U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Rachel M. Hass, Esq.
McDavid, Burke Alan Esq.
Akin Gump Strauss Hauer & Feld LLP
1700 Pacific Ave
Suite 4100
Dallas, TX 75201

DHS/ICE Office of Chief Counsel - SNA
8940 Fourwinds Drive, 5th Floor
San Antonio, TX 78239

Name: D[redacted] A[redacted] M[redacted] A[redacted]416
Riders: [redacted]417 [redacted]418 [redacted]419

Date of this notice: 1/30/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John

Userteam: Docket

Files: A[redacted] 416 – San Antonio, TX
A[redacted] 417
A[redacted] 418
A[redacted] 419

Date: JAN 30 2015

In re: A[redacted] M[redacted] D[redacted]
G[redacted] E[redacted] L A[redacted]
I[redacted] E[redacted] C[redacted]
J[redacted] H[redacted] L P[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Rachel M. Hass, Esquire
Burke A. McDavid, Esquire

ON BEHALF OF DHS: Philip A. Barr
Assistant Chief Counsel

APPLICATION: Change in custody status

The Department of Homeland Security appeals from the Immigration Judge's orders, dated October 2 and 3, 2014, granting the respondents' requests for a change in custody status. The Immigration Judge issued a bond memorandum on November 5, 2014, setting forth the reasons for his decision. The appeal will be dismissed.

We review the Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are subject to de novo review. 8 C.F.R. § 1003.1(d)(3).

We do not find that the Immigration Judge failed to provide a "reasonable foundation" for his decision. *See* DHS Brief on Appeal, dated Dec. 16, 2014, at 2. The Immigration Judge properly considered the evidence relevant to the dangerousness of the respondents, the threat they pose to national security, and their flight risk. *See Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *see also* (I.J. at 2-7). The DHS nonetheless argues that the Immigration Judge did not correctly apply the Attorney General's precedential decision of *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003). *See* DHS Brief on Appeal, dated Dec. 16, 2014, at 5. We disagree.

The Immigration Judge did consider the national security and immigration policy interests implicated by the encouragement of further unlawful mass migrations and the release of these respondents pending the resolution of their removal proceedings. *See* (I.J. at 3-7). We have likewise considered the impact on such interests of releasing these respondents (and similarly situated aliens). *See Matter of D-J-*, *supra*, at 581. However, we do not find that a denial of bond is necessary under these circumstances.

There are material distinctions between this matter and the facts presented in *Matter of D-J-*. The alien in that case arrived in the United States approximately one year after the terrorist attacks of September 11, 2001, as part of an influx of seagoing migrants. *Matter of D-J-, supra,* at 576-80. He was among a group of aliens who carried little or no identification and who attempted to evade coastal interdiction and law enforcement authorities ashore. *Id.* By contrast, the respondents in these proceedings are a family unit from El Salvador who entered the United States by crossing the southern border in July 2014 (I.J. at 1). There is no evidence in the record that the respondents sought to flee or escape the officers who apprehended them (I.J. at 2).[1]

Although the Immigration Judge is required to consider evidence that generally connects the respondents to a "surge in illegal immigration" (I.J. at 4-5), he is not precluded from weighing such evidence against the respondents' conflicting evidence. *See* (I.J. at 5-7) (stating that "the author of the Vanderbilt [University] report cited by [two of the Government's affiants] provided an affidavit in response to [their] interpretation of his report, calling it 'a superficial and selective understanding of [the report's] main findings'"). We find no clear error in the Immigration Judge's findings concerning the respondents' relationship to any active migration networks.

Upon review of the record, we conclude that the extraordinary remedy of the continued detention of the respondents without bond in order to deter future waves of mass migration is not warranted. The Attorney General's decision in *Matter of D-J-* does not compel a contrary result. *See Matter of D-J-, supra,* at 581 (stating only, "[I]n all future bond proceedings involving aliens seeking to enter the United States illegally, where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests.").[2]

We agree with the Immigration Judge's reasons for finding that the respondents are not a danger to the community, and we agree that a $5,000 bond is an appropriate amount to assure the lead respondent's appearance at future hearings. Regarding the respondents' risk of flight, the Immigration Judge found that the respondents have a fixed address in the United States, have established prima facie eligibility for relief from removal, and are represented by counsel. *See* (I.J. at 2-3). The Immigration Judge has broad discretion in selecting the factors to consider in custody redeterminations. *Matter of Guerra, supra,* at 40.

---

[1] We also note that the respondents' relief applications remain pending before an Immigration Judge, whereas the asylum application filed by the alien in *Matter of D-J-* was denied by an Immigration Judge before the Attorney General issued his decision (I.J. at 3). *Cf. Matter of D-J-, supra,* at 573.

[2] In light of our conclusions regarding the Immigration Judge's application of *Matter of D-J-* to the facts of these cases, we need not address his initial determination that *Matter of D-J-* is "not dispositive of the issue before the Court concerning these respondents" (I.J. at 5).

Finally, although we conclude that the lead respondent's release under a bond of $5,000 is reasonable, the Immigration Judge's orders will be modified to clarify that the derivative respondents are to be released on conditional parole. *See* section 236(a)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. §1226(a)(2)(B). The Immigration Judge indicated in his orders that the derivative respondents would be released on their own recognizances; however, he explicitly conditioned their releases upon the lead respondent's posting of the $5,000 bond. Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The Immigration Judge's orders are modified to reflect that the derivative respondents are released on conditional parole.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA STREET, SUITE 300
SAN ANTONIO, TEXAS 78207

IN THE MATTERS OF	)	
[redacted]	)	**Case No.: A** [redacted]
	)	**Case No.: A**
	)	**Case No.: A**
	)	**Case No.: A**
RESPONDENTS	)	
IN BOND PROCEEDINGS	)	

ON BEHALF OF THE RESPONDENTS
[redacted]

ON BEHALF OF THE GOVERNMENT
U.S. Immigration & Customs Enforcement
Office of Chief Counsel
8940 Fourwinds Dr., 5th Fl.
San Antonio, TX 78239

BOND MEMORANDUM AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

The lead respondent is a [redacted] native and citizen of El Salvador, who entered the United States at or near Roma, Texas, on July 30, 2014. The minor respondents are the lead respondent's children, [redacted], a [redacted] and a [redacted], all natives and citizens of El Salvador, who accompanied their mother into the United States. On [redacted], an asylum officer conducted a credible fear interview of the respondents and found that they established a credible fear of persecution. All respondents are charged as removable aliens pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), as amended, as aliens not in possession of valid entry documents.

The DHS determined that no bond should be set in the respondents' cases. The respondents requested a redetermination of their custody status, filing with the Court documents in support of their request. The DHS filed with the Court documents in support of a denial of a change in the respondents' custody status. On [redacted] the Court granted the respondents' request and set the lead respondent's bond at [redacted]. The Court ordered that the

minor respondents be released on their own recognizance. The Court further ordered that the lead respondent only be released with her children and, conversely, the minor respondents only with their mother. The DHS has appealed the Court's custody redetermination.

II. Redetermination of Custody Status and Bond

In general, an alien who is in the custody of the DHS may apply to an Immigration Judge for a redetermination of his custody status at any time before a removal order becomes administratively final. *See* 8 C.F.R. § 1236.1(d)(1). The alien must, however, establish that he merits release on bond. *See Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006); *see also Matter of Adeniji*, 22 I&N Dec. 1102, 1111-12 (BIA 1999). The Court must consider whether an alien is a threat to national security, a danger to the community at large (persons or property), likely to abscond, or otherwise a poor bail risk. *See Guerra*, 24 I&N Dec. at 40; *see also Adeniji*, 24 I&N Dec. at 1111-12.

The Court has broad discretion in deciding the factors that may be considered in custody redetermination. *See Guerra*, 24 I&N Dec. at 40. Indeed, the Court may choose to give greater weight to one factor over others, as long as the decision is reasonable. *See id.* The factors the Court considers include any or all of the following: (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States. *See id.*

There is no evidence in the record that the respondents have an immigration history apart from this entry or a criminal record. The respondents represented that this is their first time in the United States and that they do not have a criminal record. *See* Credible Fear Interview Questions & Answers at 2, 7. The Court further notes that there is no evidence in the record that the respondents sought to flee or escape from immigration officials after being apprehended.

The respondents have established that they will reside with [redacted] and [redacted]. [redacted] is the brother of the father of the youngest minor respondent; [redacted] resides with [redacted] at their address in [redacted] *See*

Respondents' Memorandum in Support of Motion for Bond at 7; *see also* Respondents' Documents in Support of Redetermination of Custody Status at 66, 72. The respondents, through counsel, filed with the Court proof of [redacted] and [redacted] address in [redacted] Texas, as well as financial records from both sponsors. *See* Respondents' Documents in Support of Redetermination of Custody Status at 68, 69-70, 71, 74, 75-76. The respondents, through counsel, also filed copies of [redacted] employment authorization card and [redacted] permanent resident card. *See id.* at 67, 73. [redacted] and [redacted] both submitted affidavits on the respondents' behalf, stating their intent to provide a home for the respondents. *See id.* at 66, 72. The lead respondent advised the Court that she last saw [redacted] three years ago. She also told the court that she has a half-brother who lives in [redacted] although she does not know him to have any legal status. The respondents, through counsel, also filed letters from six different members of their community in El Salvador, attesting to the lead respondent's good character as well as the perilous conditions in which the respondents had to live on account of the gangs there, which constantly threatened and harassed them. *See id.* at 30-47. The lead respondent informed the Court that she paid [redacted] to a smuggler for the respondents to come to the United States.

The Court notes that an asylum officer with the DHS found that the respondents have a credible fear of persecution, in effect finding that there is a significant possibility that the respondents could establish eligibility for relief from removal. *See* Record of Determination/Credible Fear Worksheet at 4. The Court further notes that the respondents may be eligible for relief under the Convention against Torture.[1] The respondents are also represented by attorneys of the firm [redacted] who have expressed that they will continue to represent the respondents wherever the case is venued. The Court finds that a significant possibility of relief as well as the secured assistance of counsel gives the respondents some incentive to appear at future proceedings.

The documents filed by the DHS include declarations from two DHS Assistant Directors. *See* Department of Homeland Security Submission of Documentary Evidence at 1-8. In addition, the DHS provided a copy of a written testimony by DHS Secretary Jeh Johnson for a

[1] The respondents, through counsel, filed a Salvadoran news article that depicted a society overrun by gang violence, a problem compounded by inadequate enforcement of the law. The article illustrated the lengths to which the gangs will go to consolidate their power, coercing children as young as those in the fourth grade to join their ranks. Respondents' Documents in Support of Redetermination of Custody Status at 59-60.

House Committee on Homeland Security hearing on June 24, 2014. *See id.* at 9-13. At that hearing, Secretary Johnson outlined the DHS strategy to "process the increased tide of unaccompanied children" and "stem the increased tide of illegal migration." *See id.* at 9.

The DHS also filed with the Court seven news articles on issues pertaining to illegal immigration in the United States. *See id.* at 14-40. One article describes government efforts to stem the surge in illegal immigration by "moving to 'push back' on 'misinformation that is being deliberately planted . . . about what people can expect if they come to the United States'" illegally. *See id.* at 15. Another article discusses President Barack Obama's request for "Congress . . . to quickly provide almost $4 billion to confront a surge of young migrants from Central America crossing the border into Texas," the President calling it "an urgent humanitarian situation." *See id.* at 21. The remaining articles document the challenges faced by aliens, particularly minors, attempting to illegally enter the United States. *See id.* at 25-39.

The DHS submitted a copy of *Matter of D-J-*, 23 I&N Dec. 572 (AG 2003). In that case, the then Attorney General determined that national security considerations were appropriately considered in cases of aliens attempting to illegally enter the United States by sea. *See D-J-*, 23 I&N Dec. at 579. The Attorney General also instructed immigration courts to consider evidence from Executive Branch sources with relevant expertise if the evidence establishes that significant national security interests are implicated. *See id.* at 581. In the present case, the government has provided two sworn declarations from Philip T. Miller and Traci A. Lembke, both employees of the DHS. *See* Department of Homeland Security Submission of Documentary Evidence at 1-8.

Mr. Miller states that the number of apprehensions at the Southwest border rose by 16 percent from fiscal year 2012 to fiscal year 2013, and that the number of credible fear cases also increased during that same span, mostly as a result of claims from El Salvador, Guatemala, and Honduras. *See id.* at 1. He states that "[a]ccording to debriefings of Guatemalan, Honduran, and Salvadoran detainees," the likelihood of release on a low bond or no bond "is among the reasons they are coming to the United States." *See id.* at 2. Mr. Miller cites a study from Vanderbilt University titled "*Americas Barometer Insights: 2014, Violence and Migration in Central America.*" Mr. Miller suggests that "one key factor" influencing the decision to migrate is the existence of an active migration network. *See id.* He goes on to conclude that "illegal migrants to the United States who are released on a minimal bond become part of such active migration networks." *See id.* Mr. Miller further notes that implementing a no bond or high bond policy

will provide additional time to screen detainees to identify those who might pose a threat to public safety or national security. *See id.* at 3.

Traci Lembke states that adults without children are the most frequently encountered category of individuals who illegally cross the Southwestern border. *See id.* at 5. Ms. Lembke notes that human smuggling operations have been known to abuse and extort aliens. *See id.* at 6. She also cites the Vanderbilt study mentioned by Mr. Miller, echoing his comment that illegal immigrants "released on a minimal bond" become part of active migration networks. *See id.* at 2, 6.

In considering the directives of the Attorney General in *Matter of D-J-*, I first find that *D-J-* is not dispositive of the issue before the Court concerning these respondents. *D-J-*, by its terms, involved a particular group of aliens who were entering the United States by sea, and, in that case, the government had submitted "extensive and detailed information documenting the relationship between perceptions in Haiti of successful U.S. entry by seagoing migrants and the likelihood of further mass migrations." *See D-J-*, 23 I&N Dec. at 578. This case, however, does not involve arrivals by sea, and the concern that maritime migrants typically carry little or no identification is not an issue in this case.

Nevertheless, I have considered the information submitted by Mr. Miller and Ms. Lembke and share the DHS' concern that, in some cases, juvenile and adult aliens may be motivated to undertake a dangerous journey to the United States based on false assurances from unscrupulous individuals regarding their ability to enter and remain in the United States. However, the DHS' position, taken to its logical extreme, would result in all aliens being held without bond to discourage others from coming to the United States illegally. Since the DHS releases undocumented aliens in many cases on bonds or even on their own recognizance, I do not find that the DHS' concern overrides all other considerations, as noted above, which the Court is obliged to take into account when redetermining custody status in a particular case. *See Guerra*, 24 I&N Dec. at 40; *see also Adeniji*, 22 I&N Dec. at 1111-12; *see also D-J-*, 23 I&N Dec. at 575-76.

Furthermore, the "friends and family" effect noted in the study cited by the DHS employees is but one factor among many that result in illegal immigration from Central America, and the government has not established that it is the "key" factor in this case or others like it. Professor Jonathan Hiskey, the author of the Vanderbilt report cited by Mr. Miller and

Ms. Lembke, provided an affidavit in response to Mr. Miller and Ms. Lembke's interpretation of his report, calling it "a superficial and selective understanding of [the report's] main findings." *See* Respondents' Documents in Support of Redetermination of Custody Status at 53-57, 55. In his sworn statement, Professor Hiskey explains that the concept of active migration networks was introduced only as one of several control variables in his study of the "determinants of migration intentions" and was not the "central focus" of the analysis. *See id.* at 53, 55. Instead, the "central finding" of the report was "the critical role that crime victimization in Central America plays in causing citizens of these countries to consider emigration as a viable, albeit extremely dangerous, life choice." *See id.* at 55. This finding is one supported by Professor Nestor Rodriguez, whose affidavit the respondents also filed with the Court. *See* Respondents' Documents in Support of Redetermination of Custody Status at 17-20. In his statement, Professor Rodriguez advises that gang violence and insecurity are the principal motivating factors that cause Central Americans to come to the United States and that rumors of lenient detention policies are not a significant factor fueling the migration. *See id.* In the context of Professor Hiskey's report, then, active migration networks merely formed a part of the theoretical framework in which Professor Hiskey could "better and more confidently identify the impact that crime and corruption victimization have on the emigration decision" and cannot be regarded as a key determinant of that decision itself. *See id.* at 55.

Professor Hiskey further criticizes Mr. Miller and Ms. Lembke for "ignor[ing] the theoretical logic behind the 'friends and family effect' as well as the actual measure [used] in the analysis to capture this effect." *See id.* at 56. Far from facilitating mass migration, as Mr. Miller and Ms. Lembke would allege, "women and children fleeing violence in Central America" appear to be the least likely candidates to join and contribute to an active migration network. *See id.* Professor Hiskey notes that the ability to make remittances is "far more likely among migrants that have secured stable employment and residences within the United States" than among mothers with young children who necessarily "will be focused on simply feeding" those children and who are "dependent on the income of sponsors or family members to which they are released." *See id.* Here, the minor respondents are [redacted] and [redacted] years old. While the lead respondent has a relative with whom she can stay, she will still have to care for herself and her three children. The evidence simply does not demonstrate that these respondents, or others similarly situated, are likely to constitute a part of an active migration network.

The Court has considered the evidence filed by the DHS. However, in evaluating the testimony and evidence in the record, the Court finds that detention without bond is not appropriate in this case. *See Guerra*, 24 I&N Dec. at 40; *see also Adeniji*, 22 I&N Dec. at 1111-12. There is no evidence that the respondents are a threat to national security. *See D-J-*, 23 I&N Dec. at 577. The DHS also has not established that these respondents were motivated to come to the United States based on misinformation or an expectation that they could freely enter the United States. *See id.* Indeed, the lead respondent stated that she entered the United States because she feared for her family's safety in El Salvador. The respondents have demonstrated that they will reside with a relative who has confirmed that he will support the respondents upon their release from custody. In addition, the DHS has not advised that any further screening of these respondents is necessary, nor has it requested a continuance for that purpose.

Having considered all of the testimony and documentary evidence in the record, including the respondents' lack of strong ties to the United States, the Court finds that a bond in the amount of [redacted] for the lead respondent is appropriate to ensure the respondents' presence at future immigration hearings. *See D-J-*, 23 I&N Dec. at 575-76; *see also Guerra*, 24 I&N Dec. at 40. Since the lead respondent is accompanied by her [redacted] daughter and [redacted] and [redacted] sons, the Court orders that the minor respondents be released on their own recognizance. The Court further orders that the minor respondents may only be released with their mother, and the lead respondent only with her children.

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the lead respondent be released upon posting a bond in the amount of [redacted] with the condition that she may only be released with her minor children.

IT IS FURTHER ORDERED that the minor respondent (A[redacted]) be released on his own recognizance, with the condition that he may only be released with his mother.

IT IS FURTHER ORDERED that the minor respondent (A[redacted]) be released on her own recognizance, with the condition that she may only be released with her mother.

IT IS FURTHER ORDERED that the minor respondent (A[redacted]) be released on his own recognizance, with the condition that he may only be released with his mother.

Date: [redacted], 2014

Glenn P. McPhaul
United States Immigration Judge