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 22041

Ybarra, Grisel, Esq.
2320 S.W. 57th Avenue, Ste 201
Miami, FL 33155-0000

DHS/ICE Office of Chief Counsel - KRO
18201 SW 12th St.
Miami, FL 33194

Name: NUNEZ-GARRIDO, EDDY BISMARK **A099-115-048**

Date of this notice: 2/3/2011

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

File: A099 115 048 - Miami, FL

Date: FEB 03 2011

In re: EDDY BISMARK NUNEZ-GARRIDO

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Grisel Ybarra, Esquire

ON BEHALF OF DHS: Jorge L. Pereira
Assistant Chief Counsel

APPLICATION: Autostay

The Department of Homeland Security (the "DHS"), appeals from the Immigration Judge's November 19, 2010 custody order granting the respondent's request for a redetermination of the conditions of his custody and ordering that the respondent be released upon posting a bond in the amount of $50,000. The reasons for the Immigration Judge's custody order are set forth in a bond memorandum dated December 6, 2010. The appeal will be dismissed.

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); *see also Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002). 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).

There is no dispute that the instant custody proceeding is governed by the provisions of section 236(a) of the Immigration and Nationality Act, 8 U.S.C. § 1226(a). Under this section, the respondent bears the burden of rebutting the presumption that he is a danger to property or persons or is a flight risk. *See Matter of Adeniji*, 22 I&N Dec. 1102 (BIA1999). The interpretation of whether an alien has rebutted the presumption against him is a two-step analysis and unless the alien demonstrates that he is not a danger to property or persons upon consideration of the relevant factors, he should be detained in the custody of the DHS. *See Matter of Urena*, 25 I&N Dec. 140 (BIA 2009) (holding that only if an alien has established that he would not pose a danger to property or persons should an Immigration Judge decide the amount of bond necessary to ensure the alien's presence at proceedings to remove him from the United States). Only where the alien has rebutted the presumption that he is a danger to the community does the likelihood that he will abscond become relevant. *Id.* We understand the Immigration Judge to have determined that the respondent rebutted the presumption that he is danger to the community notwithstanding evidence of the respondent's in absentia foreign conviction for murder. In this regard, we acknowledge the concerns raised by the DHS that the respondent remains a danger given the undisputed evidence of the murder conviction and related 20-year sentence from which the respondent absconded along with evidence that the respondent is currently the subject of an international arrest warrant in connection with that murder conviction.

However, on de novo review, we agree with the Immigration Judge's conclusion that the respondent has rebutted the presumption that he is a danger, particularly given the significant passage of time and the respondent's clean record since the alleged murder coupled with evidence in the record which strongly suggests that the victim's death resulted from an accidental shooting or, at worst, reckless conduct on the part of the respondent. And, while the Immigration Judge acknowledged evidence of an outstanding international arrest warrant in connection with the murder conviction and related 20-year sentence from which the respondent absconded, the Immigration Judge noted the respondent's significant family and community ties and potential means of relief from removal. *See Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987) ("A respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation hearing than one who, based on a criminal record or otherwise, has less potential of being granted such relief."). In light of the foregoing factors, we agree with the Immigration Judge that a $50,000 bond provides the requisite assurance of the respondent's appearance at any subsequent hearings. *See Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) (providing the Immigration Judge with wide discretion in considering factors that may be considered). Accordingly, the following order will be entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD

U.S. Department of Justice
E ecutive Office for Immigration Review
Board of Immigration Appeals, Office of the Clerk
P.O. Box 8530
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

MEMORANDUM TO THE FILE

Name: NUNNEZ-GARRIDO, EDDY BISMARK Date: 2/7/2011

A 099-115-048

PLEASE NOTE:

☑ The Immigration Judge's decision in this case is complete; however, it is paginated incorrectly.

☐ The Immigration Judge's / DD Visa's decision in this case is missing page

☐ The type of proceedings indicated on the Immigration Judge's decision should read "Removal Proceedings."

☐ The "A" number is incorrect on the Immigration Judge's decision. The correct "A" number is:

☐ The name of the Immigration Judge's decision is incorrect. The correct name is

☐ The date of the Immigration Judge's decision is incorrect. The correct date is:_____.

Nancy A. Abbott, Acting Team Leader
Program Staff, Transcription Unit

Rev. 9-28-06

United States Department of Justice
Executive Office for Immigration Review
U.S. Immigration Court
Krome Processing Facility
Miami, Florida

IN THE MATTER OF:		
Eddy Bismark Nunez-Garrido	)	A099 115 048
Respondent	)	IN BOND PROCEEDINGS

Bond Decision

FOR RESPONDENT:	FOR THE DEPARTMENT OF HOMELAND SECURITY:
Grisel Ybarra, Attorney at Law 2320 SW 57th Avenue, Suite 201 Miami, Florida 33155	Jorge L. Pereira, Assistant Chief Counsel 18201 S.W. 12th Street Miami, Florida 33194

I. Procedural Background

Respondent appeared before the court, with counsel, on September 27, 2010, requesting a bond hearing. The U.S. Department of Homeland Security (DHS or Department) argued that Respondent should not receive a bond, alleging that he is a flight risk and that he is dangerous. After considering the proffers and documents provided by the parties, the Court found that Respondent was not dangerous and, given his ties to the community and other factors, that a bond of $20,000 was sufficient to assure his appearance at further hearings.

On September 28, 2010, the Department of Homeland Security issued a "Notice of ICE Intent to Appeal Custody Redetermination. On September 29, 2010, the Department filed an "Emergency Motion for Custody Determination in Light of New Evidence." Respondent filed an "Answer to the Department of Homeland Security's Emergency Motion for Custody Redetermination in Light of New Evidence" in a timely fashion. On October 12, 2010, the Court issued a decision granting the Department's motion for redetermination.

On November 19, 2010, the parties again appeared before the Court for a bond hearing. The Department again argued that Respondent should not receive a bond, alleging that he is a flight risk and that he is dangerous. After considering the proffers and documents provided by the parties, the Court found that Respondent was not dangerous, but set the bond at $50,000, and imposed various conditions thereon, given that Respondent has been convicted in absentia and the circumstances surrounding the conviction. However, based upon his ties to the community and other factors, the Court believes that a bond with these conditions is sufficient to assure his appearance at further hearings.

II. Statement of the Law

For persons who are not arriving aliens (8 C.F.R. Section 1003.19(h)(2)(i)(B)), deportable on certain criminal grounds as specified under Section 236(c) of the Act, or claimed to be subject to mandatory detention related to provisions for suspected terrorists under Section 236A of the Act,[1] an Immigration Judge may determine whether to hold an alien without bond or set a bond, in the minimum amount of $1,500. See Section 236(a) of the Act. Under Section 236(a)(2)(A), the minimum bond must be a least $1,500 and an Immigration Judge can prescribe "conditions" for the release on bond. Persons should not be detained or required to post a bond unless it is determined that he or she is a threat to security or a poor bail risk. See, e.g., Matter of Patel, 15 I&N Dec. 666 (BIA 1976). However, an alien must establish that his or her release would not pose a danger to the community in order to be considered for a bond. See Matter of Urena, 25 I&N Dec. 140 (BIA 2009).

III. Factors Considered

Respondent in this matter is a thirty-three year-old single male, native and citizen of the Dominican Republic who was admitted to the United States on July 8, 2000 as a visitor. His parents are United States citizens, and they appeared in Court to support his request for bond. His aunt and uncle also appeared in Court in support of his application.

In the Dominican Republic in August of 1996, fourteen years ago, when Respondent was eighteen-years-old, he claims he "accidently" shot and killed his best friend. The mother and uncle of the victim appeared in opposition to Respondent's bond request. The victim's uncle stated that while it was alleged that the shooting was an accident, the autopsy report shows the victim was shot in the back of the head. See Bond Exhibit 6. The statements that appear to have been taken in August 1996 during the investigation of the incident do show that Respondent and the victim were friends. See Bond Exhibit 9, at 1. It appears that Respondent was a Police Officer. Id.. For the most part, the statements reveal that Respondent was arguing with the victim because he did not want the victim to drive after he had been drinking alcohol to excess. See Bond Exhibit 9 at 2, 9. Several witnesses state that Respondent's gun went off accidently in

[1] The Department has not argued that Respondent was not eligible for bond since he is subject to mandatory detention.

a struggle (id), but one witness said Respondent had been "playing" at throwing rocks at the victim earlier in the evening and played at pointing his gun at people. Id. at 14-15.

Respondent was arrested based on this event and given a bond in 1997. Sometime thereafter, he left the Dominican Republic, going to Mexico, and then to the United States.

In 2000, Respondent was "convicted" *in absentia* of murder, based on the 1996 incident, in the Dominican Republic. It is unclear whether this will constitute a "conviction." See 9 FAM 40.21(a). At one point, the Department attorney indicated that he believed that the Dominican Republic would seek to retry the Respondent.

Since living in the United States, Respondent has lived an open, public lifestyle and has not been "in hiding." In 2004, his then wife filed for a visa petition for Respondent with the Department of Homeland Security.[2] He has a gym membership, is enrolled in college, and had a long-standing "facebook" account. See Bond Exhibit B-12, at tabs G-J. As noted earlier, he has close family tie in the United States and has friends here.

Respondent has not been arrested for a crime in any country since 1997.

The victims uncle, Pedro Tejada, stated that Respondent is a flight risk because he "jumped bail" once in the Dominican Republic and "his family will go to any lengths" not to submit to the jurisdiction of the justice system in the Dominican Republic.

IV. Analysis

First and foremost, the Court must make a determination of whether Respondent is a danger to the community. See Matter of Urena, 25 I&N Dec. 140 (BIA 2009). The Court finds that Respondent is not dangerous.

While Respondent committed a horrible crime, the circumstances show it is not likely to recur. Respondent has conceded that in 1996, he shot and killed a man. From most accounts, this did not appear to be intentional; however, by at least one account it could have been reckless. One of the witnesses, as noted above, did claim that Respondent was reckless in "playing" at throwing rocks and waiving his gun around. It is also noted, as the victims uncle stated, that the victim was shot in the back of the head. Taking a life is the most serious crime that can be committed, but the circumstances here indicate that it is not likely to recur. The strongest factor showing that it is not likely to recur is that it has been over a decade – almost a decade and one half - since this event and Respondent has not had a single arrest. In addition, the event happened when he was very young; he has matured and displayed better judgment since that time. The Court also notes the factors suggesting the unintentional nature of this crime. Noting that alcohol appeared to have been a factor in the shooting, in an abundance of caution, and with

[2]See Exhibit 12, tabs B through E. Respondent and his wife have since divorced.

consent of Respondent, the Court imposed the condition that he not consume any alcohol or unprescribed drug upon his release. The Court believes, regardless, that based on the circumstances of the crime and since it appears to be an aberration in an otherwise lawful life. He did not commit any crimes before or after. Respondent was in fact a police officer at the time it was committed. He had chosen a life in law enforcement, showing some respect for the law. Based on all the factors, Respondent has shown he is not dangerous.

The Court must also consider whether Respondent is a flight risk. The Court finds, given the equities that Respondent has in the United States, a high bond with conditions will assure that Respondent complies with the requirements under the law.

Respondent has not been in hiding and has made attempts to legalize his status with the Department of Homeland Security. He applied for and received a birth certificate from his own country while in the United States. He married and his wife applied for a visa for him. He has been open in all his dealings in the United States. He has family and has made a life with friends here.

The Department contends also that Respondent is a flight risk because "there is a very strong possibility" that he will be extradited after the removal proceeding. However, Respondent's attorney proffered that he and his family recognize the need to submit to the Dominican Republic's charges and have hired an attorney there.

Respondent volunteered to be put on an electronic-monitoring system, but the Department did not agree to his request. There is no published case law as to whether the Court can order that Respondent be placed on electronic monitoring as a condition of his release under Section 236(a)(2)(A) of the Act, but the Court declines to issue such an order at this time. The Court believes the high bond and conditions are enough to assure Respondent will not flee, and notes that the fact that Respondent volunteered for such monitoring is also evidence that he is not a flight risk.

The bond of $50,000 is a high bond for Immigration Court. While it was many years ago, the Board of Immigration Appeals upheld a lower bond under factors much worse than this case. In Matter of Sugay, 17 I&N Dec. 637 (BIA 1981), the Board upheld a bond of $30,000 for an individual who had been **denied relief at an immigration hearing, had no stable employment or close family ties, had been convicted of murder in the Philippines and fled when the case was on appeal, had been arrested for a violent crime in the United States, and fled INS apprehension.** Unlike the case in Sugay, Respondent has not been denied relief (he will seek cancellation of removal), he has close family ties in the United States (U.S. citizen parents), he has been admitted to school here, he has not been arrested in the United States, and did not flee or resist detention by DHS. While the law may have evolved to the extent that today Sugay himself would not be released because of dangerousness issues (although the case did not explicitly address that issue and has not been directly overruled), the Court believes that, as in that case, setting a high bond will assure that Respondent is not a flight risk.

V. Conclusion

In light of the foregoing, the Court finds Respondent is not dangerous and that a bond of $50,000 with the conditions that he not consume any alcohol or unprescribed drugs are sufficient to assure he is not a flight risk.

Dated this 6th day of December, 2010.

Hon. Denise Noonan Slavin
U.S. Immigration Judge

cc: Assistant Chief Counsel
Attorney for Respondent

Mailed out: 12/7/10 By: M. Farias