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NON-DETAINED

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA**

In the Matter of:)
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File No(s): A 2
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**THE DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL**

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INTRODUCTION

The Department of Homeland Security (“Department” or DHS”), by and through undersigned counsel, respectfully submits this brief in support of its appeal from the decision of the Immigration Judge, dated August 25, 2014, granting the respondents a bond in the amount of \$8,500. The DHS respectfully requests that this appeal be reviewed by a three-member panel. Three-member panel review is warranted given the need to review a decision by an Immigration Judge that is not in conformity with the law or with applicable precedents, the need to review clearly erroneous factual determinations, and the need to reverse a decision of an Immigration Judge, other than a reversal under 8 C.F.R. § 1003.1(e)(5). *See* 8 C.F.R. § 1003.1(e)(6).

ISSUES PRESENTED

In order to resolve this appeal, the Board of Immigration Appeals (“Board”) must address the following issues:

1. Did the Immigration Judge err in failing to provide a reasonable foundation for her decision that releasing the respondents on upon payment of a bond is an equally effective deterrent to mass migration as continued detention, which is in direct contravention to the Attorney General’s binding precedential decision in *Matter of D-J-*?
2. Did the Immigration Judge err in finding that the respondents met their burden to establish they warranted release on bond when the findings on each of the articulated factors listed in *Matter of Guerra* weigh in favor of denying the respondents’ request for bond?

STANDARD OF REVIEW

The Board reviews an Immigration Judge’s findings of fact, including findings as to the credibility of testimony, under the “clearly erroneous” standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews *de novo* questions of law, discretion, and judgment, and all other issues in appeals from Immigration Judges’ decisions. 8 C.F.R. § 1003.1(d)(3)(ii); *see also Matter of V-K-*, 24 I&N Dec. 500, 501 (BIA 2008). When presented with a mixed question of law and fact, the

Board must first review the findings of fact under the “clearly erroneous” standard, then the Board reviews *de novo* the application of those facts to the law. *Turkson v. Holder*, 667 F.3d 523, 530 (4th Cir. 2012).

SUMMARY OF THE ARGUMENT

The Immigration Judge failed to provide a reasonable foundation for finding that releasing the respondents on bond is an equally effective deterrent to mass migration – a decision that directly contradicts the Attorney General’s standards set forth in *Matter of D-J-*. The Immigration Judge found that “release of the Respondents and similarly situated undocumented migrants would encourage future surges in illegal migration, thus further burdening an already strained law enforcement community.” Bond Memo at 9. Yet the Immigration Judge released these similarly situated undocumented migrants on bond without providing any reasonable foundation. Furthermore, the Immigration Judge erred in holding that the respondents met their burden to show that they warranted release on bond because all of the factors listed in *Matter of Guerra* weigh in favor of continued detention. As such, the DHS respectfully moves the Board to vacate the Immigration Judge’s bond decision.

STATEMENT OF THE FACTS

The lead respondent is a [redacted] old female and citizen of El Salvador who entered the United States illegally with her minor son by crossing the Rio Grande River on a raft after paying a smuggler \$10,000, and avoided immigration inspection at or near Hidalgo, Texas, on July 2014. Exhs. B1; Bond Memo at 2-3. The respondents were apprehended by Customs and Border Patrol (“CBP”) soon after their entry. Exh. B5, Tab N, p. 68. On July 10, 2014, the lead respondent was willing to answer questions from CBP (which were asked in the Spanish language) and provided a sworn statement. Exh. B5, Tab M. In that sworn statement, the lead

respondent claimed she had a fear of persecution in El Salvador, but left her home country to look for work in the United States. Exh. B3, Tab M, p. 63, 65. She admitted that she was not inspected by immigration officers at a designated point of entry and her intended destination was New York. Exh. B3, Tab M, p. 63; Tab N, p. 68. Thereafter, the respondents were detained at the Artesia Family Residential Center ("AFRC") in Artesia, New Mexico.

On July 25, 2014, an asylum officer interviewed the lead respondent and the asylum officer found the respondent established a credible fear of torture. *See* "Memorandum of Bond Decision," dated August 25, 2014, p. 1 (hereinafter "Bond Memo"). On July 25, 2014, the asylum office served the respondents with a Notice to Appear ("NTA"). Exh. B1. On August 8, 2014, the respondents appeared with an attorney via televideo at the Arlington Immigration Court from the AFRC for an initial master calendar hearing, in which the respondents admitted and conceded the allegations and charges. On August 22, 2014, the respondents appeared with their attorney via televideo for a bond hearing, and the Immigration Judge placed the lead respondent under oath. *See* Bond Memo at 2.

During the bond hearing, the lead respondent testified that in 2008, the lead respondent applied for a visa to come to the United States, but it was denied. Bond Memo at 3. She did not apply for a visa to enter the United States for this entry. Bond Memo at 3. She testified that she left El Salvador because gang members demanded monthly extortion payments from her, and her ex-husband threatened her and her son on two occasions. Bond Memo at 2. The lead respondent and her ex-husband divorced in April 2014 due to the ex-husband's abuse of the respondent and her son. Bond Memo at 2. She left El Salvador at the beginning of July, four days after the second threat from her former husband, and never reported the incidents to the police. Bond

Memo at 2. The lead respondent testified that she also left El Salvador to get away from the gangs. Bond Memo at 2. She never reported any of the threats to the police. Bond Memo at 2.

The lead respondent met with a smuggler in El Salvador and paid him \$10,000 to bring her and her son to the United States. Bond Memo at 3. She testified that she knew it was illegal to use a smuggler to help her enter the United States. Bond Memo at 3. The lead respondent stated that she has several family members who remain in El Salvador, including her parents, siblings, uncles, aunts, and a grandmother. She stated that she traveled with her son by bus through Central America and Mexico until she arrived at the U.S. border. Bond Memo at 2.

At the border, the lead respondent and her son boarded a raft with at least three other people, in addition to the smuggler, and crossed the Rio Grande River into the United States, where they were apprehended by CBP. Bond Memo at 3. She testified that, if released from custody, she and her son would live with her aunt, [REDACTED], in

[REDACTED], who is a United States citizen. Bond Memo at 3. This contradicts the lead respondent's sworn statement to CBP that she intended to go to [REDACTED] work. Exh. B3, Tab M, p.

63. The lead respondent had also told CBP that her point of contact in the United States was

[REDACTED] who lives in [REDACTED], and never mentioned her aunt in [REDACTED] Exh. B3, Tab N, p. 68. She testified that she is now going to live with

this aunt offered them a place to stay, and she denies telling CBP that she came to the United States to look for work. Bond Memo at 3. The lead respondent also claims a sister in the United States who has Temporary Protected Status ("TPS"). Bond Memo at 3.

Because this illegal entry was the respondents' first entry into the United States, the lead respondent has no equities in the United States, such as property ownership, bank accounts,

employment history or tax payments. Bond Memo at 3. The lead respondent testified she has never been arrested or committed a crime. Bond Memo at 3.

At the conclusion of the bond hearing, the Immigration Judge granted an \$8,500 bond to the respondents as a family unit, or \$4,250 for each respondent. Bond Memo at 10. On August 25, 2014, the Immigration Judge issued a bond memorandum and gave both parties until September 24, 2014 to appeal the decision. Bond Memo at 10. In that decision, the Immigration Judge found that the respondents “were part of a surge of undocumented migrants who came to the United States in recent months, on rumors that they would be allowed to stay once they are here.” Bond Memo at 9. The Immigration Judge found that “release of the Respondents and similarly situated undocumented migrants would encourage future surges in illegal migration, thus further burdening an already strained law enforcement community.” Bond Memo at 9. In stark contrast to those findings, the Immigration Judge ordered the release of the respondents upon payment of a bond, because she “believe[s] that their continued detention in Artesia, New Mexico is not warranted,” and that releasing the respondents on bond serves as “a reasonable alternative to continued detention.” Bond Memo at 9. The DHS filed a timely appeal.

ARGUMENT

The Immigration Judge failed to follow the Attorney General’s binding precedential guidelines set forth in *Matter of D-J-*, and failed to provide a “reasonable foundation” for finding the respondents met their burden to establish they warranted release on bond.

“An alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” INA § 236(a). Section 236(a) of the INA “provides that the Attorney General may (1) continue to detain the alien; or (2) release the alien on a bond or conditional parole.” *Matter of D-J-*, 23 I&N Dec. 572, 575 (BIA 2003); *see* INA § 236(a)(1) –

(2). “[A]n Immigration Judge must consider whether the alien who seeks a change in custody status is a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.” *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). The burden is on the alien to show that he or she merits release on bond. *Id.* at 40.

Immigration Judges may look to a number of factors in determining whether an alien merits release on bond, as well as the amount of bond that is appropriate . . . which may include any or all of the following: (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.

Id. The Immigration Judge may choose to give greater weight to one factor over others, as long as the decision is *reasonable*. *Id.* (emphasis added); *see also Matter of D-J-*, 23 I&N Dec. at 576 (“Attorney General’s denial of bail to alien is within his lawful discretion as long as it has a ‘reasonable foundation.’”) (citing *Carlson v. Landon*, 342 U.S. 524, 534 (1952)) (holding that the discretion of the Attorney General requires a reasonable foundation).

Additionally, in *Matter of D-J-*, the Attorney General held that “in all future bond hearings involving aliens seeking to enter the United States illegally, where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests.” 23 I&N Dec. at 581. “In future proceedings involving similarly situated aliens, this opinion [in *Matter of D-J-*] constitutes binding precedent[.]” *Id.* In his decision, the Attorney General “conclude[d] that releasing [the] respondent, or similarly situated undocumented seagoing migrants, on bond would give rise to adverse consequences for national security and

sound immigration policy.” *Id.* at 579. “[T]here is a substantial prospect that the release of such aliens into the United States would come to the attention of others . . . and encourage future surges in illegal migration[.]” *Id.* “Encouraging such unlawful mass migration is inconsistent with sound immigration policy and important national security interests.” *Id.*

The DHS contends that the Immigration Judge erred in issuing a \$8,500 bond to the respondents because the Immigration Judge (1) failed to provide any reasonable foundation for the conclusion that releasing the respondents on a bond serves as an equally effective deterrent to mass migration as continued detention; and (2) erred in finding that the respondents met their burden to establish they warrant release on bond.

I. THE IMMIGRATION JUDGE FAILED TO PROVIDE A REASONABLE FOUNDATION FOR FINDING THAT RELEASING THE RESPONDENTS ON BOND IS AN EQUALLY EFFECTIVE DETERRENT TO MASS MIGRATION, WHICH IS IN DIRECT CONTRAVENTION TO THE ATTORNEY GENERAL’S DECISION IN *MATTER OF D-J-*.

In *Matter of D-J-*, the Attorney General found that releasing respondents into the United States who are part of a mass migration is “inconsistent with sound immigration policy and important national security interests” and only “encourage[s] future surges in illegal migration.” 23 I&N Dec. at 579. “Such national security considerations clearly constitute a ‘reasonable foundation’ for the exercise of [the Attorney General’s] discretion to deny release on bond.” *Id.* In the instant case, the Immigration Judge found that the respondents “were part of the surge of undocumented migrants who came to the United States in recent months[.]” Bond Memo at 9. The Immigration Judge also found that “release of the Respondents and similarly situated undocumented migrants would encourage future surges in illegal migration[.]” Bond Memo at 9. Yet after making those findings, the Immigration Judge granted the respondents’ request for bond, stating that she “believes” that releasing the respondents on a bond is an equally effective

deterrent to mass migration as continued detention, without providing any basis for her belief. Bond Memo at 9. The Immigration Judge's decision is completely inconsistent with the Attorney General's binding decision in *Matter of D-J-*, and the Immigration Judge provides no "reasonable foundation" for her decision; thus, the DHS contends that the Immigration Judge erred in releasing the respondents on a bond.

The respondent in *Matter of D-J-* was one of 216 undocumented aliens from Haiti who were aboard a vessel and attempted to enter the United States illegally in Biscayne Bay, Florida, on October 29, 2002. 23 I&N Dec. at 576. Some of the passengers sought to evade orders of the U.S. Coast Guard by jumping from the vessel and swimming ashore, while the remaining passengers waited for the vessel to hit land, ran ashore, and then fled from law enforcement before apprehension. *Id.* During his immigration proceedings, the respondent testified that he had "not been arrested or convicted of a crime; and that, if released, he would live with an uncle residing in New York, New York, who would provide him with food, shelter, and transportation while he applied for asylum." *Id.* at 577. On appeal to the Board, the Immigration and Nationality Service ("INS") submitted declarations from officers of the Coast Guard, the Department of State, and the Department of Defense to evidence "strong concerns of national security requiring the continued detention of the respondent and similarly situated undocumented migrants pending removal proceedings." *Id.* The main area of national security concern was the threat of further mass migration. *Id.* at 578. The State Department supported continued detention of the migrants and stated that releasing those migrants who landed in Florida on October 29, 2002, into the U.S. "will spur further migration" and "create a perception in Haiti of an easing in U.S. policy with respect to admission of migrants." *Id.* The Coast Guard also supported continued detention and stated that "detaining and swiftly repatriating those who

illegally and unsafely attempted to enter the United States by sea is a significant deterrent to surges in illegal immigration and mass migration.” *Id.* In his decision to deny the respondent’s request for bond, the Attorney General found that “there is a substantial prospect that the release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea.” *Id.* at 579. “As substantiated by the government declarations, surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and DOD resources from counterterrorism and home security responsibilities.” *Id.*

The respondents in the present case are “similarly situated” to the respondent in *Matter of D-J-*. The respondents attempted to enter the United States illegally by boarding a raft with the assistance of a smuggler and crossing the Rio Grande River. Bond Memo at 2-3. Rather than presenting themselves for inspection at a designated point of entry, the respondents also evaded immigration authorities. Exh. B3, Tab N, p. 68. The lead respondent testified that if she and her son were released, she would live with a family member in California who would support them – similar to D-J-. Bond Memo at 3.

In this case, the DHS submitted declarations from Philip T. Miller, Assistant Director of Field Operations for Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement (“ICE”), and Traci A. Lembke, Assistant Director over ICE Investigative Programs for Homeland Security Investigations (“HSI”). Exh. B3, Tabs M-N. The Miller declaration states that:

[a]llowing detainees to bond out would have indirect yet significant adverse national security consequences as it undermines the integrity of our borders. . . . [T]he current detainees already are motivated, inter alia, by the belief that they would receive release from detention. Validating the belief further encourages mass migration, which only increases the already tremendous strain on our law enforcement and national security agencies.

Exh. B3, Tab M, p. 55. The Lembke declaration supports this conclusion, and states that:

According to the debriefings of detainees who have been part of the ongoing mass migration at the Southwest border, the high probability of a prompt release, coupled with the likelihood of low bond, is among the reasons they are coming to the United States. Illegal migrants to the United States who are released on a minimal bond become part of 'active migration networks,' . . . which in turn likely encourages further illegal migration into the United States. . . . Combatting illegal migration and human smuggling requires significant HSI resources which necessarily must be diverted from other investigative priorities. Such a diversion of resources disrupts our ability to deal with other threats to public safety, including criminal activity related to illicit trade, travel and finance.

Exh. B3, Tab N, p. 59. The close parallels between the fact patterns and mass migration effects regarding the respondent in *Matter of D-J-* and the respondents in this case therefore establish that these respondents are similarly situated to the respondent in *Matter of D-J-*, which the Immigration Judge seemed to acknowledge in her memorandum. See Bond Memo at 9. As previously discussed, the Immigration Judge even made a specific finding that the respondents "were part of the surge of undocumented migrants" at the Southwest border and that releasing them into the United States "would encourage future surges in illegal migration." Bond Memo at 9. Nonetheless, despite the substantial similarities between the facts and evidence in this case and those considered by the Attorney General in *Matter of D-J-*, the Immigration Judge granted the respondents' request for release on bond. The Immigration Judge so decided without any persuasive reason as to why these respondents are better suited for bond than the respondent in *Matter of D-J-*.¹ Therefore, the Immigration Judge's opinion lacks the "reasonable foundation"

¹ The Immigration Judge attempts to distinguish this case from *Matter of D-J-* in footnote 4 of the bond memorandum on two separate grounds. First, the Immigration Judge states that the Attorney General's decision was based on the "Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act," which provided for a blanket "no bond" policy for certain aliens who arrive by sea. Bond Memo at 6, n.4. However, the Attorney General specifically stated that his decision to deny bond was *not* based on this Notice. See *Matter of D-J-*, 23 I&N Dec. at 580 ("While the expedited removal policy may reduce the incidence of seagoing Haitian migrants being released on bond pending removal, it hardly provides airtight assurance against future successful entries by such migrants through legal and extra-legal maneuvers, or the encourages of additional maritime migrations likely to arise from such entries."). Second, the Immigration Judge states that "one notable difference" between this mass migration and the one at issue in *Matter of D-J-* is the "unprecedented number of unaccompanied minor children and adults with minor children." Bond Memo at 6, n.4. However, the main national security concern addressed by the Attorney General is that surges in illegal migration injure national security by diverting valuable resources from counterterrorism and other homeland security

required for the proper exercise of discretion to grant release on bond. *See Matter of D-J*, 23 I&N Dec. at 579 (citing *Carlson v. Landon*, 342 U.S. 524, 534 (1952)).

As these respondents are similarly situated to respondents in *Matter of D-J*, the Immigration Judge erred by failing to adequately consider and afford proper weight to the evidence filed by the DHS which demonstrates the ongoing problems created by illegal mass migration across the Southwest border. In addition to the affidavits of senior officials, the DHS filed contemporary articles from the New York Times and CNN documenting the rash of recent human smuggling cases across the Southwest border, and the recent deaths of many migrants who attempt to make their way to the Southwest border of the United States from Central America in the same way as the respondents. Exh. B3, Tabs D-J. Specifically, the Miller declaration noted that in FY 2014 almost 80,000 more illegal migrants were apprehended at the Southwest border than in FY 2013. Exh. B3, Tab M, p. 54.

The evidence submitted by the DHS to support its position of continued detention as a deterrent to further mass migration, is compelling. First, the diversion of scarce law enforcement resources to address this surge has been significant. In particular, on May 12, 2014, Secretary Jeh Johnson determined that the capacity of CBP and ICE to deal with the border surge was full, and he ordered that resources from other DHS agencies be drawn upon to assist. Exh. B3, Tab M, p. 55. Other agencies outside the DHS have also devoted resources to dealing with the surge. Exh. B3, Tab A, p. 3 (noting other agencies, including the Department of Justice, are assisting with the “investigation, prosecution, and dismantling of the smuggling organizations that are facilitating border crossings[.]”). Indeed, Secretary Johnson acknowledged that the DHS,

responsibilities. *Matter of D-J*, 23 I&N Dec. at 579. Illegal border crossing by minors divert resources as well as those by adults. The overall damaging effect of mass migration and the subsequent exhaustion of law enforcement resources occur during a surge in illegal migration, regardless of its demographic makeup. To the extent this is a distinction from *Matter of D-J*, it is without any difference on the importance of continued detention to prevent future illegal surges in migration.

pursuant to directives from President Obama, is coordinating with other government agencies, including “the Departments of Health and Human Services, Defense, Justice, State, and the General Services Administration,” to “bring to bear the assets of the entire federal government on the situation.” Exh. B3, Tab C, p. 10.

Second, the risk of harm to aliens coming to the United States by means of human smuggling organizations is well documented. *See, e.g.,* Johnson Testimony at Exh. B3, Tab C, p. 12 (noting in open letter that “[i]n the hands of smugglers, many children are traumatized and psychologically abused by their journey, or worse, beaten, starved, sexually assaulted or sold into the sex trade; they are exposed to psychological abuse at the hands of criminals”). The Lembke declaration explains that smugglers take aliens through “drop-houses often under unsafe conditions” and they guard them “with guns in plain view and threaten[] to kill them by shooting them in the back of the head if they tried to escape”). Exh. B3, Tab N, p. 59; *see also, e.g.,* Jim Dwyer, *A 12-Year Old’s Trek of Despair Ends in a Noose at the Border*, New York Times, April 19, 2014, at Exh. B3, Tab G (describing suicide of 12-year old Ecuadoran girl whose family sent her with smugglers so she could join her parents residing illegally in the United States); Julia Preston, *Snakes and Thorny Brush, and Children at the Border Alone*, New York Times, June 25, 2014 at Exh. B3, Tab H; *Guatemalan Boy Sought Care for Family in the U.S. and Died Crossing Border Desert*, The Guardian, July 2, 2014, at Exh B3, Tab I; *72 Bodies Found in Mexico were Immigrants, Officials Say*, CNN, August 25, 2010, at Exh. B3, Tab J (describing discovery of bodies of 72 Central and South American migrants on a ranch in Tamaulipas a few miles from the U.S. border; they had been assassinated by the Zetas cartel for unknown reasons).

Despite the detailed and specific evidentiary packet submitted by the DHS, the Immigration Judge erred in failing to give sufficient weight to the law enforcement, safety and

national security concerns engendered by this mass migration. “[W]hile clear-error review is deferential, it is not toothless.” *United States v. Antone*, 742 F.3d 151, 165 (4th Cir. 2014) (quoting *U.S. v. Wooden*, 693 F.3d 440, 451 (4th Cir. 2012)). “A reversal is warranted, for example, if the district court failed to ‘properly take into account substantial evidence to the contrary’ or its ‘factual findings are against the clear weight of the evidence considered as a whole.’” *Id.* (quoting *Wooden*, 693 F.3d at 452) (internal punctuation omitted). “[I]nadequate consideration of... substantial evidence... constitutes reversible error.” *Id.* (internal punctuation omitted).

II. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE RESPONDENTS MET THEIR BURDEN TO ESTABLISH THEY WARRANTED RELEASE ON BOND BECAUSE THE FINDINGS ON EACH OF THE ARTICULATED FACTORS LISTED IN *MATTER OF GUERRA* WEIGH IN FAVOR OF CONTINUED DETENTION.

Despite finding that several factors weighing in favor of finding the respondents to be a flight risk, the Immigration Judge erred in holding that the respondents met their burden to establish they warranted release on bond. An applicant for bond redetermination is presumed to be ineligible for bond unless she can demonstrate that her release from custody “would not pose a danger to property or persons, and that [she] is likely to appear for any future proceedings.” *See* 8 C.F.R. §§ 1236.1(c)(8). This regulation reverses the longstanding presumption of bond eligibility for non-criminal aliens recognized by the Board in *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976). *See* 62 Fed. Reg. 10312, 10313 (Mar. 6, 1997); *Reno v. Flores*, 507 U.S. 292, 295 (1993). Thus in redetermining custody under INA § 236(a), the burden is on the alien to establish that she does not present a danger to others, a threat to national security, or a flight risk. *Matter of Guerra*, 24 I&N Dec. at 39-40.

In her decision, the Immigration Judge identified several factors that an Immigration Judge “may consider in determining whether to continue detention of an alien during the pendency of removal proceedings.” Bond Memo at 9. Each factor is discussed below.

A. Whether the Alien Has a Fixed Address in the United States

The Immigration Judge found this to be a positive factor that weighed in favor of the respondents’ release on bond. In her decision, the Immigration Judge found that the respondents “have sponsorship in the United States by a relative who has lawful immigration status.” Bond Memo at 10. The Immigration Judge also found that this relative “is financially able to support them and to provide them with food, clothing, and shelter.” Bond Memo at 10. However, according to the sponsor’s submitted tax records, and her spouse already have one dependent, a parent, on an adjusted gross income of \$20,444. Exh. B4. The DHS argued at the bond hearing that this income does not even meet the 2014 Poverty Guidelines for Affidavits of Support provided by Health and Human Services for a household of three people, let alone five. While the respondents may have a fixed address, the Immigration Judge erred in finding that the respondents’ relative is financially able to support the respondents.

B. The Alien’s Length of Residence in the United States

The Immigration Judge found this to be a negative factor that indicated the respondents may be flight risks. In her decision, the Immigration Judge found that the respondents “have never lived in the United States and have not accrued many equities [in] this country.” Bond Memo at 9. The respondents were apprehended by CBP the same day they illegally entered the United States, so their length of residence in the United States is extremely limited.

C. 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

The Immigration Judge did not find this to be a positive factor weighing in favor of release on bond. The only family ties the respondents have to the United States are an aunt, who is a United States citizen unable to financially support the respondents, and a sister with TPS, whose financial situation is unknown. Bond Memo at 3. In comparison to *Matter of D-J-*, that respondent also had a family member willing to support him in the United States, but the Attorney General still found that the respondent had not met his burden to show he warranted release on bond. 23 I&N Dec. at 577, 581. In addition, none of these relationships entitle the respondents to reside permanently in the United States.

D. The Alien's Availability of Potential Relief from Removal

The Immigration Judge found this to be a positive factor weighing in favor of releasing the respondents on bond. In her decision, the Immigration Judge noted that the respondents were found to have a credible fear by the asylum office, and they "have submitted a signed Application for Asylum (Form I-859) which shows that they have a significant possibility of prevailing on the merits of their asylum applications." Bond Memo at 10. Although the respondents have filed an asylum application, the basis for one of their claims (opposition to gangs, extortion from gangs) has been rejected by the Board in published cases because opposition to gangs is neither socially distinct nor particular. *See generally Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008). Even if the respondents' additional claim (abuse from the lead respondent's ex-husband) qualifies as a basis for asylum, the respondent in *Matter of D-J-* also had potential relief available when he initially applied for bond, but the Attorney General concluded that the "minimal showing made by respondent on this point was insufficient to demonstrate the likelihood of his appearance for

future proceedings.” 23 I&N Dec. at 581; *see also Matter of Moise*, 12 I&N Dec. 102, 104 (BIA 1967) (finding that an application for withholding of deportation does not provide a basis for release on bond). Thus, this factor should not have been construed in favor of release on bond.

E. The Alien’s Employment History

The Immigration Judge acknowledged that the lead respondent had no employment history in the United States, but did not utilize this factor in her decision to release on bond. *See* Bond Memo at 3, 9. The fact that the respondent has acquired no employment history in the United States should have been construed in favor of continue detention.

F. The Alien’s Record of Appearance in Court

The Immigration Judge did not analyze this factor in her bond memorandum. The bond hearing was the respondents’ second appearance in immigration court, but this factor should not be construed in favor of release because the respondents were detained at the time of the hearing. This does not show that the respondents appeared in court on their own volition, or evidence any likelihood that they will appear in the future.

G. The Alien’s Criminal Record, Including the Extensiveness of Criminal Activity, the Recency of Such Activity, and the Seriousness of the Offenses

The Immigration Judge construed the absence of any criminal record in favor of the respondents’ release on bond. Bond Memo at 9. The Immigration Judge stated that “[t]hey have never been arrested for or convicted of a crime” and “[t]here is not evidence showing that they were involved in alien smuggling, drug trafficking, or other illicit activities.” Bond Memo at 9-10. The absence of a criminal record should be the baseline for every person – not a positive factor. Moreover, although there are no criminal proceedings, the lead respondent admitted to paying a smuggler a very large sum of money to facilitate their illegal entry into the United

States. Bond Memo at 3. This means she was involved in alien smuggling – a factor that should have been reasonably construed in favor of detention by the Immigration Judge.

H. The Alien's History of Immigration Violations

The Immigration Judge found this to be a positive factor weighing in favor of releasing the respondents on bond. The Immigration Judge stated that “[b]efore this entry, the Respondents had not violated U.S. immigration laws[.]” Bond Memo at 9: “The evidence does not suggest that they falsely claimed to be United States citizens when they were apprehended[.]” Bond Memo at 9. However, at the respondents’ one and only opportunity to commit an immigration violation, they committed said violation by boarding a raft with the assistance of a smuggler and entering the United States illegally. This should not have been construed as a positive factor in favor of release on bond.

I. Any Attempts by the Alien to Flee Prosecution or Otherwise Escape from Authorities

The Immigration Judge found this to be a positive factor in favor of releasing the respondents on bond. In her decision, the Immigration Judge stated that “[t]he evidence does not suggest . . . that they attempted to flee from the arresting U.S. Border Patrol agents.” Bond Memo at 9. The respondents chose not to present themselves for inspection at a designated point of entry, but rather paid a smuggler \$10,000 to enter the United States illegally, which is inherently an attempt to avoid authorities. Bond Memo at 2-3. Thus, the Immigration Judge could not have reasonably construed this factor in favor of releasing the respondents on bond.

J. The Alien's Manner of Entry to the United States

The Immigration Judge construed this as a negative factor, indicating that the respondents may be flight risks. The Immigration Judge stated that the respondents were part of the surge of migrants who traveled to the United States based on rumors they would be allowed to stay once

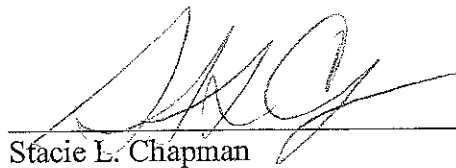
they got here, and paid a smuggler a large sum of money to help them cross the border. Bond Memo at 9.

As such, proper application of the standard enunciated above compels the conclusion that respondent poses a significant flight risk and should be detained. The findings on each of the articulated factors establish that the respondents failed to meet their burden that they are not flight risks. *See Matter of Guerra, supra*. Indeed, the Immigration Judge found that “release of the Respondents and similarly situated undocumented migrants would encourage future surges in illegal migration.” Bond Memo at 9. Because the Immigration Judge found many negative factors, and the remaining factors should have reasonably been construed as factors weighing in favor of detention, or having no weight either way, the Immigration Judge erred in granting the respondents’ request for release on bond.

CONCLUSION

The Immigration Judge failed to provide a reasonable foundation for finding that releasing the respondents on bond is an equally effective deterrent to mass migration – a decision that directly contradicts the Attorney General’s standards set forth in *Matter of D-J*. Furthermore, the Immigration Judge erred in holding that the respondents met their burden to show that they warranted release on bond because all of the factors listed in *Matter of Guerra* weigh in favor of continued detention. As such, the DHS respectfully moves the Board to vacate the Immigration Judge’s bond decision.

Respectfully submitted on this 7th day of December, 2014,

A handwritten signature in dark ink, appearing to read 'SLC', is written over a horizontal line.

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