



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 22041*

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**DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014**

Name: LOMELI-BECERRA, JOSE

A092-122-323

Date of this notice: 5/20/2011

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

Immigrant & Refugee Appellate Center | www.irac.net



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**LOMELI-BECERRA, JOSE
501 THE CITY DRIVE SOUTH
A#092-122-323
ORANGE, CA 92868**

**DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014**

Name: LOMELI-BECERRA, JOSE

A092-122-323

Date of this notice: 5/20/2011

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

**Donna Carr
Chief Clerk**

Enclosure

**Panel Members:
Guendelsberger, John**

Falls Church, Virginia 22041

File: A092 122 323 - Los Angeles, CA

Date: MAY 20 2011

In re: JOSE LOMELI-BECERRA

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Xavier Rosas, Esquire

APPLICATION: Redetermination of custody status

This case was last before this Board on February 22, 2011, when we remanded the record to the Immigration Judge for further proceedings. The Immigration Judge reaffirmed his previous decision denying the respondent's request for custody redetermination. The Immigration Judge issued a minute order and no bond memorandum was issued setting forth the reasons for his bond decision since he merely reaffirmed his previous decision. The record will again be remanded for a new individualized bond hearing.

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); *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (stating that the Board must defer to the factual determinations of an Immigration Judge in the absence of clear error). 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).

According to the digital audio recording of the bond hearing on March 15, 2011, the Immigration Judge concluded that he would not consider the respondent's custody redetermination request unless there was some evidence that the respondent was eligible for some form of relief from removal or if the respondent was held for an "egregious" period of time similar to the respondent in *Casas-Castrillon v. Dept. of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). We find no such requirement or standard pursuant to the Court's decision in *Casas-Castrillon*, in which the Ninth Circuit held that an alien detained in immigration custody while an appeal of a final removal order is pending before the Ninth Circuit is entitled to a bond hearing under section 236(a) of the Act.

Pursuant to the precedent authority of the Ninth Circuit Court of Appeals in *Casas-Castrillon*, under whose jurisdiction this case arises, the respondent is eligible for a hearing on the issue of the respondent's suitability for custody redetermination under section 236(a) of the Act. The Court concluded in *Casas-Castrillon* that the government bears the burden of proving that the respondent is unsuitable for release because he is either a danger to the community or a flight risk. *See, e.g., Matter of Guerra*, 24 I&N Dec. 27 (BIA 2006) (appropriate factors to consider in determining the respondent's suitability for release from custody).

ORDER: The record is remanded to the Immigration Judge to conduct an individualized custody redetermination hearing under section 236(a) of the Act.


FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
606 SOUTH OLIVE ST., 15TH FL.
LOS ANGELES, CA 90014

LAW OFFICES OF ELSA MARTINEZ, PLC
XAVIER ROSAS, ESQ.
523 W. SIXTH STREET, SUITE 633
LOS ANGELES, CA 90014

IN THE MATTER OF
LOMELI-BECERRA, JOSE

FILE A 092-122-323

DATE: Dec 20, 2010

___ UNABLE TO FORWARD - NO ADDRESS PROVIDED

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
606 SOUTH OLIVE ST., 15TH FL.
LOS ANGELES, CA 90014

✓ OTHER: See attached

Leida
COURT CLERK
IMMIGRATION COURT

CC:

FF

A092 122 323

LOMELI-BECERRA, Jose

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No.: 092 122 323

In the Matter of:

LOMELI-BECERRA, Jose

Respondent.

IN BOND PROCEEDINGS

ON BEHALF OF RESPONDENT:

Xavier Rosas, Esquire
Law Offices of Elsa Martinez
523 West Sixth Street, Suite 633
Los Angeles, California 90014

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel
Department of Homeland Security
606 South Olive Street, 8th Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

Statement of Facts

Respondent is a forty-eight-year old male, native and citizen of Mexico, who was admitted to the United States as a lawful permanent resident on October 20, 1989. Respondent was placed into removal proceedings on February 2, 2010, at the Immigration Court in Lancaster, California after being served with a Notice to Appear (hereinafter NTA), charging him with being removable from the United States pursuant to INA § 237(a)(2)(B)(i), as an alien who, at any time after admission has been convicted of a crime involving a controlled substance as defined in 21 U.S.C. § 802. On June 28, 2010, the Immigration Judge ordered Respondent removed from the United States. Respondent appealed the decision to the Board of Immigration Appeals (hereinafter Board) who upheld the Court's order of removal on October 14, 2010, and dismissed Respondent's appeal.

On October 19, 2010, after the order of the Board affirming the decision of the Immigration Judge, Respondent filed a Petition for Review before the U.S. Court of Appeals for the Ninth Circuit (hereinafter Ninth Circuit). Respondent is currently being held in the custody of the Department of Homeland Security (hereinafter Department) at the James A. Musick Detention Facility in Irvine, California pending the outcome of his petition with the Ninth Circuit. He has been in the Department's custody since February 2010.

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Respondent's recent encounter with the U.S. immigration system has been on account of his criminal record. Respondent has suffered numerous convictions since immigrating to the United States. The Department asserts the following convictions:

- On December 11, 2002 – Possession Controlled Substance for Sale, in violation of Cal. H&S Code § 11351, for which he was sentenced to 365 days in county jail and 36 months of probation.
- On December 21, 2005 – Driving under the Influence of Alcohol/Drugs, in violation of Cal. Veh. Code § 23152, for which he was sentenced to one day in county jail and 36 months of probation.
- August 5, 1999 – Assault, in violation of Cal. Penal Code § 240, for which he was sentenced to 36 months of probation.

See generally, Bond Exhibit #1

On November 8, 2010, Respondent, through counsel, submitted a motion for a custody redetermination hearing pursuant to the Ninth Circuit cases Prieto-Romero v. Clark, 534 F.3d 1053 (9th Cir. 2008) and its companion case Casas-Castrillon v. D.H.S., 535 F.3d 942 (9th Cir. 2008) because Respondent is in the Department's custody while his petition for review is pending before the Ninth Circuit.

On November 24, 2010, all parties appeared before the Immigration Court in Los Angeles, California. At the hearing Respondent asserted his eligibility for bond pursuant to law under Casas-Castrillon and Prieto-Romero and that, additionally, he should be granted bond because he is neither a danger to the community nor a flight risk due to his strong family ties and lengthy residence in the United States. The Department stipulated to Respondent's eligibility for custody redetermination in front of the Court, but argued that he is a danger to the community, given his criminal record and that he is a significant flight risk because he has little, if any, relief available to him no matter the outcome of his Ninth Circuit petition. The Court denied Respondent's request for a bond redetermination at the conclusion of the hearing.

Analysis and Law

The Ninth Circuit held in two cases, Casas-Castrillon, and its companion case, Prieto-Romero v. Clark, that if an alien has filed a petition for review with a circuit court of appeals and has received a judicial stay of removal, the alien is entitled to a custody redetermination hearing in front of an immigration judge. The Immigration Courts were given jurisdiction over these custody hearings because the Ninth Circuit found that during the period in which a final order of removal has been issued, but a petition for review is pending accompanied by a stay of removal, the alien is not in the "removal period" under INA § 241(a). This means the alien's custody is governed by INA §§ 236(a) and (c). Prieto-Romero, 534 F.3d at 1058-59. See Casas-Castrillon, 535 F.3d at 947. INA § 236(c) governs when the Immigration Court has no jurisdiction over certain criminal aliens, but INA § 236(c) does not apply to prolonged detentions in which an

alien is awaiting judicial review of his immigration case. This means INA § 236(a) applies and an alien is entitled to an individualized custody determination in front of an immigration judge. Casas-Castrillon, 535 F.3d at 948-49. At such a custody hearing, it is the government that has the burden of justifying the alien's detention pending removal. Diouf v. Mukasey, 542 F.3d 1222, 1234, 35 (9th Cir. 2008).

In applying Casas-Castrillon, it is imperative that the holding is differentiated from the dicta. The holding in Casas-Castrillon, allows for a custody redetermination solely to lawful permanent residents, who have been in the Department's custody for an extended period of time, such as seven years or more, and whose underlying proceedings have been granted appeal by the relevant circuit court and remanded to the Board for consideration. Consequently, the Court determines that a respondent is entitled to a custody redetermination under Casas-Castrillon in very limited circumstances. This is not Respondent's situation.

Unlike Casas-Castrillon, in which the Respondent was held in detention for seven years, Respondent has been in the Department's custody for 10 months. Both the Immigration Court and the Board have adjudicated this matter in an expeditious and time-sensitive manner, and Respondent's petition for review before the Ninth Circuit has only been pending for less than one month. The Ninth Circuit has made no indication that Respondent's appeal holds any merit. Because of these factors, the Court does not believe that Respondent is entitled to a custody redetermination in accordance with Casas-Castrillon.

Even had the Court determined that INA § 236(a) applied in Respondent's proceeding, the Court finds his release inappropriate as he poses a substantial flight risk. In reaching this conclusion, the Court has balanced whether or not it believes Respondent is a significant enough flight risk to justify his continued detention, keeping in mind the significant value placed on personal liberty. If INA § 236(a) were to apply, the Department has the burden of justifying to the Court Respondent's continued detention pending his petition for removal. This Court finds the Department has justified Respondent's detention because the Court finds Respondent's criminal record renders him ineligible for any form of relief, and the lack of relief available to him – regardless of the outcome of his petition for review – makes him a significant flight risk.

In Matter of Guerra, 24 I&N Dec. 27 (BIA 2006), the Board made clear that, under INA § 236(a), an Immigration Judge "has extremely broad discretion in deciding whether or not to release an alien on bond." Matter of Guerra at 39. Relying on Carlson v. Landon, 342 U.S. 524 (1952) (holding that denial of bail to an alien will be overruled only where it is shown to be "without a reasonable foundation"), the Board stated there is no limitation on the discretionary factors that may be considered by an Immigration Judge when ruling on custody and bond issues and the Board provided an extensive, but not exhaustive, list of factors to which an Immigration Judge may look when determining whether a Respondent has met his statutory burden. Matter of Guerra at 39, 40. See also, Matter of Saelle, 22 I&N Dec. 1258 (BIA 2000); Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994). These factors include:

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LOMELI-BECERRA, Jose

- (1) if the alien has a fixed address;
- (2) the alien's length of residence in the United States;
- (3) family ties and whether they could give permanent residency to the alien in the future;
- (4) employment history;
- (5) the alien's record of appearance in court;
- (6) the alien's criminal record, including extensiveness, recency, and seriousness of the criminal activity;
- (7) history of immigration violations;
- (8) any attempts by the alien to flee prosecution; and
- (9) manner of entry to the United States." *Matter of Guerra* at 40.

Additionally, "[t]he Immigration Judge may choose to give great weight to one factor over others, *as long as the decision is reasonable.*" *Matter of Guerra* at 40, emphasis added.

The Immigration Judge considered several factors in Respondent's case when deciding to deny bond. Specifically the Immigration Judge considered the extensiveness of Respondent's criminal record before the Superior Court of California. The Court also considered Respondent's family ties, fixed address and employment history.

After examining these factors, the Court determines, as a matter of discretion that Respondent poses a substantial flight risk. Respondent's numerous convictions, including one for trafficking a controlled substance as defined in 21 U.S.C. § 802, means Respondent has almost no form of relief available to him. The lack of available relief convinces the Court that Respondent is a significant flight risk and the Department, therefore, has a strong interest in keeping him in custody. In fact, the Court believes that Respondent has little to no incentive to appear for any future hearings or execution of a removal order given the severity of the immigration implications of his underlying convictions.


Accordingly, the following order will be entered:

Respondent's request for release from the Department's custody is **DENIED**.

Dated:

12/17/10


John F. Walsh
Immigration Judge

CERTIFICATE OF SERVICE	
THIS DOCUMENT WAS SERVED BY:	
<input checked="" type="checkbox"/> MAIL (M)	<input type="checkbox"/> PERSONAL SERVICE (P)
TO: <input type="checkbox"/> ALIEN <input type="checkbox"/> ALIEN c/o Custodial Officer	
BY: ALIEN'S ATT/REP <input type="checkbox"/> MOHS	
DATE: 12/29/10	BY: COURT STAFF 
Attachments: <input type="checkbox"/> EOIR-33 <input type="checkbox"/> EOIR-28	
<input type="checkbox"/> Legal Services List <input type="checkbox"/> Other	