the conclusion that she did not show that she is not a flight risk. The Immigration Judge issued a memorandum setting forth the reasons for his decision on July 26, 2017. The DHS has filed a response in opposition to the respondent's appeal. The request for oral argument is denied. The appeal is sustained and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i) (2017). We review issues of law, discretion, or judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge concluded that the respondent has not met her burden to show that she is not a flight risk. The Immigration Judge noted that the respondent claims that she arrived in the United States in 2004, married a lawful permanent resident on May 1, 2017, and has a 10-year-old United States citizen daughter from a prior marriage (IJ at 3). In addition, the Immigration Judge noted that the respondent does not have a criminal history but has been living here without permission since 2004 (IJ at 4). The Immigration Judge found that the respondent has not established a likelihood of success on the merits of her proposed claim of eligibility for cancellation of removal because she has not provided proof of continuous physical presence in the United States, she has not articulated any exceptional and extremely unusual hardship to her daughter and/or her husband, and much of the evidence in support of her motion for bond is illegible (IJ at 4). Thus, the Immigration Judge concluded that there is no amount of bond that will guarantee the respondent's appearance at further proceedings (IJ at 4).

On appeal, the respondent contends that the Immigration Judge erroneously stated that she did not submit an application for cancellation of removal when, in fact, she did submit an application at the bond hearing. She also argues that the Immigration Judge did not allow her to testify at the bond hearing and that she submitted evidence to establish prima facie eligibility for cancellation of removal, including evidence of 10 years of continuous physical presence and hardship to her

United States citizen daughter. The respondent further argues that the Immigration Judge erred in relying on the likelihood of success on the merits of the application rather than her prima facie eligibility in finding that she is a flight risk.

We conclude that the Immigration Judge clearly erred in finding that the respondent did not file an application for cancellation of removal and has not provided evidence to support her claim of prima facie eligibility for such relief. The record shows that the respondent has no criminal history, that she has evidence of the requisite continuous physical presence (including a copy of her daughter's birth certificate and passport showing that she was born in July 2007), and that she has qualifying relatives sufficient to demonstrate prima facie eligibility for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). Thus, we disagree with the Immigration Judge's finding that the respondent is a flight risk and that no amount of bond will guarantee her return to court. We will remand the record to the Immigration Judge to set an appropriate bond amount to ensure the respondent's attendance at her next hearing.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

Board Member Hugh G. Mullane dissents without opinion.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BROWARD TRANSITIONAL CENTER
POMPANO BEACH, FLORIDA

IN THE MATTER OF:	)	**In Bond Proceedings**
	)	[redacted]-884
T[redacted], I[redacted] F[redacted]	)	
	)	
Respondent	)	
	)	

APPLICATION: Bond Redetermination

APPEARANCES

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ON BEHALF OF THE GOVERNMENT:

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MEMORANDUM DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

On June 2, 2017, the Department of Homeland Security ("DHS" or "Department") initiated removal proceedings against Respondent through its issuance of a Form I-862, Notice to Appear ("NTA").

The Department alleged the following: (1) Respondent is not a citizen or a national of the United States; (2) Respondent is a native and a citizen of Brazil; (3) Respondent arrived in the United States ("US") at an unknown place and date (4) Respondent was not admitted or paroled after inspection by an immigration officer OR Respondent arrived at a time or place other than as designated by the Attorney General.

The Department charged Respondent with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act" or "INA"), in that Respondent is 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.

On July 5, 2017, Respondent requested a bond redetermination, and that same day the Court denied bond. *See* Order of the Immigration Judge with Respect to Custody.

Respondent appealed the Court's decision to the Board of Immigration Appeals ("BIA" or "Board"). As such, the Court will issue the following memorandum decision denying Respondent's request for a bond redetermination.

II. DISCUSSION

A. Mandatory Detention

Pursuant to INA § 236(c)(1), the Attorney General shall take into custody any alien who:

> (A) is inadmissible by reason of having committed any offense covered in INA § 212(a)(2);
> (B) is removable by reason of having committed any offense covered in INA §§ 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D);
> (C) is removable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least one year; or
> (D) is inadmissible under INA § 212(a)(3)(B) or removable under INA § 237(a)(4)(B).

1. Respondent is not subject to mandatory detention.

The Department has not charged Respondent on any of the bases that require mandatory detention under INA § 236(c)(1); thus, the Court does not find Respondent is subject to mandatory detention.

B. Discretionary Determination

Respondent is, however, subject to the provisions of INA § 236(a), which provide that the Attorney General may release a detained alien pending a final decision on removability. *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). Aliens do not have the "right" to release on bond. *See Matter of D-J-*, 23 I&N Dec. 572, 575 (BIA 2003) (citing *Carlson v. Landon*, 342 U.S. 524, 534 (1952)). To qualify for release, an alien must establish that he or she is not a threat to the community or a flight risk. *See Matter of Drysdale*, 20 I&N Dec. 815–17 (BIA 1994); *see also Matter of Patel* 15 I&N Dec. 666 (BIA 1976). According to the Board, an alien must first demonstrate that he or she does not pose a danger to the community before any release on bond may be considered. *See Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009) ("Only if an alien demonstrates that he does not pose a danger to the community should an immigration judge continue to a determination regarding the

extent of flight risk posed by the alien."). Additionally, if an Immigration Judge determines that an alien is a flight risk, he or she has the authority to decline setting a bond amount. *See Matter of D-J-*, 23 I&N Dec. at 584 (finding that the authority to remove people is meaningless without the authority to detain those who pose a danger or who are a flight risk during the process of determining whether they should be removed).

In making a determination regarding these issues, a court should consider the following nonexclusive factors: local family ties; length of residence in the community; prior arrests; convictions; record of appearances at hearings; employment history; membership in community organizations; manner of entry and length of time in the United States; immoral acts or participation in subversive activities; property or business ties; fixed address; availability and likelihood of relief; and financial ability to post bond. *See Matter of Andrade*, 19 I&N Dec. 488, 489 (BIA 1987); *see also Matter of Khalifah*, 21 I&N Dec. 107 (BIA 1995); *see also Matter of Ellis*, 20 I&N Dec. 641 (BIA 1993); *see also Matter of P-C-M-*, 201 I&N Dec. 432, 434–35 (BIA 1991); *see also Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); *see also Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974). In addition, a court may consider an alien's character as one of the factors in determining the necessity for or the amount of the bond. *See Matter of Andrade*, 19 I&N Dec. at 489. Pertinent federal regulations provide that an Immigration Judge's bond determination may be based on "any information that is available to the [I]mmigration [J]udge or that is presented to him or her by the alien or the [DHS]." *See* 8 C.F.R. § 1003.19(d). Courts have consistently recognized that the Attorney General has extensive discretion when determining whether to release an alien on bond. *See Matter of D-J-*, 23 I&N Dec. at 576.

In the instant matter, and for the reasons set forth below, the Court will not release Respondent from custody.

1. The Court will not release Respondent from custody because she has not shown she is not a flight risk.

The Court finds that Respondent has not demonstrated that she does not pose a flight risk. *See Matter of Drysdale*, 20 I&N Dec. at 815–17; *see also Matter of Patel* 15 I&N Dec. at 666. Respondent asserts that the Court should grant her bond because she is eligible for relief in the form of Cancellation of Removal for Non Lawful Permanent Residents (42B). Respondent has failed to establish *prima facie* eligibility for the relief she is seeking, or a likelihood of success on the merits. *See Matter of Andrade*, 19 I&N Dec. at 491. In fact, Respondent has not filed her 42B application in her custody case, nor has she submitted any evidence to show a meritorious claim, or to overcome the issue of flight risk.

Respondent is from Brazil, and claims she arrived in the United States in 2004. Respondent was divorced, married her lawful permanent resident (LPR) husband on May 1, 2017, and claims that she has a ten-year-old daughter born in the United States, from her prior marriage. The Respondent's LPR father has not filed an I-130 petition for Respondent.

The Respondent does not have a criminal history, but this does not offset the nature of Respondent's immigration history in the United States, living here without permission since 2004, See Matter of Guerra, 24 I&N Dec. at 40 (stating that an Immigration Judge has broad discretion to decide the factors he or she will consider in a custody redetermination).

Accordingly, such relief is speculative, and again, the Court finds that the Respondent has not met her burden of proof to show that she is not a flight risk.

The Court finds Respondent has not demonstrated more than a speculative argument for 42B, one based on a generalized claim that her daughter is "traumatized and scared" since Respondent has been taken into custody. Respondent never filed a 42B, and has not articulated any exceptional and extremely unusual hardship to her daughter and/or husband. Additionally, ICE attorney Ms. Kelly argued that Respondent has no proof of continuous physical presence in the United States for the requisite ten years, and that Respondent is a flight risk. Further, the Court notes that of Respondent's bond filings, pages 51-63, at minimum, are poorly copied and are illegible.

Accordingly, Respondent has not established a likelihood of success on the merits. The Court finds, as argued by ICE Counsel, that Respondent is a poor bail risk. *See Matter of Andrade*, 19 I&N Dec. at 491 ("an alien's potential eligibility for relief from deportation can reflect on the likelihood of his appearance at deportation proceedings.")

The Board has keenly noted that where an alien is unlikely to establish relief on the merits, "family ties....become a disincentive rather than an incentive to appear for future proceedings." *See Alvaro Veliz-Renteria*, A88 136 219 (BIA April 27, 2007) (upholding an Immigration Judge's decision to set "no bond") (unpublished) (cited for its persuasiveness).

In weighing the foregoing evidence, the Court finds that Respondent has not met her burden of proving that she is not a flight risk. *See Matter of Ellis*, 20 I&N Dec. at 642.

III. CONCLUSION

Based on the arguments heard by the Court, and the totality of the evidence in the record, the Court is unwilling to release Respondent from custody. Respondent remains a flight risk. The Court does not believe there is any amount of money that will guarantee the Respondent's return to Court. *See Matter of Drysdale*, 20 I&N at 815–17; *see also Matter of Patel* 15 I&N Dec. at 666; *see also Matter of Guerra*, 24 I&N Dec. at 40.

Accordingly, the Court enters the following Order:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that Respondent's request for bond redetermination be **DENIED**.

July 26, 2017
Date

Honorable B. Chait
United States Immigration Judge
Pompano Beach, Florida

File: [redacted] 550 – Eloy, AZ Date: SEP 10 2015

In re: E[redacted] L[redacted] V[redacted] M[redacted] a.k.a. [redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Darius M. Amiri, Esquire

APPLICATION: Redetermination of custody status

In a decision dated May 7, 2015, an Immigration Judge granted the respondent's request for a change in custody status and allowed her release upon the posting of bond in the amount of $30,000, pursuant to section 236(a) of the Immigration and Nationality Act, 8 U.S.C. § 1226(a). The bond decision is accompanied by the Immigration Judge's explanatory memorandum dated June 3, 2015. The respondent appealed from the May 2015 decision, asking for a lower bond. The appeal will be sustained.

Under the circumstances of this case, we find that a $15,000 bond is appropriate to ensure the respondent's appearance at upcoming immigration proceedings. The 21-year-old respondent, a native and citizen of Mexico, is charged with removability as being inadmissible as present without being admitted or paroled under section 212(a)(6)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i)(I), and her removal hearings are ongoing before an Immigration Judge. As the Immigration Judge discussed, the respondent has the adverse factors of a missed check-in appointment with the Immigration and Customs Enforcement Bureau ("ICE") and a subsequent September 2013 Arizona conviction upon a guilty plea for "solicitation to commit misconduct involving weapons." For that solicitation crime, she was sentenced to probation of one year, which probationary term she completed in September 2014. As positive factors, she has been in the United States for 15 years and has a 3½-year-old United States citizen son. She is her son's only parent following the killing of his father in Mexico, and she has additional family ties to two siblings in this country. She plans to apply for cancellation of removal. She has explained that she reported late for the ICE check-in appointment. We have considered the respondent's appellate contentions regarding her belief that a reduced bond for her is warranted. Upon review of the relevant factors, we conclude that a bond amount of $15,000 is sufficient in this case. *See Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). Accordingly, we issue the following order.

ORDER: The bond appeal is sustained; the May 7, 2015, bond decision is vacated; and bond is set for the respondent at $15,000.

FOR THE BOARD

Board Member Garry D. Malphrus respectfully dissents without opinion.

File: A[redacted] 975 - Oakdale, LA

Date: FEB 18 2011

In re: M[redacted] B[redacted]-V[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Lorraine L. Griffin
Assistant Chief Counsel

APPLICATION: Redetermination of custody

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's bond decision dated October 27, 2010. The Immigration Judge issued a bond memorandum setting forth the reasons for the bond decision on November 29, 2010. The appeal will be sustained and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

As background, the Department of Homeland Security ("the DHS") had set bond in the respondent's case at $7,500. In response to the respondent's request for a bond redetermination, the Immigration Judge denied the request for bond because she found that the respondent had no children or family ties in the United States and no avenue to relief from removal; therefore, the Immigration Judge concluded that the respondent was a flight risk (I.J. at 2). On appeal, the respondent argues that he has several cousins and other relatives who are living legally in the United States and that he is the beneficiary of a pending "U" visa petition, which would provide him an immigrant visa in connection with assistance he provided to law enforcement in Arkansas who are investigating a homicide. The respondent requests remand so that a hearing can be held to determine whether he merits a discretionary bond pursuant to section 236(a) of the Immigration and Nationality Act. The DHS opposes the respondent's appeal.

The respondent's custody proceedings are governed by section 236(a) of the Act. *See Matter of Adeniji*, 22 I&N Dec. 1102, 1111-13 (BIA 1999). Therefore, the respondent bears the burden to show that he does not present a threat to the community and a risk of flight from further proceedings. *Id.* In interpreting whether an alien has met this burden, we have found that unless the alien demonstrates that he is not a danger to the community upon consideration of the relevant factors, he

should be detained in the custody of the DHS. *See Matter of Drysdale*, 20 I&N Dec. 815, 817 (BIA 1994). Only where the alien has proven that he is not a danger to the community does the likelihood that he will abscond become relevant. *Id.* Potentially dangerous aliens may be held in the custody of the DHS without bond during the pendency of removal proceedings. *See Carlson v. Landon*, 342 U.S. 524, 537-42 (1952).

Here, the Immigration Judge denied bond because she found that the respondent was "ineligible for any form of relief from removal" and because he had "no children and no family ties in the United States." *See* I.J. at 2. While the respondent's chances of relief may be limited, in light of the evidence of the pending visa petition, it is not correct to find that he has *no* prospects for relief from removal. Further, in light of the letters of support from family members living legally in the United States, it also does not appear correct to state that the respondent has no family here. These factors play a significant role in determining if the alien poses a flight risk and, accordingly, should be granted a specific bond. *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976). The Immigration Judge should provide an on-the-record explanation of her weighing of these facts, and thereafter address the respondent's risk of flight and whether there is a bond amount likely to cause him to appear for future removal proceedings. *Matter of Patel, supra*.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with this order.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OAKDALE, LOUISIANA

IN THE MATTER OF	)	**IN BOND PROCEEDINGS**
	)	
M[redacted] B[redacted] -V[redacted]	)	**File No.: A[redacted]975**
	)	
Respondent	)	
	)	

MOTION: Motion for Bond Reconsideration

ON BEHALF OF RESPONDENT:
Pro se

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
DHS/ICE/Litigation Unit
1010 E. Whatley Road
Oakdale, LA 71463

ORDER OF THE IMMIGRATION JUDGE

The Respondent is a native and citizen of Mexico. On August 12, 2010, the Department of Homeland Security - Bureau of Immigration and Customs Enforcement ("DHS") issued a Notice to Appear ("NTA") alleging that the Respondent entered the United States on an unknown date without being admitted or paroled after inspection by in immigration officer. Based on these allegations, the DHS charged the Respondent as inadmissible pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended.

When DHS took the Respondent into custody, it determined that he should be released under bond amount of $7500.00. The Respondent now requests that this Court conduct a subsequent bond redetermination hearing.

The determination of whether an alien should be detained or required to post a bond is a two step process: 1.) Does he poses a danger to the persons or property in his community, and 2.) Is he a flight risk unlikely to appear for further proceedings. 8 C.F.R. § 236.1(c)(8); Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999); Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994). Until the alien satisfies these two factors, there is a presumption for detention. In determining whether the alien has successfully rebutted the presumption, such factors as seriousness of the crime committed, prior criminal history, sentences

imposed and time served, nonappearance at court proceedings, probation history, evidence of rehabilitative effort or recidivism shall be considered. See Matter of San Martin, 15 I&N Dec. 167 (BIA 1974); Matter of Patel, 15 I&N Dec. 666 (BIA 1976); Adeniji, 22 I&N Dec. 1102.

If the respondent does rebut the presumption of detention, then in determining the necessity for and the amount of bond, such factors as a stable employment history, the length of residence in the community, the existence of family ties, equities in the United States, availability of relief from removal and the likelihood of it being granted, a record of nonappearance at court proceedings, manner of entry, and evidence of serious criminal conduct or immigration law violations may be considered. Matter of Urena, 25, I&N Dec. 140 (BIA 2009); Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488, 489 (BIA 1987); Adeniji, 22 I&N Dec. 1102; Patel, 15 I&N Dec. at 666. An Immigration Judge has broad discretion in deciding the factors that may be considered in determining the amount of bond. See Guerra, 24 I&N Dec. at 40.

This Court has determined that the Respondent has not rebut the presumption of detention. He is unmarried, has no children and no family ties in the United States. He entered the United States without inspection only three years ago. Most importantly, the Respondent appears ineligible for any form of relief from removal. Based on this information, this Court determines that the Respondent is a flight risk and orders the Respondent detained at no bond.

Accordingly, the following order shall be entered:

ORDER: **IT IS HEREBY ORDERED THAT the Respondent ~~remain~~ detained at NO BOND.**

11/29/10
Date

Agnelis L. Reese
Immigration Judge

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2023, I served a copy of this Proposed Brief of Amici Curiae Northwest Immigrant Rights Project and American Immigration Lawyers Association at the following address by first-class mail:

DHS/ICE Office of Chief Counsel
1623 East J. Street, Suite 2
Tacoma, WA 98421

s/ Leila Kang Dated: August 16, 2023
Leila Kang