IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

PETITIONERS/PLAINTIFFS' SUPPLEMENTAL BRIEF ON STAY ISSUES

I. Detention may not be prolonged absent clear and convincing evidence of danger or flight risk.

This Court's Preliminary Injunction opinion and order were clear: Respondents must release class members from detention "unless the immigration judge finds, by clear and convincing evidence, that the detainee is either a flight risk or public safety risk." Jan. 2 Order, ECF 191, Pg.ID#5361. That ruling was grounded in the core constitutional command that "no person should be restrained in his or her liberty beyond what is reasonably necessary to achieve a legitimate governmental objective." *Id.* at Pg.ID#5319. Neither the Court's requirements nor the constitutional limits on prolonged detention change simply because Respondents are dissatisfied with an immigration judge's decisions on danger and flight risk. There is no dispute that both ICE and the detainee can appeal an adverse bond decision. Order, ECF 203, Pg.ID#5459 ¶ 5. The parties also agree that a class member can be briefly detained while the BIA considers ICE's request for a stay. *See* Petrs.' Mot., ECF 227, Pg.ID#5869-70. The argument centers on whether a standardless *ex parte* stay process that can greatly prolong detention comports with this Court's order, with the constitutional requirements that prolonged detention be based on flight risk or dangerousness, and with procedural due process.

II. The discretionary stays issued for *Hamama* class members violate this Court's order and due process.

ICE, according to the most recent court-ordered disclosures, has so far appealed 10 out of 157 cases in which immigration judges found no clear and

convincing evidence of either flight or public safety risk, and sought an emergency stay of release in every one. Ex. 1, Schlanger Decl. ¶¶ 4-5. ICE may, of course, file additional appeals in the future. In each case, an immigration judge individually assessed the detainee's criminal and immigration history, evaluating his credibility and other proffered evidence against ICE's arguments and evidence, and then granted either release on the detainee's own recognizance, or on bond between $7,500 and $30,000. In all but one case, ICE's appeal and stay motion were adjudicated without notice to the detainee or his counsel. And in every case, the BIA granted the stay without making any finding, express or implied, that ICE had met its burden to demonstrate danger or flight risk.

A. Standardless stays do not establish clear and convincing evidence of danger or flight risk that could justify prolonged detention. The regulations governing bond stays, 8 C.F.R. §§ 1003.19(i)(1), 1003.6(c)(5), do not specify any adjudication standard. EOIR has also failed to promulgate any guidance.[1] Respondents likewise offer no standard, instead claiming that the ordinary stay standard (strong likelihood of success on the merits) should not apply. Indeed, Respondents argue that the ordinary stay standard—or, apparently, *any* standard—

[1] Even EOIR's recently-posted "fact sheet" about the bond stay process—whose timing suggests it may well have been generated in response to this litigation—explains only when ICE can seek such a stay, not the standard under which stays are granted or the process to oppose them. *See Fact Sheet: BIA Emergency Stay Requests*, U.S. Dep't of Justice (March 2018), https://www.justice.gov/eoir/file/1043831/download.

would "interfere with EOIR's 'administrative discretion.'" Govt. Resp. ECF 258, Pg.ID# 6264-65. The BIA's "discretionary stay" decisions are thus concededly standardless.

Notably absent from the BIA stay decisions was any finding that ICE has proven flight risk or dangerousness (much less by clear and convincing evidence), or even that the BIA was likely to find later that this standard had been satisfied. Nor can such a finding be inferred from the BIA's grant of these stays. Not only have Respondents expressly disavowed a "strong likelihood of success"-type stay standard, but the BIA could not have been applying such a standard because it did not yet have the immigration judge's opinion and therefore had no way to assess whether the judge's factual determinations were clearly erroneous or the judge's legal conclusions incorrect.[2] Such standardless extension of already-prolonged detention—in the face of an explicit finding by an independent adjudicator that detention is not necessary—violates this Court's Jan. 2 Order, and also violates due process for the same reasons that supported that order in the first place.

B. *Ex parte* issuance compounds the problem of standardless stays. In all but one of the current cases, the stay was sought and obtained *ex parte*. Such one-sided decision-making is fundamentally at odds with the due process requirement of

[2] On the underlying bond appeal, the BIA must defer to factual findings and credibility findings unless they are clearly erroneous, *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 587 (B.I.A. 2015), and reviews *de novo* "questions of law, discretion, and judgment." 8 C.F.R. § 1003.1(d)(3)(ii).

notice and an opportunity to be heard.[3] Therefore, *ex parte* decision-making is traditionally restricted to circumstances where harm is imminent and notice impossible, and is then followed promptly by a hearing at which both sides can be heard. *Cf.* Fed. R. Civ. P. 65(b) (allowing *ex parte* injunctive relief only to avoid "immediate and irreparable injury," requiring justification for failure to provide notice to opposing party, and providing for a de novo *inter partes* "hearing at the earliest possible time"); *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (post-deprivation process for a deprivation of liberty satisfies due process only "where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest" so that pre-deprivation process is not feasible)*; United Pet Supply, Inc. v. City of Chattanooga*, 768 F.3d 464, 485–86 (6th Cir. 2014) (absent emergency, due process requires a pre-deprivation hearing).

The circumstances here do not justify emergency, *ex parte* decision-making, particularly given that months of human liberty are at stake. ICE did not contact the detainees or their counsel, even though in nearly every case, the class member had been represented by counsel during the bond hearing, so counsel's identity and contact information were known to ICE. Nor did the BIA contact counsel prior to

[3] The government's supplemental briefing here, with its invocations of danger and flight risk, perfectly exemplifies the dangers of one-sided presentation. The immigration judges' opinions paint a very different picture. *See*, *e.g.*, Ex. 2, Maze Decl. ¶¶ 4-5, 20-21; Ex. 3, Bajoka Decl. ¶¶ 3-7; Ex. 4, Danziger Decl. ¶¶ 5-7; Ex. 5, Frankel Decl. ¶ 5.

issuance of the stay.[4] The stay motions were filed up to two weeks after the release order, and once the stays were granted, ICE waited as much as nine days to re-detain the class member. *See* Ex. 1, Schlanger Decl., ¶ 7(c), (f). Nor, given Petitioners' agreement to a brief continuation of detention to allow *inter partes* briefing, would there be a future emergency that could justify an *ex parte* stay.

Respondents argue that the theoretical availability of a motion to reconsider—about which many of the detainees were not even informed[5]—cures the evident unfairness of the standardless, *ex parte* decision. This is incorrect. A motion to reconsider must "state with particularity the errors of fact or law in the prior Board decision, with appropriate citation to authority and the record." BIA Practice Manual § 5.7(g) (2017), https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf#page=85. *See also* 8 C.F.R. § 1003.2(b). It is hard to see how a detainee could comply with this particularity requirement without a BIA opinion to which to respond. Even more important, when a detainee seeks reconsideration, the burden is on the detainee to demonstrate error—and "the decision to grant or deny a motion to . . . reconsider is within the discretion of the Board." 8 C.F.R. § 1003.2(a); *In re O-S-G-*, 24 I. & N. Dec. 56, 57 (B.I.A. 2006). This alone violates this Court's Jan. 2 Order, which puts the

[4] The fact that the BIA can promptly contact counsel *after* a stay is granted, Gearin Decl. ¶ 10, ECF 258-4, Pg.ID# 6282-83, raises the obvious question why the BIA cannot do so *before* the stay is granted.

[5] The BIA itself seems confused about whether such motions can be filed; BIA clerks have said they will not be entertained. Ex. 2, Maze Decl. ¶¶ 14, 31.

burden on ICE to demonstrate, by clear and convincing evidence, the necessity of prolonged detention. Finally, how can a detainee demonstrate that a decision is erroneous if there is no standard for that decision? In short, the hypothetical possibility of reconsideration—discretionary, standardless, and with the burden on detainees already found to present insufficient risk of flight or danger to justify prolonged detention[6]—cannot cure the *ex parte* deprivation of liberty that occurred here.

Petitioners therefore seek a moderate set of procedural fixes to align the stay process with this Court's Jan. 2 Order and with ordinary judicial practice. For release to be stayed beyond the brief period necessary for ICE to appeal and seek a stay from the BIA, with the detainee receiving notice and an opportunity to respond, should require a finding by the BIA that ICE is highly likely to succeed in its argument that the immigration court erred[7] in finding that ICE failed to demonstrate, by clear and convincing evidence, a risk of flight or danger that

[6] Respondents rely on *El-Dessouki v. Cangemi*, No. 06-3536(DSD/JSM), 2006 WL 2727191 (D. Minn. Sept. 22, 2006), and *Organista v. Sessions*, No. CV-18-00285-PHX-GMS (MHB), 2018 WL 776241 (D. Ariz. Feb. 8, 2018). These cases offer the Government little support. In *El-Dessouki*, the court determined that the detainee was offered notice and an opportunity to be heard prior to the stay of his release on bond. 2006 WL 2727191, at *3. In *Organista*, the district court similarly found that the counsel was notified of the stay motion prior to its resolution. 2018 WL 776241, at *2. In neither opinion is there any sign that the detainee challenged the standard (or lack thereof) for grant or reconsideration of a stay.

[7] *Cf. Hilton v. Braunskill*, 481 U.S. 770, 776–77 (1987) (appellate review of habeas release that considered flight risk and dangerousness must apply traditional stay factors and "must accord a presumption of correctness to the initial custody determination").

cannot be mitigated by bond.[8]

III. Automatic stays should be limited to the period necessary to adjudicate a discretionary stay.

Respondents do not even attempt to rehabilitate the obvious deficiencies of the automatic stay process. *See* ECF 227 at Pg.ID# 5884-87; Petrs.' Reply, ECF 241 at Pg.ID# 6137-40. The Government used automatic stays to prevent the ordered release of at least six class members, Ex. 1, Schlanger Decl. ¶ 7(a); Ex. 2, Maze Decl. ¶ 22; Ex. 3, Bajoka Decl. ¶ 8; Ex. 4, Danziger Decl. ¶ 8; Ex. 5, Frankel Decl. ¶ 6, and expressly declined, at the status conference, to disavow their use.[9] As previously briefed, the Court should limit automatic stays to 10 business days, the time reasonably necessary to protect the Government's legitimate need for adjudication of a stay request, with notice and an opportunity to be heard, safeguarding procedural fairness and complying with this Court's Jan. 2 Order.

[8] Respondents suggest in a footnote that "under 8 U.S.C. 1226(e), there are serious questions about whether the Court has jurisdiction to impose standards on the BIA that would dictate how it exercises its discretion under 8 C.F.R. 1003.19(i)." ECF 258, Pg.ID# 6265 n.5. This vastly overstates the reach of § 1226(e), which—as is evident from the very cases Respondents cite—constrains judicial review of statutory bond decisions, not of the legality of the bond process, and which the Supreme Court recently reaffirmed does not preclude review, *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018). In any event, Petitioners are not here seeking review of any particular bond decision, but rather are seeking to ensure that if ICE chooses to continue the prolonged detention of class members, such prolonged detention comports with constitutional standards.

[9] Respondents claim that "supplemental briefing was limited to the discretionary stay procedure under 8 C.F.R. § 1003.19(i)(1)," ECF 258, Pg.ID# 6259 n.1, but no such limitation is evident from the Court's order, ECF 254, Pg.ID# 6226-27, and Petitioners asked at the status conference for a ruling on the automatic stay issue.

Respectfully submitted,

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Dated: March 22, 2018

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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EXHIBIT 1

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Class Action

THIRD DECLARATION OF MARGO SCHLANGER

I, Margo Schlanger, hereby make this declaration based upon my own personal knowledge and if called to testify, I could and would do so competently as follows:

1. My qualifications and background are fully set out in my first declaration in this case, dated November 6, 2017, ECF 138-2, Pg.ID# 3402 ¶¶ 2-4. As it says, I am the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan Law School, and counsel for all Petitioners/Plaintiffs. I have since been designated class counsel, as well. ECF 191, Pg.ID# 5360 ¶ 1(d).

2. This declaration is based on three sources of information: the Respondents' court-ordered disclosures, ECF 203, Pg.ID# 5460, ¶ 9(c); ECF 254, Pg.ID# 6227-29 ¶¶ 12, 19; communication with detainees' immigration counsel; and the immigration court documents shared by detainees' immigration counsel.

Overall Bond Hearing Results

3. Respondents have disclosed the outcomes in 247 bond hearings, held pursuant to this Court's January 2 Preliminary Injunction, ECF 191 (hereinafter Jan. 2 Order).

4. All told, out of the 247 bond hearings that have been disclosed, there have been 22 releases on the detainees' own recognizance, 135 grants of bond,

and 90 denials of release by immigration judges. The bond amounts have varied between $1,500 and $100,000.

ICE's Use of Automatic and Discretionary Stays

5. ICE is required to disclose each appeal it files. ECF 203, Pg.ID# 5460 ¶ 9(c); ECF 254, Pg.ID# 6229 ¶ 19. It has disclosed 10 appeals of immigration judge bond orders in favor of detainees. In each of its 10 appeals, ICE simultaneously filed a motion for "discretionary stay" of bond release, and the BIA granted each such motion.

6. Table A, which follows at the end of this Declaration, sets out information about each of these appeals/stay cases.

7. Table A shows:

   a. In at least 6 of the 10 cases, ICE filed a form EOIR-43 after the bond decision. *See* row h. The EOIR-43 effects an "automatic stay" of bond releases for 10 business days, while ICE decide whether to appeal.

   b. In most cases ICE withdrew the automatic stay before filing for a discretionary stay, but in at least one case, the withdrawal did not occur until after ICE filed for a discretionary stay. *Compare* rows i and j.

   c. The discretionary stay motions were filed between 3 and 13 days after the bond decisions. *Compare* rows e and j. ICE took as long as 11 days after withdrawing the automatic stay to file for an emergency discretionary stay. *Compare* rows i and j.

   d. In nearly all the cases, the detainee was represented in the bond hearing. *See* row b. That means that counsel's contact information was available to EOIR and to ICE at the time ICE filed for a discretionary stay.

   e. The BIA granted each of ICE's 10 discretionary stay applications. In all but one case for which we have the relevant information, the grant occurred within one day of ICE's application for the stay. *Compare* rows j and k. (For two cases we do not have information on the dates of the stay application and/or grant.)

   f. Once stays were granted, ICE waited as much as 9 additional days to

re-detain the class member. *Compare* rows k and l.

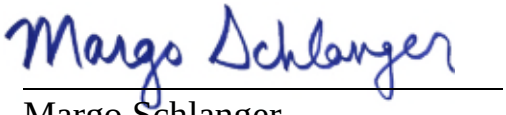
8. The 10 bond orders were issued by four immigration judges: Judge David Paruch (Detroit); Judge Alison Brown (Cleveland); Judge Kuyomars Golparvar (York); and Judge John Duck. Jr. (Oakdale). *See* Table A, row a. I was able to use the other data disclosed in this case to examine the bond records of the four judges whose orders were appealed. Judge Paruch, who had 42 *Hamama* bond hearings, denied bond 30% of the time (13 cases). Judge Brown, who had 20 *Hamama* bond hearings, denied bond 5% of the time (1 case). Judge Duck who had 8 cases, denied bond 25% of the time (2 cases). Judge Golparvar had only 3 *Hamama* bond hearings, and found bond appropriate in each of them.

Table A: Information about the 10 cases ICE has appealed

	AMA, -938	AS, -847	BM, -710	MC, -541	ASB, -623	ADJ, -820	YB, -001	AHA, -919	ARM, -314	SM, -319
a. Bond court (Judge)	Detroit (Paruch)	Detroit (Paruch)	Detroit (Paruch)	Detroit (Paruch)	Cleveland (Brown)	Cleveland (Brown)	Cleveland (Brown)	York (Golparvar)	Oakdale (Duck)	Oakdale (Duck)
b. Represented at bond hearing?	Y	Y	Y	Y	Y	Y	Y	Y	N	Unk.
c. Bond hearing date	1/26/2018	1/31/2018	1/29/2018	1/30/2018	1/18/2018	1/24/2018	1/31/2018	1/29/2018	1/22/2018	1/18/2018
d. Bond amount	$20,000	$20,000	$20,000	$30,000	$7,500	ROR	$7,500	$15,000	ROR	ROR
e. Bond decision date	1/26/2018	1/31/2018	1/29/2018	1/30/2018	1/31/2018	1/24/2018	1/31/2018	2/2/2018	1/22/2018	Unk.
f. Bonded out date	NA	2/2/2018	2/5/2018	2/6/2018	2/2/2018	1/25/2018	NA	NA	1/22/2018	Unk.
g. Bond opinion date	2/6/2018	2/6/2018	2/8/2018	3/15/2018	2/16/2018	2/7/2018	2/15/2018	2/14/2018	1/29/2018	Unk.
h. E-43 filed date	1/29/2018	NA	1/30/2018	1/31/2018	NA	NA	2/1/2018	2/2/2018	NA	1/22/2018
i. E-43 withdrawal date	2/1/2018	NA	2/2/2018	2/5/2018	NA	NA	2/1/2018	2/6/2018	NA	Unk.
j. ICE appeal & stay motion date	2/2/2018	2/5/2018	2/5/2018	2/13/2018	2/8/2018	1/30/2018	2/12/2018	2/5/2018	1/25/2018	1/25/2018
k. Stay granted date	2/2/2018	2/6/2018	2/6/2018	2/14/2018	3/12/2018	Unk.	2/13/2018	2/6/2018	1/26/2018	Unk.
l. Redetention date	NA	2/13/2018	2/15/2018	2/16/2018	3/20/2018	2/5/2018	NA	NA	1/31/2018	Unk.
m. Reconsideration sought date	3/5/2018	2/26/2018	NA	2/27/2018	NA	NA	NA	NA	NA	Unk.
n. Reconsideration adjudication date	3/15/2018	3/12/2018	NA	3/13/2018	3/12/2018	NA	NA	NA	NA	Unk.
o. Bond merits: ICE brief date	3/21/2018	3/21/2018	3/9/2018	not set	4/9/2018	4/6/2018	4/6/2018	3/9/2018	3/5/2018	Unk.
p. Bond merits: detainee brief date	3/21/2018	3/21/2018	3/30/2018	not set	4/9/2018	4/6/2018	4/6/2018	3/9/2018	3/5/2018	Unk.

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury under the laws of the United States that the above statements are true and correct to the best of my knowledge, information, and belief.

Date: March 22, 2018



Margo Schlanger

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al., Plaintiffs/Petitioners, v. **REBECCA ADDUCCI**, et al., Defendants/Respondents.	Case No. 2:17-cv-11910 Hon. Mark A. Goldsmith Mag. David R. Grand Class Action

DECLARATION OF BRADLEY MAZE

I, Bradley Maze, make this statement under the penalties of perjury of the laws of the United States and if called to testify I could and would do so competently based upon my personal knowledge as follows:

1. I am an attorney in good standing licensed to practice law in the State of Michigan since 2006. I have practiced primarily in the area of immigration and nationality law since 2006.

Client A-S- (847)

2. I have been retained as immigration counsel by A-S- (847) ("Mr. A."), a class member in this litigation. He has lived in the United States since 2007, and his family members are U.S. citizens or lawful permanent residents.

3. Pursuant to this Court's order, Mr. A. was scheduled for a bond hearing on January 31, 2018. By that time, Mr. A., who was arrested by ICE on August 18, 2016, had been in detention for approximately 18 months.

4. The immigration court considered documentary submissions by Mr. A and DHS, and the arguments of both parties before rendering a decision. After considering all of the evidence and argument, including my client's criminal history, Immigration Judge David Paruch granted Mr. A.'s release on a bond of $20,000, finding that he was not a danger to the community and that the bond amount would mitigate any flight risk.

5. Judge Paruch's written decision was issued February 6, 2018. That decision, attached hereto as Exhibit A, sets out in detail the judge's reasons for granting bond. Judge Paruch rested his finding that DHS had not established he was a current danger to the community on the fact that after criminal convictions in 2011, Mr. A. had no record of other dangerous conduct. With respect to flight risk, Judge Paruch found that the high bond he set—$20,000—was sufficient to ensure respondent's presence at removal proceedings and for removal. *See* Ex. A at 5.

6. On February 2, 2018, Mr. A. was able to make bond. He was released and reunited with his family.

7. On February 5, 2018—five days after the IJ's bond decision and three days after my client had posted bond and been released—the Department of Homeland Security (DHS) filed both an appeal of the bond decision and Emergency Motion for a Discretionary Stay to the Board of Immigration Appeals (BIA). Neither my client nor I were informed of this appeal and motion, even though my contact information was readily available to DHS, because of my appearance in immigration court.

8. The first time I heard anything about DHS filing the appeal and stay motion was on February 6, 2018, when I received a call from the BIA clerk's office asking me to submit an appearance form, the EOIR-27, so that I could receive a copy of the decision that the BIA had issued that day in my client's case. (There was no way I could have previously submitted an EOIR-27 to guard against the possibility that DHS would seek a stay without notice to me, because there was no open case at the BIA in which to file.) I submitted the appearance form, as requested, and the BIA faxed me the order granting DHS' request for a stay. A copy of the BIA Order is attached as Exhibit B.

9. The BIA's Order did not evaluate, analyze or mention any specific facts from the case, let alone address whether clear and convincing evidence exists to warrant a stay of the immigration court's January 31, 2018 Bond Order. The BIA's Order did not indicate under what standard, if any, the stay had been granted. It simply stated: "After consideration of all information, the Board has considered the request and has concluded that the stay of the bond order will be granted."

10. To the best of my knowledge, when the BIA granted the stay, the only information it considered was DHS's motion, since Judge Paruch's written decision was issued the same day that the BIA granted the stay. I, of course, was

unable to submit anything for Mr. A. as I did not receive notice of the stay motion before it was granted. DHS, in moving for the stay, presented only its side of the argument, omitting important information relied on by Judge Paruch in deciding that release on bond was appropriate. DHS's motion treated an inflammatory police report as "fact", even though many of the allegations therein were unproven hearsay and Mr. A was not convicted of those alleged offenses. DHS also minimized the fact that more than seven years have passed since Mr. A's last criminal offense, and more than five since his last disciplinary violation while in custody. Thus DHS's claim that Mr. A has been engaged in an "egregious actions over an eight-year period" did not comport with the fact that his criminal acts ended in 2010 and his disciplinary violations in 2012.

11. I informed Mr. A. that DHS had obtained a stay of his release on bond. Mr. A., knowing, that he would almost certainly be re-arrested, nonetheless reported on February 13, 2018, for his first scheduled check-in under his post-bond Order of Supervision. ICE rearrested him. He is currently detained at the Calhoun County Correctional Facility. As these facts show, DHS's argument that Mr. A. is a flight risk lacks merit.

12. On February 27, 2018, I filed an Emergency Motion to Reconsider the Stay grant and asked that the BIA issue a decision in short order, just as it had done on the DHS's Emergency Motion for Discretionary Stay. It was difficult to frame the motion appropriately, because motions to reconsider are required to point to particular errors in the BIA opinion for which reconsideration is sought—and there was no opinion. See BIA Practice Manual 5.7(g), https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf.

13. On February 28, 2018, DHS filed an opposition to my Emergency Motion to Reconsider the Stay.

14. On March 6, 2018 I called the BIA, to ask about the status of the reconsideration motion. I was informed orally that Board was no longer considering the stay issue, as the Board had already issued its decision on the stay, and that the case is now moving on to the merits of the bond appeal itself.

15. Additionally, I was informed that the briefing schedule had been set for Mr. A.'s underlying bond appeal, with all briefs to be filed by March 21, 2018. I was further told that the earliest a decision would be made is six weeks after the close of briefing, in other words in early May. Even assuming the BIA makes a

decision at the six-week mark, at that point, Mr. A. will have been detained for almost three months as a result of a stay which was granted without any notice to him, without any opportunity to be heard, with no standard for decision, and without any finding that he is either dangerous or a flight risk.

16. In my experience, it can take as long as four months – after briefing closes – for the BIA to decide a bond appeal. Therefore, it is likely that Mr. A. will be incarcerated for much longer than three months as a result of the stay.

17. On March 12, 2018, the BIA denied Mr. A.'s motion to reconsider. Like the Board's initial decision granting DHS's motion to stay, the Board's decision denying the motion to reconsider did not contain any analysis. The Board did not articulate what standard it used in deciding either the motion to reconsider or the stay itself, nor did it indicate that the government would be likely to show clear and convincing evidence of danger or flight risk, which is the standard for *Hamama* hearings. The Board's denial simply stated: "After consideration of all the information presented by both parties, we do not find an adequate basis to warrant reconsideration of the February 6, 2018, decision." A copy of the BIA order denying the motion to reconsider is attached as Exhibit C.

Client M-C-J (541)

18. M-C-J- (541) I am also immigration counsel for M-C-J- (541) ("Mr. M."), a class member in this litigation. Mr. M was born in Greece and has never been to Iraq. He has lived in the United States since 1982, and his family members are U.S. citizens or lawful permanent residents. He has two U.S. citizen daughters.

19. Pursuant to this Court's order, Mr. M. had a bond hearing on January 30, 2018. By that time, Mr. M., who was arrested by ICE on May 24, 2017, had been in detention for over eight months.

20. The immigration court considered documentary submissions and the arguments of both parties before rendering a decision. After considering all of the evidence and argument, including my client's criminal history, Immigration Judge David Paruch granted Mr. M. release on a bond of $30,000, finding that he was not a danger to the community and that the bond amount would mitigate any flight risk.

21. Judge Paruch's written decision was issued March 15, 2018. That decision, attached hereto as Exhibit D, sets out in detail the judge's reasons for granting bond. Judge Paruch concluded that Mr. M. was not a current danger

because his admittedly "troubling criminal history" showed no "significant criminal event" after 2013. With respect to flight risk, Judge Paruch found that the high bond he set—$30,000—would mitigate that risk.

22. On January 31, 2018, the day after the bond hearing and before Judge Paruch issued a written decision, DHS filed an E-43, which triggers an automatic stay of release. On February 5, 2018, DHS withdrew the E-43, which allowed for Mr. M.'s release.

23. On February 6, 2018, Mr. M. bonded out and was reunited with his family.

24. On February 14, 2018, I received a call from an ICE/ERO officer informing me that the BIA had issued a stay of the bond order and that Mr. M.C.J. would be taken back into custody. This was the first time I heard that DHS had filed an appeal of the bond decision and a motion for an emergency discretionary stay—both filed on February 13—and that the BIA had issued the stay on that same day. I was not informed of any of these filings or the BIA's order granting the stay until the ICE/ERO officer called me to ask me to bring my client in to be rearrested.

25. When the BIA granted the stay, the only information it considered was DHS's motion. Judge Paruch's written decision was not issued until March 15, after the BIA had already granted the stay. I was unable to submit anything for Mr. M., as I did not receive notice of the stay motion before it was granted. DHS presented only its side of the argument, omitting important information relied on by Judge Paruch in deciding that release on bond was appropriate. For example, DHS's stay motion stated that Mr. M has warrants for child neglect. In fact, the evidence presented at the bond hearing established that these relate to back child support, that Mr. M was current in his child support payments until he was arrested by ICE, and that the only reason he is behind in his payments is because ICE has incarcerated him and made him unable to work.

26. The BIA's order granting the stay simply stated: "After reviewing all the information presented, the Board has considered the request and has concluded that the stay of the bond order will be granted." The BIA's Order did not evaluate, analyze or mention any specific facts from the case, let alone address whether clear and convincing evidence of flight risk and dangerousness exists so as to warrant the suspension of the Immigration Court's Bond Order. The BIA's Order also did

not indicate under what standard, if any, the stay had been granted. A copy of the BIA Order is attached as Exhibit E.

27. The ICE/ERO officer who called me to inform me of the stay also informed me that in the interest of order and transparency he would like me to accompany Mr. M. to an order of supervision appointment scheduled for two days later, on February 16, 2018. On that day, I accompanied my client when reported as directed so that he could be taken back into custody by ICE/ERO. He is currently detained at the St. Clair County Jail. As these facts show, DHS's argument that Mr. M. is a flight risk lacks merit.

28. On February 17, 2018, a day after my client was rearrested and four days after the BIA issued the stay, I received a copy of the order granting the stay by mail.

29. On February 27, 2018, I filed an Emergency Motion to Reconsider the Stay grant asking that the BIA issue a decision in short order on the stay issue as it had done on DHS's Emergency Motion for Discretionary Stay. Again, it was difficult to frame the motion appropriately, because motions to reconsider are required to point to particular errors in the BIA opinion for which reconsideration is sought—and there was no opinion.

30. On February 28, 2018, DHS filed an opposition to my Emergency Motion to Reconsider Stay.

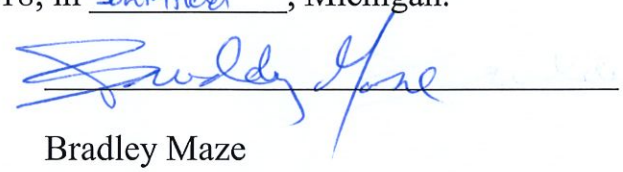
31. I called the BIA on March 6, 2018, and asked about the status of the stay for Mr. M. I was informed orally that the stay issue was no longer being considered by the Board, as the Board had already issued its decision on the stay, and that only the merits of the bond appeal itself would now be considered.

32. On March 13, 2018, the BIA denied Mr. M.'s motion to reconsider, using language identical to that in Mr. A.'s denial. The Board's decision denying the motion to reconsider did not contain any analysis. The Board did not articulate what standard it used in deciding either the motion to reconsider or the stay itself, nor did it indicate that the government would be likely to show clear and convincing evidence that Mr. M.C.J. presents a danger or flight risk that cannot be mitigated by bond. The Board's denial simply stated: "After consideration of all the information presented by both parties, we do not find an adequate basis to warrant reconsideration of the February 13, 2018, decision." A copy of the BIA order denying the motion to reconsider is attached as Exhibit F.

33. I still do not have a briefing schedule for Mr. M.'s underlying bond appeal. As discussed above, in my experience it can take up to four months after briefing is completed for the Board to decide a bond appeal. Accordingly, I expect that Mr. M. could be incarcerated for months, and potentially as long as half a year, based on the Board's standardless stay grant, even though he had no notice or opportunity to respond, and there has still been no finding that he poses a danger or flight risk.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on March 21, 2018, in Southfield, Michigan.



Bradley Maze

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

Palmer Rey, PLLC
Maze, Bradley
29566 Northwestern Hwy, Ste 200
Southfield, MI 48034

In the matter of
A [redacted], S [redacted]

File A [redacted]847 DATE: Feb 6, 2018

__ 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
5107 Leesburg Pike, Suite 2000
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. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:
IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

__ Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.

__ Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.

__X__ Other: BOND MEMO

COURT CLERK
IMMIGRATION COURT

FF

cc: DHS/ICE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No.: [redacted]847	)	FEBRUARY 6, 2018
	)	
In the Matter of:	)	
	)	
A[redacted], S[redacted]	)	**In Removal Proceedings**
Respondent	)	(Bond Redetermination)

Charges: Section 237(a)(2)(A)(i) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, you have been convicted of a crime involving moral turpitude committed within five years of admission for which a sentence of one year or longer may be imposed.

Section 237(a)(2)(A)(ii) of the Act, as amended, in that, at any time after admission, you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

Section 237(a)(2)(A)(iii) of the Act, as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act, a law relating to sexual abuse of a minor.

Section 237(a)(2)(A)(iii) of the Act, as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(H) of the Act, a law relating to an offense described in Title 18, United States Code, sections 875, 876, 877, or 1202 (relating to the demand for or receipt of ransom).

Application: Bond Pursuant to the January 2, 2018 Opinion and Order in *Hamama v. Adducci.*

ON BEHALF OF RESPONDENT
Bradley Maze, Esq.
Palmer Rey, PLLC
29566 Northwestern Hwy.
Suite 200
Southfield, Michigan 48034

ON BEHALF OF THE GOVERNMENT
Benjamin Dacin, Assistant Chief Counsel
Department of Homeland Security
Immigration and Customs Enforcement
333 Mt. Elliott, Second Floor
Detroit, Michigan 48207

BOND MEMORANDUM

I. PROCEDURAL HISTORY

The Court presumes the parties' familiarity with the procedural history in this case, and

will not reiterate it in full here. Most recently, the federal district court for the Eastern District of Michigan ("district court") ordered that certain Iraqi nationals be granted a bond hearing. *Hamama v. Adducci*, Case No. 17-cv-11910 (E.D. Mich, 2018). Respondent was deemed to be a member of that class, and the Court held a bond hearing on January 31, 2018, at which respondent was present and represented. At the hearing, both respondent and the Department of Homeland Security ("DHS" or "Government") agreed that respondent fell within the parameters of the district court's decision. No witness testimony was presented. Following arguments from both parties, the Court set a $20,000 bond and, should he post that bond, ordered respondent to comply with all terms of the order of supervision.

II. LEGAL STANDARD

The United States Supreme Court has long recognized the Attorney General's discretionary authority to detain removable aliens while seeking their removal from the United States. *See Carlson v. Landon*, 342 U.S. 524, 538 (1952). In addition, INA § 236(a) vests wide discretion in the Attorney General and his delegates to determine whether to detain or release an alien pending a final decision in removal proceedings, and on what terms an alien should be released. *See* INA § 236(a); *Reno v. Flores*, 507 U.S. 292 (1993). Typically, to obtain release, an alien has the burden of proving that his release ". . . would not pose a danger to property or persons, and that the alien is likely to appear for any future proceedings." *See* 8 C.F.R. § 236.1(c)(8); *Matter of Adeniji*, 22 I&N Dec. 1102, 1112 (BIA 1999). However, pursuant to the district court's opinion and order in *Hamama v. Adducci*, certain Iraqi nationals are entitled to a bond hearing while the district court's July 2017 order is operating to stay their removal. To be eligible for a *Hamama* bond hearing, a detainee must be an Iraqi national who had a final order of removal "at any point between March 1, 2017 and June 24, 2017" who has been or will be detained for removal by Immigration and

Customs Enforcement ("ICE"). *Hamama* at 43. Moreover, the detainee must have been detained for over 180 days (six months). This includes detainees whose motions to reopen have been granted and who are currently being detained pursuant to INA § 236(c). *Id.*

For purposes of the *Hamama* bond proceedings, the Department of Homeland Security ("DHS" or "Government") bears the burden to prove, by clear and convincing evidence, that the alien is either a danger to the community or a flight risk. *Id.* at 13 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013). If the alien is deemed to be a danger to the community, bond shall not be granted. *Matter of Siniauskas*, 27 I&N Dec. 207, 207-08 (BIA 2018) (citing *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009)). "The purpose behind detaining criminal aliens is to ensure their appearance at removal proceedings and to prevent them from engaging in further criminal activity." *Id.* at 208 (citing *Matter of Kotliar*, 24 I&N Dec. 124, 127 (BIA 2007)). "In bond proceedings, it is proper for the Immigration Judge to consider not only the nature of a criminal offense but also the specific circumstances surrounding the alien's conduct." *Id.* (citing *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006)).

If the alien is not a danger but is deemed to be a flight risk, the decision whether to detain an alien depends upon consideration of relevant factors, such as:

> (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.

Matter of Guerra, 24 I&N Dec. at 40; *see also Matter of Melo-Pena*, 21 I&N Dec. 883, 886 (BIA 1997). The Court can also consider the availability and likelihood of relief from removal, which

"may be an incentive or disincentive for [the alien] to appear." *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987) (a respondent who is likely to be granted relief has a greater motivation to appear for removal proceedings than one who has less potential to obtain relief). The potential difficulties that the Government may face in executing a final order of removal due to conditions existing in the country of removal are not a proper consideration for an immigration judge in redetermining an alien's custody status. *Matter of P-C-M-*, 20 I. & N. Dec. 432 (BIA 1991). The Board of Immigration Appeals has also held that evidence indicating dangerousness may include not only past criminal activity, but also potential future criminal conduct. *Matter of Drysdale*, 20 I&N Dec. 815, 817 (BIA 1994) (citing *United States v. Salerno*, 481 U.S. 739, 746-52 (1987)) (pretrial detention on the basis of future dangerousness is a permissible form of regulation under the Bail Reform Act of 1984).

III. FINDINGS AND ANALYSIS

The Court has determined that respondent is not a danger to the community but that he does constitute a flight risk. First, the Government argued that respondent is a clear, present, and serious danger to the community based on his 2010 convictions for extortion, and possession of child sexually abusive material, as well as his 2011 conviction for domestic violence. Exh. Bond-2, Tabs D-F. The Government emphasized that these convictions were based on his relationship with a minor child. The Government further emphasized that respondent forced his then-girlfriend to engage in sexual intercourse with him, threatened to show her family videos that he took of them engaging in such acts, physically abused his then-girlfriend for weeks, and forced her to have an abortion. *Id.* The Court agreed that the police reports related to respondent's convictions demonstrate egregious conduct. However, the Court noted that the only subsequent conduct that brought respondent into contact with the criminal justice system was a violation of his probation,

when respondent violated a no-contact order by calling and texting his ex-girlfriend. The Court therefore found that, on the record before it, the Government did not meet its burden to establish, by clear and convincing evidence, that respondent is today a danger to the community and should be denied bond.

Second, the Government argued that respondent presents a unique and heightened flight risk based on the fact that his merits hearing has already been conducted and that he is potentially eligible only for Deferral of Removal under the United Nations Convention Against Torture. The Court noted that respondent had previously been successfully reporting under his order of supervision. However, the Court found, given the limited nature of relief available to respondent and the consequences of a potential denial of that relief, that respondent constitutes a flight risk. The Court may therefore decide the amount of bond necessary to ensure respondent's presence at his removal proceedings. *Matter of Urena*, 25 I. & N. Dec. 140 (BIA 2009). The Court concluded that $20,000 was an appropriate amount to ensure that respondent appears for removal, if that ultimately becomes necessary. *Matter of Andrade*, 19 I&N Dec. at 490. The Court further required respondent, should he post bond, to fully comply with all terms set forth in his order of supervision.

IV. ORDER

IT IS HEREBY ORDERED that respondent's request for bond be **GRANTED**.

IT IS FURTHER ORDERED that respondent fully comply with any and all terms of his order of supervision.

Hon. David H. Paruch
U.S. Immigration Judge

2/6/2018
Date

EXHIBIT B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted]347 – Detroit, MI

Date: FEB 06 2018

In re: S[redacted] A[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Robert Melching
Assistant Chief Counsel

APPLICATION: Stay of Execution of the Bond Order

The Department of Homeland Security (DHS) has applied for an emergency stay of the decision of the Immigration Judge's bond order of January 31, 2018 ordering the respondent released from custody upon posting a bond of $20,000. After consideration of all information, the Board has considered the request and has concluded that the stay of the bond order will be granted.

ORDER: The request for stay of execution of the bond order is granted.

FOR THE BOARD

[1] The record reflects that a Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27) has not been submitted. Therefore, because there is no Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27), we consider the respondent pro se. However, the attorney who represented the respondent before the Immigration Court will be provided with a courtesy copy of this decision.

EXHIBIT C

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted]847 – Detroit, MI Date: MAR 12 2018

In re: S[redacted] A[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bradley Maze, Esquire

ON BEHALF OF DHS: Robert Melching
Assistant Chief Counsel

APPLICATION: Stay of Execution of the Bond Order

On February 6, 2018, the Board entered an order granting the Department of Homeland Security's request for an emergency discretionary stay of the Immigration Judge's January 31, 2018, bond order in this case. Counsel for the respondent has now filed a motion to reconsider the Board's February 6, 2018, decision. After consideration of all the information presented by both parties, we do not find an adequate basis to warrant reconsideration of the February 6, 2018, decision.

ORDER: The motion to reconsider the Board's February 6, 2018, decision is denied.

FOR THE BOARD

EXHIBIT D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No.: [redacted]-541	)	MARCH 15, 2018
	)	
In the Matter of:	)	
	)	
M[redacted], C[redacted] J[redacted]	)	**In Removal Proceedings**
Respondent	)	(Bond Determination)

Charges: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as describe in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code.

Section 237(a)(2)(B)(i) of the INA, as amended, in that, at any time after admission, you have been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC § 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

ON BEHALF OF RESPONDENT
Bradley Maze, Esq.
Palmer Rey, PLLC
19901 Dix Toledo Hwy
Brownstown Twp., Michigan 48183

ON BEHALF OF THE GOVERNMENT
Jonathan Goulding, Senior Attorney
Department of Homeland Security
Immigration and Customs Enforcement
333 Mount Elliott, Second Floor
Detroit, Michigan 48207

BOND MEMORANDUM

I. PROCEDURAL HISTORY

The Court presumes the parties' familiarity with the procedural history in this case, and will not reiterate it in full here. Most recently, the federal district court for the Eastern District of Michigan ("district court") ordered that certain Iraqi nationals be granted a bond hearing. *Hamama v. Adducci*, Case No. 17-cv-11910 (E.D. Mich, 2018). Respondent was deemed to be a member of that class, and the Court held a bond hearing on January 30, 2018, at which respondent was

present and represented. At the hearing, both respondent and the Department of Homeland Security ("DHS" or "Government") agreed that respondent fell within the parameters of the district court's decision. No witness testimony was presented. Following arguments from both parties, the Court set a $30,000 bond and, should he post that bond, ordered respondent to comply with all terms of the order of supervision.

II. LEGAL STANDARD

The United States Supreme Court has long recognized the Attorney General's discretionary authority to detain removable aliens while seeking their removal from the United States. *See Carlson v. Landon*, 342 U.S. 524, 538 (1952). In addition, INA § 236(a) vests wide discretion in the Attorney General and his delegates to determine whether to detain or release an alien pending a final decision in removal proceedings, and on what terms an alien should be released. *See* INA § 236(a); *Reno v. Flores*, 507 U.S. 292 (1993). Typically, to obtain release, an alien has the burden of proving that his release ". . . would not pose a danger to property or persons, and that the alien is likely to appear for any future proceedings." *See* 8 C.F.R. § 236.1(c)(8); *Matter of Adeniji*, 22 I&N Dec. 1102, 1112 (BIA 1999). However, pursuant to the district court's opinion and order in *Hamama v. Adducci*, certain Iraqi nationals are entitled to a bond hearing while the district court's July 2017 order is operative to stay their removal. To be eligible for a *Hamama* bond hearing, a detainee must be an Iraqi national who had a final order of removal "at any point between March 1, 2017 and June 24, 2017" who has been or will be detained for removal by Immigration and Customs Enforcement ("ICE"). *Hamama* at 43. Moreover, the detainee must have been detained for over 180 days (six months). This includes detainees whose motions to reopen have been granted and who are currently being detained pursuant to INA § 236(c). *Id.*

For purposes of the *Hamama* bond proceedings, the Department of Homeland Security

("DHS" or "Government") bears the burden to prove, by clear and convincing evidence, that the alien is either a danger to the community or a flight risk. *Id.* at 13 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013). If the alien is deemed to be a danger to the community, bond shall not be granted. *Matter of Siniauskas*, 27 I&N Dec. 207, 207-08 (BIA 2018) (citing *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009)). "The purpose behind detaining criminal aliens is to ensure their appearance at removal proceedings and to prevent them from engaging in further criminal activity." *Id.* at 208 (citing *Matter of Kotliar*, 24 I&N Dec. 124, 127 (BIA 2007)). "In bond proceedings, it is proper for the Immigration Judge to consider not only the nature of a criminal offense but also the specific circumstances surrounding the alien's conduct." *Id.* (citing *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006)).

If the alien is not a danger but is deemed to be a flight risk, the decision whether to detain an alien depends upon consideration of relevant factors, such as:

> (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.

Matter of Guerra, 24 I&N Dec. at 40; *see also Matter of Melo-Pena*, 21 I&N Dec. 883, 886 (BIA 1997). The Court can also consider the availability and likelihood of relief from removal, which "may be an incentive or disincentive for [the alien] to appear." *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987) (a respondent who is likely to be granted relief has a greater motivation to appear for removal proceedings than one who has less potential to obtain relief). The potential difficulties that the Government may face in executing a final order of removal due to conditions

existing in the country of removal are not a proper consideration for an immigration judge in redetermining an alien's custody status. *Matter of P-C-M-*, 20 I. & N. Dec. 432 (BIA 1991). The Board of Immigration Appeals has also held that evidence indicating dangerousness may include not only past criminal activity, but also potential future criminal conduct. *Matter of Drysdale*, 20 I&N Dec. 815, 817 (BIA 1994) (citing *United States v. Salerno*, 481 U.S. 739, 746-52 (1987)) (pretrial detention on the basis of future dangerousness is a permissible form of regulation under the Bail Reform Act of 1984).

III. FINDINGS AND ANALYSIS

The Court has determined that respondent is not a danger to the community but that he does constitute a flight risk. First, the Government argued that respondent is a clear, present, and serious danger to the community based on his extensive criminal history. Exh. 1. The Government noted that respondent had two recent outstanding warrants: one in August 2017 for failure to pay child support and the other in September 2017 for a moving traffic violation. Respondent argued that his failure to pay child support was a result of his detention and that his moving traffic violation did not constitute a danger to society. While the Court does not condone respondent's lengthy and troubling criminal history, it found that the Government's argument that respondent is a danger to society was substantially undercut given the last significant criminal event that occurred was in 2013. The Court therefore found that the Government, based on the record as it stands during the time of the hearing, did not meet its burden to establish, by clear and convincing evidence, that respondent is today a danger to the community and should be denied bond.

Second, the Government argued that respondent presents a unique and heightened flight risk based on the fact that he is potentially eligible only for Deferral of Removal under the United Nations Convention Against Torture ("Torture Convention") and has in the past violated his order

of supervision. The Court noted that the submitted copy of respondent's order for supervision demonstrates that he has consistently reported to ICE. The Court found that, given the limited nature of relief available to respondent, he is a flight risk. The Court may therefore decide the amount of bond necessary to ensure respondent's presence at his removal proceedings. *Matter of Urena*, 25 I. & N. Dec. 140 (BIA 2009). Given the limited nature of the only relief for which respondent is potentially eligible, the Court concluded that $30,000 was an appropriate amount to ensure that respondent appears at his removal proceedings. *Matter of Andrade*, 19 I&N Dec. at 490. The Court further required respondent, should he post bond, to comply with all terms set forth in his order of supervision.

IV. ORDER

IT IS HEREBY ORDERED that respondent's request for bond be **GRANTED**.

IT IS FURTHER ORDERED that respondent comply with any and all terms of his order of supervision.

Hon. David H. Paruch
U.S. Immigration Judge

3/15/18
Date

EXHIBIT E

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

Maze, Bradley
Palmer Rey, PLLC
29566 Northwestern Hwy, Ste 200
Southfield, MI 48034

DHS/ICE Office of Chief Counsel - DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: M[redacted], C[redacted] J[redacted] **A[redacted]541**

Date of this notice: 2/13/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

AbrahamW
Userteam: Paralegal

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] 541 – Detroit, MI Date: FEB 13 2018

In re: C[redacted] J[redacted] M[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bradley Maze, Esquire

ON BEHALF OF DHS: Jonathan Goulding
Senior Attorney

APPLICATION: Stay of Execution of the Bond Order

The Department of Homeland Security has applied for an emergency stay of the decision of the Immigration Judge's bond order on January 30, 2018. After reviewing all the information presented, the Board has considered the request and has concluded that the stay of the bond order will be granted. Either party wishing to file a motion to reconsider challenging the stay of execution of the bond order, must file the motion directly with the Board.

ORDER: The request for stay of execution of the bond order is granted.

FOR THE BOARD

EXHIBIT F

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] 541 – Detroit, MI Date: MAR 13 2018

In re: C[redacted] J[redacted] M[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bradley Maze, Esquire

ON BEHALF OF DHS: Jonathan Goulding
Senior Attorney

APPLICATION: Stay of Execution of the Bond Order

On February 13, 2018, the Board entered an order granting the Department of Homeland Security's request for an emergency discretionary stay of the Immigration Judge's January 30, 2018, bond order in this case. Counsel for the respondent has now filed a motion to reconsider the Board's February 13, 2018, decision. After consideration of all the information presented by both parties, we do not find an adequate basis to warrant reconsideration of the February 13, 2018, decision.

ORDER: The motion to reconsider the Board's February 13, 2018, decision is denied.

FOR THE BOARD

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al., Plaintiffs/Petitioners, v. **REBECCA ADDUCCI**, et al., Defendants/Respondents.	Case No. 2:17-cv-11910 Hon. Mark A. Goldsmith Mag. David R. Grand Class Action

DECLARATION OF EDWARD AMIR BAJOKA

I, Edward Amir Bajoka, make this statement under the penalties of perjury of the laws of the United States and if called to testify I could and would do so competently based upon my personal knowledge as follows:

1. I am an attorney in good standing licensed to practice in the State of Michigan. I have been practicing law for over ten years. My primary areas of practice are criminal defense and immigration, particularly removal defense. I would estimate that I have handled dozens of immigration bond hearings in my career to date.

2. I currently represent multiple individuals who are members of the *Hamama* class. Many of those individuals are currently in DHS custody. I have represented twelve of the *Hamama* class members at bond hearings that were conducted pursuant to this Court's Preliminary Injunction dated January 2, 2018.

3. One of the individuals whom I represented in bond proceedings is B-M- (710) ("Mr. B."), for whom I appeared at a January 29, 2018 *Hamama* bond hearing in the Detroit Immigration Court before Judge David Paruch. At the hearing, Judge Paruch was apprised of all of Mr. B's criminal convictions. He noted that Mr. B did not have any recent convictions. He considered the evidence submitted regarding family ties, community ties, and other equities, including letters of support from family and friends.

4. I regularly appear before Judge Paruch, and am familiar with how he handles bond cases. In my experience, Judge Paruch is a very thoughtful jurist who takes his time to weigh the equities in a case before making a bond decision. Judge Paruch denied bond to several other *Hamama* clients, one of whom I represent,

although in my professional opinion release in those cases was warranted as DHS failed to establish by clear and convincing evidence that my clients were a danger or flight risk.

5. In Mr. B.'s case, Judge Paruch weighed the evidence presented and concluded that DHS did not meet its burden to show by clear and convincing evidence that the respondent is a danger to the community or a flight risk that cannot be mitigated by bond.

6. In a bond memorandum, subsequently issued on February 8, 2018, Immigration Judge Paruch explained that, "[w]hile the Court does not condone respondent's lengthy and troubling criminal history, it found that the Government's argument that respondent is a danger to society was substantially undercut given the last significant criminal event that occurred was in 2011."

7. With respect to flight risk, Judge Paruch found that Mr. B. "has consistently reported to ICE without incident since 2011." The Court further found that any risk of flight posed by Mr. B. could be ameliorated by setting a bond in the amount of $20,000. A copy of the Bond Order is attached as Exhibit A.

8. My client waived appeal, and DHS reserved appeal. On January 30, 2018, the day after the bond hearing, the Government filed a Form EOIR-43 Notice of Intent to Appeal Custody Redetermination, automatically staying the Immigration Judge's custody decision. On February 2, 2018, the Department withdrew the Form EOIR-43, thus clearing the way for Mr. B. to post the bond.

9. On February 5, 2018, Mr. B.'s family, who had gone to great lengths to gather the significant bond amount ($20,000) needed to secure Mr. B.'s release, went to the Detroit ICE office and posted the bond. Mr. B. was released and reunited with his family.

10. Unbeknownst to Mr. B. or myself, on February 5, 2018, DHS filed an emergency motion for discretionary stay along with a Form EOIR-26 Notice of Appeal with the Board of Immigration Appeals. DHS failed to indicate in its pleadings to the BIA that Mr. B. had already posted bond and been released, and did not notify either Mr. B. or me, although it had contact information for us.

11. On February 6, 2018, the Board ordered a stay of the execution of the immigration judge's Bond Order. A copy of the BIA Order is attached as Exhibit B. The bond order however, had already been executed. I was given no notice of DHS's motion, or intent to seek the stay, and was never given a chance to respond.

12. I learned of all of this when I received a call from a clerk at the BIA requesting my fax number so that they could send me a copy of the stay that had been granted in Mr. B.'s case. I was of course caught unaware, as I had no idea that the government was even seeking a stay. Surprised, I indicated to the clerk that Mr. B. had already been released. She told me that I would have to wait and brief the issue before the BIA in the underlying bond appeal. The clerk did not suggest that there was anything else that could be done (nor did the BIA's decision itself suggest any options for reconsideration).

13. I called Mr. B. and informed him of the issuance of the stay. Mr. B. was of course disappointed. He had been detained for around eight months and his case had yet to arrive at a final hearing.

14. Mr. B. was required to report pursuant to his Bond Order to ICE on February 15, 2018, which was 9 days after the BIA stayed the order granting release. To my knowledge, ICE did not attempt to take Mr. B. into custody during that time. Rather, attorney Shahad Atiya, who works with my office regularly, accompanied Mr. B. when he reported for supervision on February 15. He was unfortunately detained, even though he had already posted his bond and was in compliance with the issued Bond Order.

15. It is unclear why the government would withdraw the EOIR-43 and then seek an emergency stay on an ex parte basis, rather than allowing the automatic stay to remain in place and provide time for Mr. B. to respond to the request for a discretionary stay. Instead, Mr. B. was given no opportunity to respond to the motion for a discretionary stay. I did not receive a copy of the government's motion until it came in the mail about a week after the stay was granted. His bond appeal is still pending with the Board of Immigration Appeals. The fact that he was released and then reported to ICE significantly weakens the government's position that he is a flight risk. He was released from custody, had the opportunity to flee, and still reported pursuant to his Bond Order, despite the certainty that he would be taken back into custody.

16. The BIA's Order did not evaluate, analyze or mention any specific facts from the case, let alone address whether there is clear and convincing evidence of danger or flight risk that exists to warrant staying the immigration court's Bond Order. The BIA's Order did not indicate under what standard, if any, the stay had been granted. It simply stated: "After consideration of all information, the Board has considered the request and has concluded that the stay of the bond order will be granted."

17. When the BIA denied the stay on February 6, not only did the BIA not have a response from me on behalf of Mr. B., but the BIA did not even have Judge Paruch's decision, which was not issued until February 8.

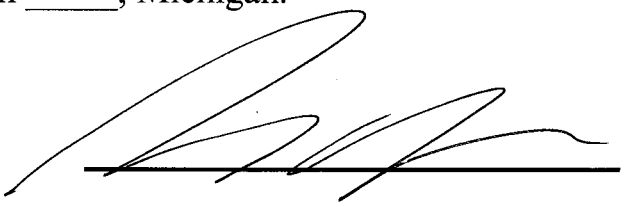
18. The only information the BIA had when it granted the stay was DHS's motion. That motion presented only DHS's view of the facts and law.

19. Under this Court's order a *Hamama* class member must be released unless there is clear and convincing evidence that he presents a danger or flight risk that cannot be mitigated by bond. Judge Paruch found that DHS had failed to meet its burden. In reviewing that decision, the BIA must defer to Judge Paruch's factual findings unless they are clearly erroneous. That could not have happened here since the BIA did not even have a copy of Judge Paruch's decision.

20. As a result of the standardless, ex parte stay, Mr. B. remains in prolonged detention for what is now ten months, even though an independent adjudicator has determined that he can safely be released on bond.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on March 22, 2018 in Warren, Michigan.



Edward Amir Bajoka

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

Bajoka Law Group PLLC
Bajoka, Edward A
8424 E 12 Mile Rd
Suite 200
Warren, MI 48093

In the matter of
B[redacted], M[redacted]

File A [redacted]710 DATE: Feb 8, 2018

__ 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
5107 Leesburg Pike, Suite 2000
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. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:

IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

__ Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.

__ Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.

X Other: Enclosed is a copy of the Bond Memo of the Immigration Judge.

COURT CLERK
IMMIGRATION COURT

FF

cc: HARRIS, TARA
333 MT. ELLIOTT
DETROIT, MI, 48207

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No.: [redacted]710	)	FEBRUARY 8, 2018
	)	
In the Matter of:	)	
	)	
B[redacted], M[redacted]	)	**In Removal Proceedings**
Respondent	)	(Bond Redetermination)

Charges: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(of the Act.

Section 237(a)(2)(B)(i) of the Act, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC § 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

ON BEHALF OF RESPONDENT
Edward A.Bajoka
Bajoka Law Group, PLLC
400 Monroe, Suite 280
Detroit, Michigan 48226

ON BEHALF OF THE GOVERNMENT
Robert Melching, Assistant Chief Counsel
Department of Homeland Security
Immigration and Customs Enforcement
333 Mount Elliott, Second Floor

BOND MEMORANDUM

I. PROCEDURAL HISTORY

The Court presumes the parties' familiarity with the procedural history in this case, and will not reiterate it in full here. Most recently, the federal district court for the Eastern District of Michigan ("district court") ordered that certain Iraqi nationals be granted a bond hearing. *Hamama v. Adducci*, Case No. 17-cv-11910 (E.D. Mich, 2018). Respondent was deemed to be a member of that class, and the Court held a bond hearing on January 29, 2018, at which respondent was present and represented. At the hearing, both respondent and the Department of Homeland

Security ("DHS" or "Government") agreed that respondent fell within the parameters of the district court's decision. No witness testimony was presented. Following arguments from both parties, the Court set a $20,000 bond and, should he post that bond, ordered respondent to comply with all terms of the order of supervision.

II. LEGAL STANDARD

The United States Supreme Court has long recognized the Attorney General's discretionary authority to detain removable aliens while seeking their removal from the United States. *See Carlson v. Landon*, 342 U.S. 524, 538 (1952). In addition, INA § 236(a) vests wide discretion in the Attorney General and his delegates to determine whether to detain or release an alien pending a final decision in removal proceedings, and on what terms an alien should be released. *See* INA § 236(a); *Reno v. Flores*, 507 U.S. 292 (1993). Typically, to obtain release, an alien has the burden of proving that his release ". . . would not pose a danger to property or persons, and that the alien is likely to appear for any future proceedings." *See* 8 C.F.R. § 236.1(c)(8); *Matter of Adeniji*, 22 I&N Dec. 1102, 1112 (BIA 1999). However, pursuant to the district court's opinion and order in *Hamama v. Adducci*, certain Iraqi nationals are entitled to a bond hearing while the district court's July 2017 order is operating to stay their removal. To be eligible for a *Hamama* bond hearing, a detainee must be an Iraqi national who had a final order of removal "at any point between March 1, 2017 and June 24, 2017" who has been or will be detained for removal by Immigration and Customs Enforcement ("ICE"). *Hamama* at 43. Moreover, the detainee must have been detained for over 180 days (six months). This includes detainees whose motions to reopen have been granted and who are currently being detained pursuant to INA § 236(c). *Id.*

For purposes of the *Hamama* bond proceedings, the Department of Homeland Security ("DHS" or "Government") bears the burden to prove, by clear and convincing evidence, that the

alien is either a danger to the community or a flight risk. *Id.* at 13 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013). If the alien is deemed to be a danger to the community, bond shall not be granted. *Matter of Siniauskas*, 27 I&N Dec. 207, 207-08 (BIA 2018) (citing *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009)). "The purpose behind detaining criminal aliens is to ensure their appearance at removal proceedings and to prevent them from engaging in further criminal activity." *Id.* at 208 (citing *Matter of Kotliar*, 24 I&N Dec. 124, 127 (BIA 2007)). "In bond proceedings, it is proper for the Immigration Judge to consider not only the nature of a criminal offense but also the specific circumstances surrounding the alien's conduct." *Id.* (citing *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006)).

If the alien is not a danger but is deemed to be a flight risk, the decision whether to detain an alien depends upon consideration of relevant factors, such as:

> (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.

Matter of Guerra, 24 I&N Dec. at 40; *see also Matter of Melo-Pena*, 21 I&N Dec. 883, 886 (BIA 1997). The Court can also consider the availability and likelihood of relief from removal, which "may be an incentive or disincentive for [the alien] to appear." *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987) (a respondent who is likely to be granted relief has a greater motivation to appear for removal proceedings than one who has less potential to obtain relief). The potential difficulties that the Government may face in executing a final order of removal due to conditions existing in the country of removal are not a proper consideration for an immigration judge in

redetermining an alien's custody status. *Matter of P-C-M-*, 20 I. & N. Dec. 432 (BIA 1991). The Board of Immigration Appeals has also held that evidence indicating dangerousness may include not only past criminal activity, but also potential future criminal conduct. *Matter of Drysdale*, 20 I&N Dec. 815, 817 (BIA 1994) (citing *United States v. Salerno*, 481 U.S. 739, 746-52 (1987)) (pretrial detention on the basis of future dangerousness is a permissible form of regulation under the Bail Reform Act of 1984).

III. FINDINGS AND ANALYSIS

The Court has determined that respondent is not a danger to the community but that he does constitute a flight risk. First, the Government argued that respondent is a clear, present, and serious danger to the community based on his extensive criminal history. Exh. 1. The Government emphasized that respondent was arrested as recently as 2016 for a drug related incident. While the Court does not condone respondent's lengthy and troubling criminal history, it found that the Government's argument that respondent is a danger to society was substantially undercut given the last significant criminal event that occurred was in 2011. The Court therefore found that the Government, based on the record as it stands during the time of the hearing, did not meet its burden to establish, by clear and convincing evidence, that respondent is today a danger to the community and should be denied bond.

Second, the Government argued that respondent presents a unique and heightened flight risk based on the fact that he is potentially eligible only for Deferral of Removal under the United Nations Convention Against Torture ("Torture Convention") and has in the past violated his order of supervision: in 2009 respondent absconded and 2010 failed to appear due to his incarceration. The Court noted that the submitted copy of respondent's order for supervision demonstrates that he has consistently reported to ICE without incident since 2011. The Court found that, given the

limited nature of relief available to respondent, he is a flight risk. The Court may therefore decide the amount of bond necessary to ensure respondent's presence at his removal proceedings. *Matter of Urena*, 25 I. & N. Dec. 140 (BIA 2009). Given the limited nature of the only relief for which respondent is potentially eligible, the Court concluded that $20,000 was an appropriate amount to ensure that respondent appears at his removal proceedings. *Matter of Andrade*, 19 I&N Dec. at 490. The Court further required respondent, should he post bond, to comply with all terms set forth in his order of supervision.

IV. ORDER

IT IS HEREBY ORDERED that respondent's request for bond be **GRANTED**.

IT IS FURTHER ORDERED that respondent comply with any and all terms of his order of supervision.

Hon. David H. Paruch
U.S. Immigration Judge

2/8/2018
Date

EXHIBIT B

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

Edward Bajoka, Esquire
8424 East 12 Mile Road
Warren, MI 48093

DHS/ICE Office of Chief Counsel - DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: B[redacted], M[redacted] **A[redacted]710**

Date of this notice: 2/6/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.

cc:

JordanJ
Userteam: Paralegal

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted]710 – Detroit, MI

Date: FEB 06 2018

In re: M[redacted] B[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Robert Melching
Assistant Chief Counsel

APPLICATION: Stay of Execution of the Bond Order

The Department of Homeland Security (DHS) has applied for an emergency stay of the decision of the Immigration Judge's bond order of January 29, 2018 ordering the respondent released from custody upon posting a bond of $20,000. After consideration of all information, the Board has considered the request and has concluded that the stay of the bond order will be granted.

ORDER: The request for stay of execution of the bond order is granted.

FOR THE BOARD

[1] The record reflects that a Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27) has not been submitted. Therefore, because there is no Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27), we consider the respondent pro se. However, the attorney who represented the respondent before the Immigration Court will be provided with a courtesy copy of this decision.

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,	Case No. 2:17-cv-11910
Plaintiffs/Petitioners,	Hon. Mark A. Goldsmith
	Mag. David R. Grand
v.	
REBECCA ADDUCCI, et al.,	
Defendants/Respondents.	Class Action

DECLARATION OF JACOB K. DANZIGER

I, Jacob K. Danziger, make this statement under the penalties of perjury of the laws of the United States and if called to testify I could and would do so competently based upon my personal knowledge as follows:

1. I am an attorney in good standing licensed in the State of Michigan since 2014. I am admitted to practice before this Court and am an associate at the law firm of Schiff Hardin, LLP.

2. I am *pro bono* counsel for Y-B- (-001) ("Mr. Y."), a *Hamama* class member who is currently detained in Calhoun County Correctional Center in Battle Creek, Michigan, for the purposes of his motion to reopen proceedings, bond proceedings, and related proceedings regarding his December 16, 2013 Order of Removal.

3. Mr. Y. has lived in the United States for over thirty-seven years, since he was a six-year-old child. He entered the United States on September 8, 1980 as a refugee with his parents and sister. His status was adjusted to that of lawful permanent resident on April 22, 1982. Mr. Y. is a Chaldean Catholic Christian. Mr. Y. enlisted in the U.S. Navy and served for approximately one year. Mr. Y speaks primarily English (as well as conversational Aramaic) but cannot read or write in Arabic or any dialects thereof. Mr. Y. has not visited or returned to Iraq

since his family first fled from the country, fearing persecution in the late 1970's, and Mr. Y. has no remaining immediate family or friends there.

4. On December 16, 2013, Mr. Y. was ordered removed to Iraq under 8 U.S.C. § 237(a)(2)(A)(ii), but travel documents to Iraq were never issued and Mr. Y. never departed from the United States. Mr. Y. was released under an order of supervision in March 2014. He fully complied with his order of supervision for over three years. He was detained again in June 2017, has remained in DHS's custody since then, and has been moved between four different ICE detention facilities over the course of the last nine months.

5. Pursuant to this Court's Order, Immigration Judge Alison M. Brown of the Cleveland Immigration Court held a bond hearing for Mr. Y. on January 31, 2018. The immigration court considered documentary submissions, the testimony of Mr. Y., and the arguments of both parties before rendering a decision. After considering all of the evidence and argument, including Mr. Y.'s criminal history prior to his previous release to an order of supervision in 2014, Mr. Y's compliance with his order of supervision from 2014-2017, and the absence of any criminal convictions after his release in 2014, the Court ordered Mr. Y. released subject to a monetary bond of $7,500.

6. Judge Brown issued a Bond Order on January 31, 2018, following the bond hearing, noting that both parties had reserved the right to appeal through March 2, 2018.

7. Judge Brown subsequently issued a written opinion, dated February 15, 2018, which is attached as Exhibit A, setting out the court's findings and analysis. The opinion stated:

- "[Mr. Y.] is not a danger to the community. . . [d]ue to how long ago the convictions that involved any type of violence were." The court noted that Mr. Y.'s conviction for assault dated back to 2006, and that, although he had had disciplinary issues while in custody, he had not been charged with any crimes.

- The court also rejected the government's argument that Mr. Y. presented a flight risk that could not be mitigated by bond, noting that he was planning to file a motion to reopen and that he "has many ties to the community…[and] would be motivated to pursue his case so as not to be deported to Iraq."

- The court concluded that "$7,500 [is] an appropriate amount to ensure that [Mr. Y.] appears at his removal proceedings."

8. On February 1, 2018, DHS filed an automatic stay (Form EOIR-43) with the immigration court, putting in place an automatic stay of the bond order pending DHS's decision to appeal. Then, later that same day, on February 1, 2018, DHS filed a withdrawal of the stay with the Immigration Court, requesting that the automatic stay be withdrawn.

9. DHS did not immediately appeal the bond decision.

10. From February 1, 2018 through February 12, 2018, Mr. Y. endeavored to secure the financial resources from his family necessary to post bond in the amount of $7,500, but was unable to do so, due to financial hardship.

11. On February 12, 2018, almost two weeks after the bond order issued, DHS filed Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge, and on the same day, filed an Emergency Motion for a Discretionary Stay of a Custody Decision Pending Appeal by the Department.

12. DHS's counsel was aware that I represent Mr. Y; I had appeared in his bond hearing pursuant to a duly filed immigration court appearance form. DHS as a result had my full contact information. But nobody informed me in any way—formally or informally—that the appeal and stay motion had been filed. I had not formally appeared in the Board of Immigration Appeals (BIA) because there was no case there involving Mr. Y. in which I could appear until DHS filed its appeal.

13. Neither I nor my client received notice of the DHS appeal or stay motion. In addition, Judge Brown had not yet issued the opinion in this matter; it issued a few days later, on February 15. Thus, the only version of the facts and law before the BIA was DHS's version, which Mr. Y. obviously opposed and which Judge Brown had rejected.

14. On February 13, 2018, the BIA granted DHS's Emergency Motion for a Discretionary Stay, issuing a one paragraph decision ordering a Stay of Execution of the Immigration Court's January 31, 2018 Bond Order.

15. The BIA's Order did not evaluate, analyze or mention any specific facts from the case, let alone address whether clear and convincing evidence exists to warrant a stay of the immigration court's January 31, 2018 Bond Order and continue Mr. Y.'s prolonged detention. The Order did not indicate under what

standard, if any, the stay had been granted. It simply stated: "After reviewing all the information presented, the Board has considered the request and has concluded that the stay of the bond order will be granted." A copy of the BIA Order is attached as Exhibit B.

16. I finally learned that the Emergency Motion for a Discretionary Stay had been filed when the BIA faxed me a copy of the BIA's Order granting the Discretionary Stay, after it was issued.

17. DHS's Notice of Appeal and Emergency Motion for a Discretionary Stay were served to my office by mail on February 12, 2018, and I did not receive them until later that week. I did not receive any notice of DHS's appeal or emergency stay motion until after the BIA had already granted the stay.

18. DHS's motion, the only information before the BIA when it decided to stay Mr. Y's release, presented a very one-sided picture of my client's situation, for example:

- DHS argued that Mr. Y's 2016 arrest for an alleged domestic violence offense should be considered, while failing to mention that ***all charges*** associated with this 2016 arrest ***were dismissed***, despite evidence of such dismissal being presented to the Immigration Court during the bond hearing. In fact, Judge Brown noted that "[Mr. Y.] was arrested for domestic violence in 2016…however, those charges were dismissed." Exhibit A at 4.

- DHS argued that Mr. Y's December 16, 2013 Order of Removal is final, and that Mr. Y has no viable relief from removal, despite evidence being presented to the Immigration Court during the bond hearing that Mr. Y's time to file a motion to reopen consistent with the *Hamama* deadlines established by this Court had not yet passed. In fact, Judge Brown noted that "[Mr. Y's attorney] argued a motion to reopen is about to be filed." *Id.*

19. I have not filed a motion to reconsider for Mr. Y., because a motion to reconsider must "state with particularity the errors of fact or law in the prior Board decision." BIA Practice Manual 5.7(e), https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf. Because the BIA order in this matter is simply a conclusion, I cannot comply with this requirement. Thus a motion to reconsider—which seeks a discretionary remedy in any event (*see* 8 C.F.R. § 1003.2(a))—seemed futile.

20. The BIA issued a briefing schedule for the merits of DHS's appeal of the Immigration Court's Bond Order. Briefing is due April 6, 2018. Mr. Y. has been detained for over one month since the Immigration Court's Bond Order was stayed, before receiving any notice regarding when the BIA will consider the fully briefed positions of each party regarding DHS's appeal, or when the BIA will ultimately render a decision regarding DHS's February 12, 2018 appeal.

21. Additionally, when Judge Brown held the bond hearing on January 31, 2018, Mr. Y.'s Motion to Reopen the Proceedings had not yet been filed. Consistent with the *Hamama* deadlines established by this Court, on February 26, 2018, Mr. Y. filed a Motion to Reopen, or in the alternative, Request for Sua Sponte Reopening, with the Detroit Immigration Court (Judge David H. Paruch). On March 20, 2018, Mr. Y.'s Motion to Reopen was granted by the Detroit Immigration Court (Judge David H. Paruch), and is scheduled for a hearing on April 12, 2018.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on March 22, 2018 in Ann Arbor, Michigan.

Jacob K. Danziger
Michigan Bar No. P78634
Schiff Hardin LLP
350 S. Main Street, Ste. 210
Ann Arbor, MI 48104
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(734) 222-1500

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CLEVELAND, OHIO

File No.: [redacted]-001	)	FEBRUARY 15, 2018
In the Matter of:	)	
Y[redacted], B[redacted]	)	**In Removal Proceedings**
Respondent	)	(Bond Redetermination)

Application: Bond Pursuant to the January 2, 2018 Opinion and Order in *Hamama v. Adducci*.

ON BEHALF OF RESPONDENT
Jacob Danziger, Attorney at Law
Schiff Hardin LLP
350 S. Main Street, Suite 210
Ann Arbor, MI 48104

ON BEHALF OF THE GOVERNMENT
Kris Stoker, Assistant Chief Counsel
Office of Chief Counsel / ICE
925 Keynote Circle, Room 201
Brooklyn Heights, OH 44131

BOND MEMORANDUM

I. PROCEDURAL HISTORY

The Court presumes the parties' familiarity with the procedural history in this case, and will not reiterate it in full here. Most recently, the federal district court for the Eastern District of Michigan ("district court") ordered that certain Iraqi nationals be granted a bond hearing. *Hamama v. Adducci*, Case No. 17-cv-11910 (E.D. Mich, 2018). Respondent was deemed to be a member of that class, and the Court held a bond hearing on January 31, 2018, at which Respondent was present and represented. Following evidence and arguments from both parties, the Court set a $7,500 bond.

II. LEGAL STANDARD

The United States Supreme Court has long recognized the Attorney General's discretionary authority to detain removable aliens while seeking their removal from the United States. *See Carlson v. Landon*, 342 U.S. 524, 538 (1952). In addition, INA § 236(a) vests wide discretion in the Attorney General and his delegates to determine whether to detain or release an alien pending

a final decision in removal proceedings, and on what terms an alien should be released. *See* INA § 236(a); *Reno v. Flores*, 507 U.S. 292 (1993). Typically, to obtain release, an alien has the burden of proving that his release ". . . would not pose a danger to property or persons, and that the alien is likely to appear for any future proceedings." *See* 8 C.F.R. § 236.1(c)(8); *Matter of Adeniji*, 22 I&N Dec. 1102, 1112 (BIA 1999). However, pursuant to the district court's opinion and order in *Hamama v. Adducci*, certain Iraqi nationals are entitled to a bond hearing while the district court's July 2017 order is operating to stay their removal. To be eligible for a *Hamama* bond hearing, a detainee must be an Iraqi national who had a final order of removal "at any point between March 1, 2017 and June 24, 2017" who has been or will be detained for removal by Immigration and Customs Enforcement ("ICE"). *Hamama* at 43. Moreover, the detainee must have been detained for over 180 days (six months). This includes detainees whose motions to reopen have been granted and who are currently being detained pursuant to INA § 236(c). *Id.*

For purposes of the *Hamama* bond proceedings, the Department of Homeland Security ("DHS" or "Government") bears the burden to prove, by clear and convincing evidence, that the alien is either a danger to the community or a flight risk. *Id.* at 13 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013). If the alien is deemed to be a danger to the community, bond shall not be granted. *Matter of Siniauskas*, 27 I&N Dec. 207, 207-08 (BIA 2018) (citing *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009)). "The purpose behind detaining criminal aliens is to ensure their appearance at removal proceedings and to prevent them from engaging in further criminal activity." *Id.* at 208 (citing *Matter of Kotliar*, 24 I&N Dec. 124, 127 (BIA 2007)). "In bond proceedings, it is proper for the Immigration Judge to consider not only the nature of a criminal offense but also the specific circumstances surrounding the alien's conduct." *Id.* (citing *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006)).

If the alien is not a danger but is deemed to be a flight risk, the decision whether to detain an alien depends upon consideration of relevant factors, such as:

> (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.

Matter of Guerra, 24 I&N Dec. at 40; *see also Matter of Melo-Pena*, 21 I&N Dec. 883, 886 (BIA 1997). The Court can also consider the availability and likelihood of relief from removal, which "may be an incentive or disincentive for [the alien] to appear." *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987) (a respondent who is likely to be granted relief has a greater motivation to appear for removal proceedings than one who has less potential to obtain relief). The potential difficulties that the Government may face in executing a final order of removal due to conditions existing in the country of removal are not a proper consideration for an immigration judge in re-determining an alien's custody status. *Matter of P-C-M-*, 20 I. & N. Dec. 432 (BIA 1991). The Board of Immigration Appeals has also held that evidence indicating dangerousness may include not only past criminal activity, but also potential future criminal conduct. *Matter of Drysdale*, 20 I&N Dec. 815, 817 (BIA 1994) (citing *United States v. Salerno*, 481 U.S. 739, 746-52 (1987)) (pretrial detention on the basis of future dangerousness is a permissible form of regulation under the Bail Reform Act of 1984).

III. FINDINGS AND ANALYSIS

The Court has determined that respondent is not a danger to the community. The Court has reviewed the DHS submission at Bond Exhibit 1 which includes his criminal record. The

Respondent was convicted of assault in 2006 but has no other convictions that would be deemed dangerous based on the record before the Court. The Court acknowledges that the Respondent was arrested for domestic violence in 2016 and has reviewed those records however, those charges were dismissed. The Respondent also failed to report one time in 2017.

Since being detained, the Respondent has had disciplinary issues at the detention facilities as outlined on his I-213 but has not been accused of any crimes. Exh. 1.

First, the Government argued that Respondent is a clear, present, and serious danger to the community based on his convictions for assault and his disciplinary problems in custody. Exh. 1.

Second, the Government argued that Respondent presents a unique and heightened flight risk based on the fact that his merits hearing has already been conducted. However his attorney argued a motion to reopen is about be filed in Respondent's case.

Due to how long ago the convictions that involved any type of violence were, the Court finds DHS did not meet its burden of proof that the Respondent is currently a danger to the community. The Court may therefore decide the amount of bond necessary to ensure Respondent's presence at his removal proceedings. *Matter of Urena*, 25 I. & N. Dec. 140 (BIA 2009).

While potential relief is unclear as the motion to reopen has not yet been filed or adjudicated, the Respondent has lived in the United States since he was six years old and has many ties to the community. The Court believes he would be motivated to pursue his case so as not to be deported to Iraq. Thus the Court concluded that $7,500 was an appropriate amount to ensure that respondent appears at his removal proceedings. *Matter of Andrade*, 19 I&N Dec. at 490.

Date FEB 15 2018

Alison M. Brown
Immigration Judge

RE: Y[redacted], B[redacted]

File: [redacted]-001

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [P] DHS

DATE: 2/15/18 BY: COURT STAFF

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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C1

EXHIBIT B

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

Y[redacted], B[redacted]
[redacted]-001
2240 HUBBARD ROAD
YOUNGSTOWN, OH 44505

DHS/ICE Office of Chief Counsel - CLE
925 Keynote Circle, Room 201
Brooklyn Heights, OH 44131

Name: Y[redacted], B[redacted]

A[redacted]-001

Date of this notice: 2/13/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

Userteam:

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted]001 – Cleveland, OH

Date: FEB 13 2018

In re: B[redacted] Y[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Thorin Freeman
Assistant Chief Counsel

APPLICATION: Stay of Execution of the Bond Order

The Department of Homeland Security has applied for an emergency stay of the decision of the Immigration Judge's bond order on January 31, 2018. After reviewing all the information presented, the Board has considered the request and has concluded that the stay of the bond order will be granted. Either party wishing to file a motion to reconsider challenging the stay of execution of the bond order, must file the motion directly with the Board.

ORDER: The request for stay of execution of the bond order is granted.

FOR THE BOARD

[1] The record reflects that a Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27) has not been submitted. Therefore, because there is no Form EOIR-27, we consider the respondent pro se. However, the attorney who represented the respondent before the Immigration Court will be provided with a courtesy copy of this decision.

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.	)	Case No. 2:17-cv-11910
	)	
Petitioners and Plaintiffs	)	Hon. Mark A Goldsmith
	)	
v.	)	
	)	
REBECCA ADDUCCI, et al.	)	
	)	
Respondents and Defendants.	)	
_____	)	

DECLARATION OF RICHARD H. FRANKEL

I, Richard H. Frankel, make this statement under the penalties of perjury of the laws of the United States and if called to testify I could and would do so competently based upon my personal knowledge as follows:

1. I am an attorney in good standing licensed to practice law since 2003. I am currently licensed to practice law and a member in good standing in the State of Pennsylvania, and I have been since 2011.

2. I am an Associate Professor of Law and the Director of the Federal Litigation Appeals Clinic at the Drexel University Thomas R. Kline School of Law. The Clinic is a law school program in which law students provide direct representation to needy individuals. Our clinic represents a number of individuals in deportation and removal proceedings, including detained individuals.

3. The Clinic represents a *Hamama* class member, A-A-H (919) ("Mr. A-H."). He was born in a refugee camp in Saudi Arabia to Iraqi parents, and has lived in the United States since he was two years old. He lives here with both his parents, who are lawful permanent residents, and with his four U.S. citizen siblings. He has never set foot in Iraq.

4. Mr. A-H. currently is detained at York County Prison. He has been detained there for more than eight months, since June 30, 2017. His total time in

post-removal-order immigration detention now exceeds one year, with two periods of immigration detention separated only by a period of federal criminal custody.

5. Pursuant to this Court's Order, Immigration Judge Kuyomars Golparvar of the York Immigration Court held a bond hearing for Mr. A-H. on Friday, February 2, 2018. The immigration court considered documentary submissions, the testimony of our client, and the arguments of both parties before rendering a decision. After considering all of the evidence and argument, including our client's criminal history, Judge Golparvar ordered our client released subject to (a) a monetary bond of $15,000, and (b) any conditions of supervision, including electronic monitoring that the Department of Homeland Security (DHS) "deems appropriate." A copy of the Bond Order is attached as Exhibit A.

6. At the conclusion of the hearing, DHS filed an automatic stay (Form EOIR-43) with the Immigration Court. That filing put in place an automatic stay for ten business days pending DHS's decision to appeal. If DHS appeals, the automatic stay remains in effect until the Board decides the appeal, or 90 days from the filing of the appeal, whichever occurs first. BIA Practice Manual Rule 7.3(a)(iv), https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf.

7. On the next business day, February 5, 2018, DHS filed with the Board of Immigration Appeals, a notice of appeal and a Motion for an Emergency Stay of the Immigration Court's bond order.

8. One day later, on February 6, 2018, the Board, in a one-paragraph order, granted DHS's motion for a stay and ordered that the bond order be stayed. The Board's order did not evaluate, analyze or mention any specific facts from the case. The Order did not cite any standard for staying the immigration judge's decision, let alone address whether clear and convincing evidence exists to keep our client detained. The Order simply stated that "[a]fter consideration of all information, the Board has considered the request and has concluded that the stay of the bond order will be granted." A copy of the BIA Order is attached as Exhibit B.

9. The Clinic did not receive notice of DHS's motion or have an opportunity to respond before the Board issued its stay order. Although my phone number and email address were available to DHS, because it is part of the appearance form in immigration court, DHS did not attempt to reach me by phone or by email. While DHS did serve us with a copy of the notice of appeal and

motion for a stay, it did so by first-class mail. I did not receive DHS's filing until several days after the Board issued its stay order.

10. Judge Golparvar's written decision was issued February 14, 2018, about a week after the Board issued the stay. That decision, attached hereto as Exhibit A, sets out in detail the judge's reasons for granting bond. The judge described our client's criminal record as "concerning," but then properly proceeded to consider it as part of the totality of the circumstances. Judge Golparvar found that our client's two convictions arose out of a single incident, that the conduct giving rise to the convictions was more than seven years old, that Mr. A-H.'s conduct was non-violent, and that his role was "comparatively minimal." In addition, the immigration judge found that Mr. A-H. testified "truthfully and credibly," that he has taken full responsibility for his actions, that he has taken steps toward rehabilitation, including participation in rehabilitation courses, that he has complied with the government since his arrest and throughout his detention, and that he was granted early release from his prison sentence.

11. With respect to flight risk, Judge Golparvar took into account that Mr. A-H. has been in this country since he was two, that his family resides here, that he has a claim for relief for removal, and was intending to file a motion to reopen based on changed country conditions. (Mr. A-H. filed his motion to reopen on February 26, 2018). The Court also noted that during Mr. A-H.'s lengthy detention, DHS has "had sufficient time to procure travel documents" but had been unable to do so, even when there was no impediment to his removal for more than three years, from the date of his removal order on March 28, 2014, until this Court issued a stay of removal. *See* Ex. A at 5. The Judge also allowed DHS to impose any supervision conditions it deemed appropriate, including electronic monitoring.

12. The automatic stay which was invoked on February 2, immediately following the bond hearing, was still in effect when DHS filed for an emergency discretionary stay and our client remained in detention. DHS ultimately withdrew the automatic stay on February 6, 2018 after the Board granted its request for a discretionary stay pending disposition of the appeal. Because the automatic stay was still in effect, there was no emergency that justified an ex parte decision. There would have been sufficient time for the Board to await a written decision from the immigration judge and a submission from us. However, the Board issued the stay without seeing or considering Judge Golparvar's careful analysis, and without any submission from Mr. A-H.

13. The only information considered by the Board was DHS's motion for a stay. Such submissions are, by their nature, one-sided, presenting only DHS's view of the evidence and omitting relevant evidence that weighs against the government's desired outcome. For example, the DHS stay motion argues that Mr. A-H. is a flight risk because he has no application for immigration relief pending, thereby ignoring the immigration judge's finding that Mr. A-H. has a claim for relief and was intending to file a motion to reopen (which he has since done). The DHS stay motion also focuses on allegations in criminal indictments, such as weapons possession, that were not part of his judgment of conviction, but conveniently fails to mention that the Immigration Judge expressly found, based on oral testimony and review of the entire record, that "DHS has not proven by clear and convincing evidence that Respondent was involved with weapons or other criminal activity beyond what his convictions set forth in the record." Ex. A, at 4.

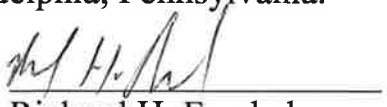
14. Under the ordinary rules of civil procedure, if there is a need for a decision to be made *ex parte*, such a decision lasts only until there is an opportunity for both sides to be heard, and there is a process to ensure that this opportunity promptly occurs. Here, the BIA's decision has no time limit, and will last until DHS's appeal of the bond decision is heard, which I understand could be many months away. The BIA's decision also did not indicate any process or procedure through which the Board would hear from both sides.

15. When we learned that the BIA had stayed the immigration judge's bond order, we considered moving for reconsideration, since the Board's decision was issued *ex parte*. However, it was not clear how we could file such a motion to reconsider which, by statute and regulation, must "specify the errors of law or fact in the previous order." 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. § 1003.2(b); *accord* BIA Practice Manual Rule 5.7(g), https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf (same). *See also Matter of O-S-G*, 24 I&N Dec. 56, 57 (BIA 2006) ("[A] motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior Board decision."). There was no reasoning or analysis in the stay decision which simply said that "[a]fter consideration of all the information, the Board has considered the request and has concluded that the stay of the bond order will be granted." There was nothing upon which one could hinge an argument for reconsideration. We also searched Westlaw and Lexis and could not find a single decision from the Board—precedential or non-precedential—addressing (much less granting) a request to lift a discretionary stay. Therefore, we focused instead on the merits of the bond appeal.

16. Although Judge Golparvar concluded on February 2, 2018 that our client is not a danger and that any flight risk can be mitigated by bond and supervision conditions, Mr. A-H. remains incarcerated based on an *ex parte*, standardless decision by the Board of Immigration Appeals.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on March 22, 2018 in Philadelphia, Pennsylvania.



Richard H. Frankel

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

Thomas R. Kline School of Law
Frankel, Richard
Drexel University
3320 Market Street
Philadelphia, PA 19104

In the matter of File A [redacted]919 DATE: Feb 14, 2018
A[redacted] H[redacted], A[redacted]

__ 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
5107 Leesburg Pike, Suite 2000
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. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:
IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

__ Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.

__ Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.

X Other: Please see attached Bond Memorandum.

HW
COURT CLERK
IMMIGRATION COURT FF

cc: DISTRICT COUNSEL, C/O YORK PRISON
3400 CONCORD ROAD
YORK, PA, 174020000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

IN THE MATTER OF	**IN BOND PROCEEDINGS**
A A H	**A -919**
Respondent	

ON BEHALF OF THE RESPONDENT
Richard Frankel, Esq.[1]
3320 Market Street
Philadelphia, PA 19104

ON BEHALF OF DHS
Jeffrey Boyles, Esq.
Office of Chief Counsel
Immigration and Customs Enforcement
3400 Concord Rd.
York, PA 17402

BOND MEMORANDUM DECISION OF THE IMMIGRATION COURT

I. FACTS AND PROCEDURAL HISTORY

Respondent is a native and citizen of Iraq who was admitted to United States as a refugee in 1994. Bond Ex. 3, tab A.

Respondent has a criminal history. As a juvenile, Respondent had arrests for Aggravated Felonious Assault-Non-family- Other Weapon (Possession of a BB gun) and possession of marijuana.[2] *Id.* at tab E. On July 22, 2013, Respondent was convicted of Possession with Intent to Deliver Marijuana under MICH. COMP. LAWS § 333.7401(D)(3). *Id.* at tab F. On June 5, 2015, Respondent was convicted of Conspiracy to Distribute Controlled Substance in violation of 21 U.S.C. §§ 841(a)(1); 841(b)(1)(B)(vii), for which he received a sentence of forty-six months. *Id.* at tab C.[3] The criminal conduct that led to these two convictions arose from a single scheme.

[1] Mr. Brian Han and Mr. Christopher Tappan, two student attorneys, accompanied Mr. Frankel and argued the case under his supervision pursuant to 8 C.F.R. § 1292.1(a)(2).

[2] At Respondent's bond hearing, government counsel was uncertain whether these arrests resulted in juvenile adjudications. When questioned, however, Respondent testified that he pleaded and was adjudicated delinquent. He was not charged or convicted as an adult. In regards to Respondent's aggravated assault charge, the arrest report provides that Respondent possessed a BB gun and shot several pellets at the victim's vehicle.

[3] It appears from the record of proceedings that Respondent's federal and state drug trafficking offenses evolved from the same criminal scheme and were not two separate and distinct offenses. The I-213 lists a third drug offense and

On February 24, 2014, an Immigration Judge found Respondent subject to removal. All relief and protection from removal was denied. Respondent was subsequently ordered removed to Iraq on March 28, 2014.[4] *See* Bond Ex. 3, tab B. However, Respondent failed to file an appeal and the decision became administratively final on April 28, 2014.

Following Respondent's release from his federal prison sentence, Respondent came into ICE custody pursuant to INA § 241. The Department of Homeland Security (DHS) attempted to effectuate Respondent's removal but has been unable to obtain the necessary travel documents.[5] According to DHS, Respondent came into DHS custody on or about June 30, 2017 and the DHS was unable to remove him before the nationwide stay went into effect. Bond Ex. 3, tab A. Thus, at the time of Respondent's bond hearing before this Court, he had been in ICE custody for seven months.

On July 24, 2017, a U.S. District Court Order for the Eastern District of Michigan entered a nationwide preliminary injunction that stayed the removal of all Iraqi nationals in the United States who had final orders of removal and who have been, or will be detained by Immigration and Customs Enforcement for removal. *Hamama v. Adducci*, 261 F. Supp. 3d 820 (E.D. Mich. July 24, 2017). On January 2, 2018, the district court granted a second preliminary injunction requiring the government to provide bond hearings to certain class members covered under the July 24, 2017 order while their stays of removal are in force. *Hamama v. Adducci*, No. 17-CV-11910, 2018 WL 263037 (E.D. Mich. Jan. 2, 2018) (hereinafter "Order").

Pursuant to the January 2, 2018 Order, this Court held a hearing on Respondent's continued detention on February 2, 2018. At Respondent's custody/bond hearing, the DHS conceded that Respondent is covered under this class action, that this Court has jurisdiction to re-determine his custody conditions, and that the only issues the Court can consider are danger and flight risk. Further, pursuant to the District Court Order, the DHS bears the burden of establishing that the Respondent is a danger and a significant flight risk. The Court's findings are based on Bond Exhibits 1-4 as well as the testimony provided at that hearing. At Respondent's bond hearing, the DHS argued that Respondent was both a danger and a flight risk. The Court found, however, that the DHS did not meet its burden in proving Respondent to be a danger. While the Court found the Respondent to be a flight risk, this Court deemed that a $15,000 bond would be appropriate to ensure Respondent's appearance for removal when or if the DHS can effectuate such removal. Additionally, the Court finds that this amount will ensure his appearance at future removal hearings if he is successful on getting his motion to reopen granted. Both Respondent and the DHS reserved

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indicates that Respondent was arrested on January 25, 2011 and convicted on July 22, 2013. While the conviction record provides an Information evidencing Respondent's 2011 arrest, the record does not provide that this particular arrest resulted in a conviction. DHS did not argue that a third conviction exists, as listed on the I-213, and since they bear the burden to establish that the Respondent is a danger and a significant flight risk by clear and convincing evidence, the Court does not afford any weight to that portion of the Form I-213.

[4] Respondent's removal order lists Saudi Arabia as alternative country of removal as Respondent's counsel informed the Court that Respondent was born in a refugee camp there. However, based on Saudi Arabian law, Respondent is not a citizen despite his birth there, and therefore Saudi Arabia would not accept him following his order of removal. DHS also does not contend that they can remove him to Saudi Arabia. *See* Bond Ex. 4, tab G.

[5] Oral testimony provided that there had been no stays or appeals of Respondent's case that would otherwise impede the DHS from removing Respondent for at least 6 months prior to the most recent District Court Class Action that stayed this Respondent's removal.

the right to appeal, and the DHS also filed a Form EOIR-43 (automatic stay) Notice of Intent to Appeal Custody Redetermination. On February 6, 2018, the DHS withdrew the Form EOIR-43 to stay the immigration judge's custody redetermination, but did not withdraw its reservation of appeal.

II. Legal Analysis

Jurisdiction

The January 2, 2018 Order provides that in order to be eligible for a bond hearing, the detainee must be a member of the putative class which is limited to "Iraqi nationals in the U.S. who had final orders of removal at any point between March 1, 2017 and June 24, 2017 and who have been or will be detained for removal by ICE." Order at 42-43¶ 1a-c.[6] Additionally, the class members must fall under one of two detention subclasses—the final order subclass or the mandatory subclass. The final order subclass consists of all members of the putative class with final orders of removal who have been detained for six months or longer. *Id.* at 43¶ 1b. The mandatory detention subclass consists of all members of the putative class whose motions to reopen have been granted and are now being detained under INA § 236(c), 8 U.S.C. § 1226(c). *Id.* at 43¶ 1c.

Respondent's March 28, 2014 order of removal became final on April 28, 2014 and Respondent came into DHS custody on June 30, 2017. Bond Ex. 3, tab A. As Respondent's removal order was still in effect during the relevant time frame, and Respondent had been detained for over six months awaiting the effectuation of the order, this Court finds, and the DHS concedes, that Respondent falls squarely into the class of individuals for whom a bond hearing must be provided.

Standards for Release of Detained Aliens

As always, the two primary factors underlying the decision of whether to release an alien from DHS custody is (1) whether he presents a danger to the United States , and (2) whether he is a flight risk . *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

However, using *Demore v. Kim*, 538 U.S. 510 (2003), as a legal template, the Third Circuit observed that the detention of an alien beyond five months will become suspect without further inquiry into the necessity of continued detention. *Diop v. ICE/Homeland Security,* 656 F.3d, at 234 (3d Cir. 2011). The January 2, 2018 Order provides that the DHS will have the burden of proving by clear and convincing evidence that the detainee is a danger or a flight risk. Order at 44¶ 2c.

The Court will apply the bond provisions of INA § 236(a). In doing so, the Court must undertake a two-step analysis to determine whether Respondent is eligible for bond. First, the Court must determine whether the DHS has met their burden by clear and convincing evidence that Respondent's release poses a danger to persons or property in the community, and second,

[6] Please note that all page citations to the January 2, 2018 Order refer to the page numbering in the Order and not the Westlaw citations.

whether DHS has met their burden by clear and convincing evidence that the Respondent is a significant flight risk. In making its assessment, the Court shall consider the following factors: seriousness of the crimes committed, if any; prior criminal history; sentences imposed and time served; nonappearance at court proceedings; probation history; length of residence in the community; and evidence of rehabilitative effort or recidivism. *Id.* at 817; *Matter of Melo*, 21 I&N Dec. 883, 886 (BIA 1997); *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987).

Discussion

Respondent testified at his bond hearing, and the DHS called him as a witness. Throughout the hearing, Respondent was consistent and forthcoming when questioned by the DHS, the Court, and Respondent's attorney. The Court finds that Respondent testified truthfully and credibly and that Respondent took responsibility for his actions.

Respondent is a 24 year old male who came to the United States as refugee when he was just two years old. Respondent subsequently adjusted his status to that of a lawful permanent resident.[7]

Although Respondent's criminal history is concerning and his most recent conviction is very serious, the Court finds that considering the totality of the circumstances, the DHS has not met its burden in establishing that Respondent is a danger. Respondent testified that he sold marijuana but has never sold any other drugs. Respondent testified that he sold small amounts of marijuana in 2011, when he was 19 years old, and that he has not sold drugs since 2011. Respondent further testified that he made between 10 and 20 drug transactions in total, that he did not receive more than $200 in any one transaction, and that the total amount received from the drug proceeds did not exceed $3,500. Since his 2011 conduct, Respondent pleaded guilty in 2013 (Michigan state crime) and 2015 (Federal crime) to selling drugs, has accepted full responsibility, and has been participating in rehabilitative courses in recent years.

In addition to arguing the seriousness of Respondent's drug offenses, the DHS asserted that the drug trafficking ring associated with Respondent's federal conviction brandished weapons while trafficking multiple types of drugs. The DHS asked Respondent about his involvement with such weapons. The DHS also questioned Respondent regarding an allegation that Respondent spoke to a co-conspirator on the phone about plans to burn houses. Respondent denied any involvement with weapons other than using a BB gun when he was a juvenile. Respondent also denied the conversation about planning to burn houses and testified that the individual asserting that claim had been discredited. As the government bears the burden in this case, the Court finds that the DHS has not proven by clear and convincing evidence that Respondent was involved with weapons or other criminal activity beyond what his convictions set forth in the record.

The Court considers that since Respondent's conviction, he has attended drug rehabilitation classes, he has complied with the government since his arrest and throughout his detention, and he was granted early release of his prison sentence. The Court further finds that Respondent was

[7] The Court notes that the Court is only in possession of Respondent's Bond file as Respondent's file remains within the jurisdiction of the Detroit Immigration Court. Therefore, the Court does not have full access to the entirety of Respondent's record of proceedings.

forthcoming regarding his role in the trafficking scheme and that his role was comparatively minimal. Respondent testified that he conducted between 10-20 drug transactions which were limited to selling marijuana at a quarter of an ounce. Respondent testified that the total amount of money he received from such transactions amounted to $3,500, and no single transaction exceeded $200. Further, his drug trafficking convictions evolved from a single scheme, and while this criminal ring started in 2009 and ended in 2013, Respondent's involvement took place back in 2011 when he was 19 years old. While the Court in no way minimizes the serious nature of such conduct, the burden is on the DHS to prove Respondent is a danger, and the Court finds that the DHS has not established such in this case. In regards to this finding, the Court, however, adds the condition that the DHS is permitted to require any monitoring device it deems appropriate, including electronic monitoring.

The DHS also argues that the Court should find that Respondent is a flight risk. The Court considers that Respondent has been in this country since he was two years old and that his family also resides in the United States. The Court further considers that Respondent's counsel has informed that Respondent plans to submit a motion to reopen his case based on a change of circumstances which includes Respondent's conversion to Christianity. The Court also notes that the DHS has had sufficient time to procure travel documents for Respondent and they have not been able to do so, despite there being no impediments to his removal for a period exceeding six months. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). While this Court finds the Respondent to be a flight risk, the Court does not deem that he is so significant a flight risk that no bond is warranted. The Court, therefore, sets a $15,000 bond which it finds to be an appropriate amount to ensure Respondent's appearance for removal when or if DHS can effectuate such removal. The Court further finds that such an amount will ensure his appearance at future removal hearings if he is successful on getting his motion to reopen granted. *See Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999); *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987); *Matter of D-J-*, 23 I&N Dec. 573, 575 (A.G. 2003).

Accordingly, the Court grants bond in the amount of $15,000 with the condition that the DHS may require any monitoring device for Respondent that it deems appropriate.

The following order was entered:

ORDER: **IT IS HEREBY ORDERED THAT** Respondent's request for custody re-determination be **GRANTED** upon posting of $15,000, further DHS can require any monitoring/electronic tracking devise upon Respondent's release that it deems appropriate.

2-14-18
Date

Kuyomars "Q" Golparvar
U.S. Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals on or before thirty (30) calendar days from the date of service of this decision.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer (✓) ALIEN's ATT/REP (✓) DHS

DATE: 2-14-18 BY: COURT STAFF HU

Attachment(s): ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other

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EXHIBIT B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted]919 – York, PA

Date: FEB 06 2018

In re: A[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Jeffrey Forrest Boyles
Assistant Chief Counsel

APPLICATION: Stay of Execution of the Bond Order

The Department of Homeland Security (DHS) has applied for an emergency stay of the decision of the Immigration Judge's bond order of February 2, 2018 ordering the respondent released from custody upon posting a bond of $15,000. After consideration of all information, the Board has considered the request and has concluded that the stay of the bond order will be granted.

ORDER: The request for stay of execution of the bond order is granted.

FOR THE BOARD

[1] The record reflects that a Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27) has not been submitted. Therefore, because there is no Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27), we consider the respondent pro se. However, the attorney who represented the respondent before the Immigration Court will be provided with a courtesy copy of this decision.