



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: F [REDACTED], S [REDACTED] M [REDACTED]

A [REDACTED]-137

Date of this notice: 4/20/2020

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:
Greer, Anne J.
Donovan, Teresa L.
Wilson, Earle B.

Userteam: Docket

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Falls Church, Virginia 22041

File: A-137 – New York, NY

Date:

APR 20 2020

In re: S-M-F

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jonathan Langer, Esquire

APPLICATION: Redetermination of custody status

The respondent appeals from an Immigration Judge's September 26, 2019, decision denying his request for release from the custody of the Department of Homeland Security ("DHS") on bond.¹ The DHS has not responded to the appeal. The record will be remanded for further proceedings consistent with this order.

The applicant is a native and citizen of India who entered the United States in December 2002, with permission to remain until May 2003 (Bond Memo. at 1). He was taken into DHS custody in 2017, after being placed into removal proceedings in or about 2015. He has been convicted in New York for disorderly conduct and aggravated driving while intoxicated, both in 2017 (*Id.* at 3). He applied for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). An Immigration Judge denied this application on September 18, 2018, and this decision was affirmed by the Board on March 11, 2019. On September 23, 2019, the respondent filed a motion to reopen his removal proceedings, which remains pending at the Board.

The respondent previously sought a change in his custody status in May 2018 and March 2019. The latter request was made pursuant to the decision of the United States Court of Appeals for the Third Circuit in *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208 (3d Cir. 2018). Therein, the court held that aliens detained by the DHS pursuant to section 241(a)(6) of the Act—including those subject to prolonged detention during the "removal period," in which they are subject to an administratively final order of removal—are entitled to individualized bond hearings in Immigration Court after 6 months of detention.² At the time of the March 2019 bond hearing, the respondent had not been subject to prolonged detention under section 241(a) of the Act, and,

¹ The Immigration Judge's decision is explained in a bond memorandum dated September 26, 2019.

² In bond hearings conducted under section 236(a) of the Act, 8 U.S.C. § 1226(a), detained aliens bear the burden of proving that they are neither a danger to the community nor a flight risk. *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006). In contrast, *Guerrero-Sanchez* places the burden on the DHS to prove the detained alien's dangerousness and/or flight risk by clear and convincing evidence. See 905 F.3d at 224 n.12.

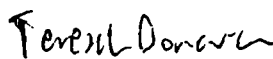
therefore, the Immigration Judge held that she lacked jurisdiction to conduct a bond hearing under *Guerrero-Sanchez*.³

The instant appeal involves the respondent's subsequent request for a redetermination of his custody status under *Guerrero-Sanchez*. The Immigration Judge denied this request on September 27, 2019, finding clear and convincing evidence of the respondent's danger and significant flight risk. In support of the danger finding, the Immigration Judge cited the respondent's aforementioned convictions for disorderly conduct and driving while intoxicated, as well as evidence that while in DHS custody, "the respondent was involved in a physical altercation with another detainee" in April 2018 (Bond Memo. at 3). In support of the flight risk assessment, the Immigration Judge cited the denial of the respondent's cancellation of removal application, and insufficient community ties, despite the respondent's 20-year residence in this country, family ties (including to his 20-year-old United States citizen son), and potential eligibility for adjustment of status once his son reaches the age of 21 and files a visa petition on his behalf (*Id.*).

While we acknowledge the Immigration Judge's reasoning, we will remand this record. The record lacks factual findings to support the conclusion that the respondent's actions in either the disorderly conduct conviction or the physical altercation in detention were indicative of his propensity toward danger or physical violence. *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018) (in deciding whether to set bond, Immigration Judge should consider the nature and circumstances of the alien's criminal activity, including any arrests and convictions, to determine if the alien is a danger to the community). In fact, as the respondent argues on appeal, the record evidence suggests that he was the victim of physical violence in detention, rather than a perpetrator. *Cf.* Respondent's Br. at 8. Moreover, while driving under the influence is extremely dangerous conduct, the evidence of the respondent's efforts at rehabilitating himself after his single conviction for this offense were inadequately weighed. *Id.* at 6-7 (noting evidence of the respondent's completion of several programs to treat substance abuse as well as his efforts to facilitate the use of these programs by other detainees). Accordingly, further factual findings are necessary before we can determine whether the record reflects clear and convincing evidence of the respondent's dangerousness.

While the denial of the respondent's application for relief is a factor to be considered in determining his overall flight risk, the respondent's ties to the community and his family should have been given more weight, particularly in light of his potential eligibility for adjustment of status. *See* Respondent's Br. at 10-11. Additional factual findings are also necessary to analyze whether the respondent's risk of flight from future proceedings could be mitigated by the imposition of reasonable bond and/or alternatives to detention. In light of the foregoing, the record will be remanded on the entry of the following order.

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



FOR THE BOARD

³ The Board summarily affirmed this decision.