U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: T[redacted], [redacted] F[redacted]... **A [redacted]884**

Date of this notice: 1/5/2018

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:
Adkins-Blanch, Charles K.
Greer, Anne J.
Mullane, Hugh G.

Userteam: Docket

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

In re: I[redacted] F[redacted] [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

ON BEHALF OF RESPONDENT:

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ON BEHALF OF THE GOVERNMENT:

Patricia Kelly, Assistant Chief Counsel
Department of Homeland Security
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Pompano Beach, FL 33073

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