PRACTICE ADVISORY
(Current as of September 2015)

Immigration Judges' Authority to Grant Release on Conditional Parole Under INA § 236(a) as an Alternative to Release on a Monetary Bond

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This advisory discusses the district court's decision in *Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015), which clarifies that immigration judges ("IJs") have authority under INA § 236(a), 8 U.S.C. § 1226(a) to grant release on conditional parole as an alternative to release on a monetary bond.

The Immigration and Nationality Act ("INA"), § 236(a), 8 U.S.C. § 1226(a), expressly authorizes the Attorney General to release a noncitizen from detention pending her removal case on a "bond of at least $1,500 . . . or conditional parole." However, in recent years, IJs nationwide have refused to hear requests for conditional parole—or release on recognizance—on the grounds that they lack authority under the statute and regulations to grant release without a minimum $1,500 bond. The result is that many individuals remain in detention even where non-monetary conditions of release would suffice to ensure their appearance at future proceedings, solely because they are unable to pay a bond.

In October 2014, the ACLU Immigrants' Rights Project ("IRP"), ACLU of Washington, and Northwest Immigrant Rights Project ("NWIRP") filed *Rivera v. Holder*, a class action lawsuit on behalf of detainees in the Western District of Washington challenging the immigration courts' policy of refusing to hear requests for conditional parole. **On April 13, 2015, the district court certified the class and ruled that the plain language of INA § 236(a) permits IJs to grant conditional parole. Thus, under the ruling, IJs in Washington State must now consider whether to grant conditional parole instead of imposing a monetary bond. *See Rivera*, 307 F.R.D. at 553.** We strongly encourage practitioners in Washington State to request that IJs consider releasing individuals on conditional parole pursuant to *Rivera*.

Rivera is only binding in Washington State. However, it should be instructive for people across the country as it was the first federal court to examine the issue and held that "[INA § 236(a)] clearly presents [conditional parole] as an alternative to releasing [a noncitizen] subject to bond. Defendants have not articulated a coherent alternative reading of the statute." *Id.*

Moreover, after *Rivera* was filed, the government certified a case—*In re V-G*—to the Board of Immigration Appeals ("BIA"), asking that the BIA clarify this issue nationwide in a precedential decision. On January 21, 2015, the Department of Homeland Security ("DHS") filed its brief with the BIA. **There, DHS *conceded* that IJs have "authority under section INA § 236(a) to release a respondent on her own recognizance and pursuant to conditional parole, as opposed to settling a monetary bond with a minimum amount of $1,500." *In re V-G*, DHS Br. at 3 (BIA filed Jan. 21, 2015).** On September 14, 2015, the BIA denied the request for certification and declined to decide whether INA § 236(a) authorizes IJs to grant conditional parole. *In re V-G*, at 1 (BIA Sept. 14, 2015). However, practitioners should still use DHS' brief in support of conditional parole requests.

We are monitoring the implementation of *Rivera* and IJs' responses to DHS' position in *In re V-G*. If you practice in Washington State, we would appreciate any updates on how IJs are responding to the *Rivera* ruling. If you practice elsewhere in the country, we would also appreciate updates on how local ICE counsel and IJs respond to DHS' brief in *In re V-G* and the outcome of any requests for conditional parole. **Please send your updates to Sophia Yapalater of the ACLU IRP at syapalater@aclu.org.**

Attached to this advisory are:

- *Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wa. 2015)
- *In re V-G*, DHS Br (BIA filed Jan. 21, 2015)
- Sample pro se motions asking that the IJ grant release on conditional parole or hold a new bond hearing to consider a request for conditional parole

What does *Rivera* hold?

Rivera holds that the plain language of INA § 236(a) requires IJs to consider requests for release on conditional parole as an alternative to release on a monetary bond. *Rivera*, 307 F.R.D. at 553; *see id*. (holding that "[INA § 236(a)] unambiguously states that an [Immigration Judge] may consider conditions for release beyond a monetary bond.").

Critically, *Rivera* rejected the government's argument that only noncitizens who are eligible for release on the minimum $1,500 bond set forth in INA § 236(a)(2)(A) are eligible for release on conditional parole. This is because "conditional parole could require conditions more onerous than (at least) the minimum bond." *Id*. at 547 (citing *In Re Luis Navarro–Solajo*, 2011 WL 1792597, at *1 n. 2 (BIA Apr. 13, 2011)). As the Court explained:

> The Court has found no authority indicating that an alien may only receive a bond or conditional parole where, absent a bond or conditions on her release, she would still not present a flight risk. Bond amounts are set

> above the minimum in order to mitigate the flight risk that an alien poses, and this would be the same purpose served by imposing onerous "conditions" on an alien's release in lieu of a bond . . . . The Court cannot conclude that aliens presenting some flight risk are per se ineligible for conditional parole.

Id. at 547 n.4. Thus, under *Rivera*, noncitizens are entitled to seek conditional parole regardless of whether they may be released on a bond of any amount, on whatever conditions the IJ may deem reasonably necessary to ensure his or her appearance.

What does conditional parole entail?

The district court did not precisely elaborate what release on conditional parole entails—apart from holding that it clearly provides release on conditions of supervision as an *alternative* to release on monetary bond.

Notably, DHS routinely exercises its authority to grant "conditional parole" under INA § 236(a) by releasing noncitizens on their own recognizance. Thus, the Form I-220A, Order of Release on Recognizance states that "[i]n accordance with Section 236 of the [INA] . . . you are being released on your own recognizance," and requiring, among other things, that the noncitizen "report for any interview or hearing as directed," "surrender for removal from the United States if so ordered," obtain permission before changing her place of residence, and assist in obtaining travel documents. Similarly, the brief filed by DHS in *In re V-G conceded* that IJs have "authority under section INA 236(a) to ***release a respondent on her own recognizance and pursuant to conditional parole***, as opposed to settling a monetary bond with a minimum amount of $1,500." *In re V-G*, DHS Br. at 3 (BIA filed Jan. 21, 2015) (emphasis added). Thus, individuals should be able to request release on similar conditions.

Who is covered by the ruling in *Rivera*?

The district court certified the following class:

> All individuals who are or will be subject to detention under 8 U.S.C. § 1226(a), and who are eligible for bond, whose custody proceedings are subject to the jurisdiction of the Seattle and Tacoma Immigration Courts; excluding those who (a) are being detained without bond following a bond determination and (b) those who have been released from custody.

Rivera, 307 F.R.D. at 551.

Specifically, *Rivera* applies to your client if he or she is currently detained in Washington State under INA § 236(a) and either:

> (1) has not yet received a bond hearing before the IJ or

> (2) had bond set by the IJ at a hearing held prior to April 13, 2015—i.e., the date of the district court's decision—but remains in detention because he or she cannot afford to post the bond.

Pursuant to the district court order, IJs in Washington State must henceforth consider requests for conditional parole by noncitizens who have not yet received a bond hearing under INA § 236(a). *Rivera* does *not* apply to your client if he or she has already been released from custody or was previously denied release on bond by the IJ.

How should I go about requesting conditional parole under *Rivera*?

If your client is a *Rivera* class member and has yet to receive an IJ bond hearing, you should request that the IJ consider your client for conditional parole. Some sample pro se motions for a custody redetermination hearing are attached to this advisory.

If your client is a *Rivera* class member, has already had bond set by the IJ, but has been unable to post that bond, you should request a new bond hearing in light of *Rivera* and request that the IJ consider releasing your client on conditional parole. *See* 8 C.F.R. § 1003.19(e). A sample pro se motion for a new custody hearing is attached to this advisory.

What about immigration courts outside of Washington State?

Rivera is binding only in Washington State. However, after *Rivera* was filed, the government certified a case—*In re V-G*—to the Board of Immigration Appeals ("BIA"), asking that the BIA clarify IJs' authority to grant conditional parole in a nationwide, precedential decision. On January 21, 2015, the DHS filed a brief with the BIA conceding that

> [t]he Immigration Judge [has] authority under section INA § 236(a) to release a respondent on her own recognizance and pursuant to conditional parole, as opposed to settling a monetary bond with a minimum amount of $1,500. No authority precludes an Immigration Judge from releasing a respondent on conditional parole under INA § 236(a)(2)(B), if the circumstances warrant release without a monetary bond.

In re V-G, DHS Br. at 3 (BIA filed Jan. 21, 2015); *see also id*. at 6-11 (discussing how this authority is confirmed by the plain language of the statute and regulations; the statutory history; and BIA case law).

On September 14, 2015, the BIA denied the request for certification and declined to decide whether INA § 236(a) authorizes IJs to grant release on conditional parole. *In re V-G*, at 1 (BIA Sept. 14, 2015). However, we encourage attorneys and detainees outside Washington State to request conditional parole and attach DHS' brief in support of their requests. A redacted copy of DHS' brief is attached to this advisory.

On September 14, 2015, the BIA denied the request for certification and declined to decide whether INA § 236(a) authorizes IJs to grant release on conditional parole. *In re V-G*, at 1 (BIA Sept. 14, 2015). However, we encourage attorneys and detainees outside Washington State to request conditional parole and attach DHS' brief in support of their requests. A redacted copy of DHS' brief is attached to this advisory.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIA SANDRA RIVERA,

Plaintiff-Petitioner,

v.

ERIC H. HOLDER, *et al.*,

Defendants-Repondents.

Case No. C14-1597RSL

ORDER GRANTING MOTION TO CERTIFY CLASS AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on plaintiff-petitioner's motion to certify a class, Dkt. # 2; defendants-respondents' motion to stay proceedings, Dkt. # 18; and the parties' cross-motions for summary judgment, Dkt. # 25; Dkt. # 28-1. Having reviewed the memoranda and exhibits submitted by the parties, the Court finds as follows.

I. BACKGROUND

Plaintiff-petitioner Maria Sandra Rivera ("plaintiff") is a native of Honduras who entered the United States on May 29, 2014, and was subsequently held in immigration detention under § 236(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(a). Dkt. # 1 ¶ 44. On June 23, 2014, U.S. Immigration and Customs Enforcement ("ICE") set an initial bond for plaintiff at $7,500. Id. ¶ 48. Plaintiff requested a custody redetermination hearing before an Immigration Judge ("IJ"), and requested release on her own recognizance pursuant to the government's authority under § 1226(a) to grant conditional parole. Id. ¶ 49. The IJ ruled that

he did not have jurisdiction under § 1226(a) to consider plaintiff's request for release on conditional parole. Dkt. # 5 (Arno Decl.) ¶ 3. Finding that plaintiff presented "somewhat" of a flight risk, the IJ reduced plaintiff's bond to $3,500. Dkt. # 27-5 (IJ Mem.) at 4. Unable to pay this bond, plaintiff remained in detention until October 28, 2014, when the IJ granted plaintiff's application for asylum. Dkt. # 26 (Benki Decl.) ¶ 8. At the time of her release after five months of detention, plaintiff's appeal to the Board of Immigration Appeals ("BIA") was still pending. Dkt. # 36 (Pl. Reply MSJ) at 11.

On October 16, 2014, plaintiff filed this class action and moved for class certification, petitioning for the writ of habeas corpus and seeking declaratory and injunctive relief. Dkt. # 1; Dkt. # 2. Plaintiff claims that Immigration Judges in Seattle and Tacoma Immigration Courts uniformly deny all requests for "conditional parole" under 8 U.S.C. § 1226(a) on the ground that this statutory provision restricts IJs to permitting aliens' release on a minimum $1,500 bond. Dkt. # 1 ¶ 65. Plaintiff argues that this policy and practice violates the statute, id. ¶ 66, and requests that the Court declare this policy unlawful and order defendants-respondents ("defendants") to provide aliens with bond hearings where the IJ will consider requests for conditional parole.

On November 3, 2014, the parties stipulated that the case was appropriate for resolution under Fed. R. Civ. P. 56(a) because it "rais[ed] a purely legal issue" and no material facts were in dispute. Dkt. # 17 at 2-3. The parties agreed that if the Court decided "the sole legal issue raised by this lawsuit in favor of the Petitioners, class relief would be appropriate . . . as the legal issue in this case is determinative of whether 'final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole' under Federal Rule of Civil Procedure 23(b)(2)." Id. at 2.

On December 15, 2014, defendants moved to stay this action on the grounds that the BIA might address the issue presented here in a separate case, In re Vicente-Garcia. Dkt. # 18. In that case, the alien similarly sought release on conditional parole, Dkt. # 18-2 (IJ Mem.); the IJ

certified the question of whether an IJ has the authority to grant such requests to the Board, and the BIA subsequently requested supplemental briefing from the parties on the following issues:

> (1) Whether the Immigration Judge is authorized to grant conditional parole and can release the alien without any monetary bond on his or her own recognizance during a custody redetermination hearing;
>
> (2) Given that the alien in this case has posted the full bond and been released, should the Board adjudicate the merits of the bond appeal or dismiss the appeal as moot? What impact, if any, do the procedures set forth in 8 C.F.R. §§ 1236.1(d)(1), (2), and (3), which relate to the District Director's authority to ameliorate the terms and conditions of release, have on this question?

Dkt. # 38-1 (BIA Letter). Although this briefing has been submitted, Dkt. # 38-1; Dkt. # 38-2; the BIA has not yet indicated whether it will decide the first issue or dismiss the appeal. The parties in the instant case have both moved for summary judgment. Dkt. # 25; Dkt. # 28-1.[1]

II. LEGAL STANDARDS

Summary judgment is appropriate if, viewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, the moving party shows that "there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Torres v. City of Madera, 648 F.3d 1119, 1123 (9th Cir.

[1] Defendants argue that they should all be dismissed as improper parties with the exception of Lowell Clark, Warden of the Northwest Detention Center. Defendants rely on Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004), which held that, as a default rule, habeas petitioners challenging their confinement may only proceed against the wardens of their detention facilities (the persons with immediate custody over them). The Padilla Court notably declined to reach whether the Attorney General was a proper respondent to a habeas petition filed by an alien detained pending deportation. Id. at 435 n. 8. The Ninth Circuit has only once addressed how the "immediate custodian" rule applies to habeas petitioners in the immigration context, in an opinion that it withdrew with directions that it may not be cited as precedent. Armentero v. INS, 340 F.3d 1058 (9th Cir. 2003), withdrawn, 382 F.3d 1153 (9th Cir. 2004). Unlike in Padilla, plaintiff here challenges a government policy that is based on a misapplication of the INA, seeking relief that her immediate custodian would be unable to provide. The Court thus finds the immediate custodian rule inapplicable in this case, consistent with Olmos v. Holder, 2014 WL 222343, at *2 (D. Colo. Jan. 17, 2014) (rule inapplicable where petitioner sought bond hearing); see also Sanchez-Penunuri v. Longshore, 7 F. Supp. 3d 1136, 1141-51 (D. Colo. 2013). The Court notes that the Attorney General, the Director of Homeland Security and an ICE Field Office Director were defendants/appellants in a recent case before the Ninth Circuit where a habeas petitioner challenged his bond hearing on the basis of the IJ's legal error. Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011). All of the named defendants will remain in this action.

2011). The moving party "bears the initial responsibility of informing the district court of the basis for its motion." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The summary judgment standards do not change when the parties file cross-motions: the court must apply the same standard and rule on each motion independently. We Are Am. v. Maricopa Cnty. Bd. of Sup'rs, 297 F.R.D. 373, 380 (D. Ariz. 2013) (citations omitted). The granting of one motion does not necessarily translate into the denial of the other unless the parties rely on the same legal theories and the same set of material facts. Id. (citations omitted).

A district court generally has "broad discretion" to stay proceedings as incident to its power to control its own docket, Clinton v. Jones, 520 U.S. 681, 703 (1997) (citation omitted). A court may, "with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." Leyva v. Certified Grocers of California Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979). A court considering whether a stay is appropriate must weigh the competing interests that will be affected by the requested stay, including: (1) the possible damage which may result from granting the stay; (2) the hardship or inequity which a party may suffer if the suit is allowed to go forward; and (3) the "orderly course of justice," measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962).

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979). A party seeking to maintain a class action must prove that she has met all four requirements of Fed. R. Civ. P. 23(a) and at least one of the requirements of Rule 23(b). Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). Although the trial court exercises broad discretion in determining whether to certify a class, the Court must nonetheless conduct a "rigorous analysis" to determine whether the party seeking certification has satisfied all the necessary Rule 23 elements. Wal–Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2552

(2011). The Court may consider questions going to the merits "to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen Inc. v. Conn. Retirement Plans and Trust Funds, 133 S.Ct. 1184, 1195 (2013). Classes of aliens seeking habeas relief for their prolonged detentions have been certified in this Circuit. Rodriguez v. Hayes, 578 F.3d 1105 (9th Cir. 2009).

III. DISCUSSION

A. Standing

Defendants argue that plaintiff lacks standing because she has not asserted a cognizable injury, traceable to defendants' conduct, that the requested remedy is likely to redress. Dkt. # 28-1 at 12. Plaintiff asserts that she has suffered a "procedural injury," given that her IJ's failure to consider her eligibility for conditional parole deprived her of the proper bond hearing which she was entitled to under § 1226(a). Dkt. # 33 (Pl. Resp. MSJ) at 6.

To establish Article III standing, a plaintiff must demonstrate that: (1) she suffered an injury in fact that is concrete, particularized, and actual or imminent (not conjectural or hypothetical); (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). However, a litigant to whom Congress has accorded "a procedural right to protect his concrete interests" may "assert that right without meeting all the normal standards for traceability and redressibility." Id. at 672 n. 7; Massachusetts v. EPA, 549 U.S. 497, 498 (2007). Such a litigant need only demonstrate (a) that she has a procedural right that, if exercised, "could" protect her concrete interests and (b) that those interests fall within the zone of interests protected by the statute at issue. Natural Res. Def. Council v. Jewell, 749 F.3d 776, 782-83 (9th Cir. 2014) (citation omitted); see also Center for Food Safety v. Vilsack, 636 F.3d 1166, 1171 (9th Cir. 2011) (it must be "reasonably probable" that the challenged action will threaten plaintiff's concrete interests). Unlike parties who assert substantive injuries, litigants alleging the deprivation of procedural rights do not have to prove that, had their rights been respected, the

substantive result would have been altered. Wash. Envtl. Council v. Bellon, 741 F.3d 1075, 1078 (9th Cir. 2014) (citation omitted). Nevertheless, the redressibility requirement "is not toothless in procedural injury cases," Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 545 1220, 1227 (9th Cir. 2008); and so it must be possible that exercising their rights could protect their concrete interests, see id. The "procedural injury" framework has typically been applied in environmental cases. E.g., id.

This Court has found no precedent directly holding that providing an alien with a bond hearing that does not comply with § 1226(a) constitutes the type of "procedural injury" discussed in Lujan and other cases. The Court has considered Ninth Circuit precedent in the immigration context in evaluating plaintiff's claim, and this authority offers support for finding that plaintiff has alleged a redressable harm. In Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 951 (9th Cir. 2008), the Ninth Circuit held that § 1226(a) required the Attorney General to provide individualized bond hearings to aliens faced with prolonged detention, noting that a statute permitting prolonged detention absent such a hearing would be "constitutionally doubtful." In Singh v. Holder, 638 F.3d 1196, 1200 (9th Cir. 2011), the Ninth Circuit heard a petitioner's claim that his due process rights were violated during his bond hearing, finding that district courts had habeas jurisdiction to review Casas bond hearings for "constitutional claims and legal error." The Singh court held that bond hearings had to employ certain procedural safeguards as a matter of due process to protect a detainee's "liberty interest" in "freedom from prolonged detention." Id. at 1205-09. The court also found that petitioner was entitled to a new bond hearing without expressly finding that a proper hearing would result in a different outcome. Id. at 1209. If detainees may bring such challenges, it follows that an alien who is subjected to "prolonged detention" without receiving a bond hearing that complies with § 1226(a) has standing to challenge her defective hearing and demand a new one.

Defendants argue that finding that plaintiff has standing would require the Court to review (and assert the authority to reverse) the IJ's discretionary decision to impose a $3,500

bond, which the Court is barred from doing under § 1226(e).[2] Dkt. # 35 (Def. reply MSJ) at 5. The Court disagrees. While an IJ's discretionary judgment in how it applies the statute is not subject to review, this Court has found no authority supporting the notion that an IJ has the discretion to misinterpret the statute under which he operates. This would appear to conflict with Singh. See 638 F.3d at 1200-01 (district courts have habeas jurisdiction to review Casas bond hearing determinations "for constitutional claims and legal error . . . . Although § 1226(e) restricts jurisdiction in the federal courts in some respects, it does not limit habeas jurisdiction over constitutional claims or questions of law."); see also Prieto-Romero v. Clark, 534 F.3d 1053, 1067 (9th Cir. 2008) (finding that court had no authority to hear challenge that bond amount was excessively high, but noting that extent of Attorney General's authority under the INA was not a matter of discretion and therefore proper for judicial review).

Furthermore, plaintiff need not show that the IJ's decision necessarily would have been different had he been aware of his authority to grant conditional parole. Singh made no such finding when it held that petitioner was entitled to a new bond hearing; instead, the court applied a harmless error analysis, finding that he was entitled to a new hearing due to certain errors that prejudiced him and "could well have" affected the hearing's outcome. 638 F.3d at 1205. It is possible that plaintiff's IJ would not have imposed a bond had he been aware that he could have granted parole with non-monetary conditions more onerous than the bond amount he imposed, consistent with the BIA's observation in In Re: Luis Navarro-Solajo, 2011 WL 1792597, at *1 n. 2 (BIA Apr. 13, 2011). The question is whether § 1226(a) permits IJs to grant such parole.[3]

Defendants cite Navarro-Solajo to argue that the IJ would have imposed a bond (that

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[2] The statute states, in relevant part:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e).

[3] The Court interprets the term "conditional parole" to refer to the release of an individual subject to certain conditions.

plaintiff could not pay) regardless of whether conditional parole was available, as aliens who receive bonds greater than the minimum (on the grounds that they are flight risks) are ineligible for conditional parole. Dkt. # 28-1 at 17. This case makes no such assertion. In Navarro-Solajo, the BIA reviewing a bond determination held that the IJ properly considered the relevant factors in imposing the statutory minimum bond of $1,500. Id. at *1. In a footnote, the BIA declined to reach respondent's argument that he should have been released on conditional parole:

> It is not necessary here to address the extent of an Immigration Judge's authority as to conditional parole. A release on conditional parole as provided under section 236(a)(2)(B) of the Act could present more onerous conditions on a respondent than the minimum bond set by the Immigration Judge in this case. Moreover, the respondent requested and was granted the minimum bond. The Immigration Judge's decision to impose a monetary bond was the proper disposition for this case.

Id. at *1 n. 2. While the BIA's order is not a model of clarity, the footnote suggests that Navarro-Solajo could not receive conditional parole because he requested the minimum bond before the IJ and because the bond amount was fair in that case. The Court cannot interpret the case as holding that aliens who would require a bond amount greater than the minimum are per se ineligible for conditional parole. Nor can the Court infer that the IJ in plaintiff's case would not have granted conditional parole in lieu of imposing any bond, especially where (according to the BIA) conditional parole could require conditions more onerous than (at least) the minimum bond. Assuming that the IJ made a mistake of law when he concluded that he lacked authority to grant plaintiff conditional parole, the Court cannot conclude that this mistake was harmless just because it is possible he would have rendered the same decision had he not been misinformed.[4]

[4] Defendants argue that individuals found to be flight risks are legally ineligible for conditional parole, citing federal regulations interpreting the INA and cases interpreting these regulations. Matter of Castillo-Padilla, 25 I. & N. Dec. 257, 261 (BIA 2010) ("Pursuant to 8 C.F.R. § 236.1(c)(8) (2010), an alien may be released from custody on conditional parole under section 236(a) of the Act only if "such release would not pose a danger to property or persons, and . . . the alien is likely to appear for any further proceeding."). This argument is unconvincing. The regulation in question authorizes officers "authorized to issue a warrant of arrest" to release aliens under the conditions set out in § 1226(a)(2) (authorizing release on bond or conditional parole) if the alien demonstrates he is likely to appear for

This leaves defendants' strongest standing argument: that plaintiff lacks standing because her detention only lasted a total of five months (four months at the time of filing), and therefore was not prolonged. Dkt. # 35 at 3. The Casas and Singh courts held that bond determinations (and their procedural protections) were required to prevent "prolonged detentions." This Circuit has held that "detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." Diouf v. Napolitano, 634 F.3d 1081, 1092 n. 13 (9th Cir. 2011) (interpreting § 1231(a)(6)); see Rodriguez v. Robbins, 715 F.3d 1127, 1139 (9th Cir. 2013) (holding that immigration detention becomes prolonged at the six-month mark "regardless of the authorizing statute," interpreting Diouf). As a result, courts in this Circuit have held that a § 1226(a) detainee is entitled to a bond hearing after six months of detention. E.g., Alvarado v. Clark, 2014 WL 6901766, at *2 (W.D. Wash. Dec. 8, 2014). Because plaintiff never endured prolonged (i.e., six-month) detention, defendants argue, she was never entitled to a bond hearing and was never actually harmed by receiving a defective hearing.

While the government may have had six months before it was obliged to give plaintiff a bond hearing, the Court fails to see how an alien's detention remains presumptively reasonable after the government has given her a bond hearing to determine whether she should be detained. In finding six months to be a "presumptively reasonable" period for detaining aliens who have been ordered removed, the Supreme Court in Zadvydas v. Davis recognized six months as a reasonably necessary period for the Executive branch to secure an alien's removal and navigate the attendant issues that fall within executive expertise. 533 U.S. 678, 701-02 (2001)

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any future proceeding. The Court has found no authority indicating that an alien may only receive a bond or conditional parole where, absent a bond or conditions on her release, she would still not present a flight risk. Bond amounts are set above the minimum in order to mitigate the flight risk that an alien poses, and this would be the same purpose served by imposing onerous "conditions" on an alien's release in lieu of a bond. See Prieto-Romero, 534 at 1068 (IJ had imposed a $15,000 bond to ensure that alien appeared at removal); see also In Re Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006) (IJs consider factors indicating an alien's likelihood of flight in considering both whether to release this alien on bond and what amount of bond to impose). The Court cannot conclude that aliens presenting some flight risk are per se ineligible for conditional parole.

(interpreting § 1231). The six-month rule appears to have the same significance in the § 1226(a) context. See Prieto-Romero, 534 F.3d at 1063 (Attorney General's detention authority under 1226(a) is limited to the period reasonably necessary to affect an alien's removal) (citing Zadvydas). In granting an alien a bond hearing during that period, the government makes the decision that the reasonableness of continuing to detain this alien while the removal process runs its course is ripe for review given the possibility of prolonged detention. It only follows that this Court should recognize this alien's liberty interest in not being detained unnecessarily and find her entitled to a proper Casas hearing. The Court thus finds that aliens who are detained following defective bond hearings (regardless of how long they have been detained) may immediately challenge their hearings for legal error on the grounds that their continued detention is an unnecessary harm. Plaintiff had standing to bring this action.

B. Mootness

Defendants argue that plaintiff's claims are moot because she is no longer in custody. Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (internal quotation marks omitted). A claim becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. Haro v. Sebelius, 747 F.3d 1099, 1110 (9th Cir. 2013) (citation omitted). However, where a plaintiff's claim becomes moot while she seeks to certify a class, her action will not be rendered moot if her claims are "inherently transitory" (such that the trial court could not have ruled on the motion for class certification before her claim expired), as similarly-situated class members would have the same complaint. See Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1090-91 (9th Cir. 2011) (describing how this "relation back" doctrine applies in class actions). The theory behind this rule is that such claims are "capable of repetition, yet evading review." See id.

Plaintiff brought this action and sought class certification prior to her release from custody, when she had standing to seek a new bond hearing. Dkt. # 1; Dkt. # 2. Although plaintiff's class certification motion was ultimately noted for consideration well after plaintiff's release, the Court finds that the relation back doctrine applies. In Lyon v. United States Immigration & Customs Enforcement, 300 F.R.D. 628, 639 (N.D. Cal. 2014), the court held that immigration detainees' claims were inherently transitory because "the length of [an alien's] detention cannot be ascertained at the outset" of a case "and may be ended before class certification by various circumstances." The Court finds plaintiff's claims inherently transitory on this same basis.

Defendants argue that plaintiff's claims do not "evade review" because the administrative process entitles aliens to appeal to the BIA, and the BIA may hear these appeals even if their claims are moot for Article III purposes. Dkt. # 31 (Def. Resp. Certif.) at 19-20; In Re Luis-Rodriguez, 22 I. & N. Dec. 747, 753 (BIA 1999). The Court has only seen this concept in the context of judicial review, and defendants provide no authority suggesting that the availability of administrative review renders the relation-back doctrine inapplicable. The authority defendants cite indicates that BIA review of mooted appeals is discretionary, and the BIA in Vincente-Garcia specifically sought briefing on whether it should dismiss that case for mootness; this undercuts defendants' arguments about the general availability of such review for claims such as plaintiff's.

C. Class Certification

Given that whether plaintiff's class should be certified relates directly to whether this action is moot, the Court next addresses the certification question. Plaintiff seeks to certify a class consisting of the following:

> All individuals who are or will be subject to detention under 8 U.S.C. § 1226(a), and who are eligible for bond, whose custody proceedings are subject to the jurisdiction of the Seattle and Tacoma Immigration Courts.

Dkt. # 2-1 (Proposed Order) at 2. Plaintiff is consistently unclear in her briefing about whether her class would include all currently-detained aliens who are still awaiting their bond hearings, or only aliens who have been or will be detained following their allegedly-defective bond hearings. The Court assumes the former, given that courts frequently refer to "aliens detained under 8 U.S.C. § 1226(a)" when discussing aliens who are awaiting their bond hearings. E.g., Leonardo v. Crawford, 646 F.3d 1157, 1159 (9th Cir. 2011).

The parties stipulated that no discovery was necessary in this case, which presents a "purely legal issue that will determine the merits of the litigation and likely the propriety of class certification." Dkt. # 17 at 2. The parties dispute whether the proposed class satisfies Fed. R. Civ. P. 23(a).

1. Class Definition

Defendants argue that plaintiff's "overbroad" class definition includes aliens who lack standing due to their ineligibility for conditional parole.[5] This includes: (1) aliens with a bond set at some amount above the statutory minimum; (2) aliens denied monetary bond; and (3) aliens who have been released on bond. For reasons the Court has already provided, the first group may be entitled to relief and thus may be part of the class. However, the Court agrees that

[5] Defendants rely on Mazza v. Am. Honda Motor Co., 666 F.3d 581, 594 (9th Cir. 2012), for the proposition that unnamed class members must have standing. See id. ("no class may be certified that contains members lacking Article III standing."). As other courts have pointed out, Mazza appears inconsistent with prior Ninth Circuit precedent, namely the Ninth Circuit's en banc holding in Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements . . . . Thus, we consider only whether at least one named plaintiff satisfies the standing requirements."). See, e.g., Waller v. Hewlett-Packard Co., 295 F.R.D. 472, 475-79 (S.D. Cal. 2013). Mazza also seems in conflict with post-Dukes precedent, Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011) ("[O]ur law keys on the representative party, not all of the class members, and has done so for many years."); and Ninth Circuit authority directly relating to habeas class actions brought by aliens, Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2009) ("The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)."). Nevertheless, while district courts in this Circuit are divided on this issue, the Court finds it necessary to exclude those groups who clearly lack standing to seek relief. See Burdick v. Union Sec. Ins. Co., 2009 WL 4798873, at *4 (C.D. Cal. Dec. 9, 2009). Plaintiff has not argued to the contrary.

aliens who have been detained without bond should not be part of the class, as it is implausible that they would receive conditional parole if the IJ would not even release them subject to a bond. Furthermore, the Court fails to see why aliens who have been released on bond should be part of the class, given that they do not face prolonged detention. This limits plaintiff's class to (a) aliens who are being or will be detained after having a bond imposed that they are unable to pay; and (b) aliens who have not yet had a bond hearing but risk receiving a defective one.

The latter group's standing is debatable. Although the Court has found that being detained after a defective bond hearing can be an injury even where an alien has not yet spent six months in detention, it is impossible to know ex ante which aliens will receive a bond hearing (prior to their final release or removal) and which will be detained without bond, arguably making the danger to them conjectural. Ninth Circuit precedent suggests that a class may include uninjured parties. In Hayes, the court rejected the government's argument that a class of aliens demanding bond hearings had to be decertified where this class likely included aliens who were not entitled to bond hearings. 591 F.3d at 1125 ("The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)."). However, Hayes predated the trend in this Circuit after Mazza to scrutinize the standing of absent class members. The Court need not resolve this issue, because the requirements for class certification have been satisfied even excising this group from the class definition and focusing solely on aliens who have been (or will be)[6] detained following their bond hearings for inability to pay.[7]

2. Numerosity

In assessing whether the class is "so numerous that joinder is impracticable" for the purposes of Rule 23(a)(1), the Court notes that plaintiff has not provided any specific number for

[6] Hayes, 591 F.3d at 1118 ("The inclusion of future class members in a class is not in itself unusual or objectionable . . . . When the future persons referenced become members of the class, their claims will necessarily be ripe.") (internal citations omitted).

[7] The Court will ultimately not modify the class definition to remove this group; this is unnecessary, given that this group would still benefit from the requested classwide relief.

how many aliens fall within the narrowed class; however, this is not dispositive. In re Stec Inc. Sec. Litig., 2012 WL 6965372, at *4 (C.D. Cal. Mar. 7, 2012) ("the exact size of the class need not be known so long as general knowledge and common sense indicate that it is large.") (citation omitted). Relatively small class sizes have been found to satisfy this requirement where joinder is still found impractical. McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan & Trust, 268 F.R.D. 670, 673 (W.D. Wash. 2010) (certifying class of twenty-seven known plaintiffs); see also Villalpando v. Exel Direct Inc., 2014 WL 6625011, at *16 (N.D. Cal. Nov. 20, 2014) (noting that courts routinely find numerosity where class comprises 40 or more members). Factors in assessing whether impracticality justifies finding a small class sufficiently numerous include judicial economy, geographic dispersal of the class members, the ability of individual claimants to bring separate suits, and whether plaintiffs seek prospective relief affecting future class members. McCluskey, 268 F.R.D. at 673 (quoting Jordan v. Los Angeles County, 669 F.2d 1311, 1319 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982)). Courts in this Circuit have disagreed about whether the inclusion of future class members, by itself, satisfies the numerosity requirement. Compare Nat'l Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595, 599 (N.D. Cal. 1986) ("[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met, regardless of class size.") (citation and quotation marks omitted); with R.G. v. Koller, 2006 WL 897578, at *5 (D. Haw. Mar. 16, 2006) ("[A] court should only consider potential future class members if the court can make a reasonable approximation of their number.").

Plaintiff's evidence suggests that hundreds of § 1226(a) detainees are detained in Seattle each month, Dkt. # 4 (Tan Decl.) (interpreting 2011 detainee numbers); that the Tacoma Immigration Court hears between 45-72 bond hearings per week, Dkt. # 7 (Warden-Hertz Decl.) ¶ 6; and that 1,287 aliens had a bond set in Tacoma Immigration Court between April 1, 2013 and April 1, 2014. Dkt. # 3 (Hausman Decl.); Dkt. # 3-1 (Hausman Data). Admittedly, plaintiff

has not provided a way to determine how many of the 2013-2014 detainees were able to immediately pay their bonds or were subsequently detained for inability to pay. However, the Court finds it highly plausible that more than 40 aliens will be detained on this basis over the next year, and that more than 40 aliens are being detained on this basis currently. As the Court explains further infra, plaintiff has also provided compelling evidence that IJs in this District refuse to consider conditional parole requests, a policy that could affect such aliens' bond determinations. Thus, especially given the transient nature of the class and the inclusion of future class members, the Court finds the class sufficiently numerous and joinder impractical. Plaintiff has established numerosity.

3. Other Rule 23(a) Requirements

The Court finds that Rule 23(a)'s requirements of commonality, typicality and adequacy have been easily satisfied. Class members share common questions of law and fact (concerning whether they received or will receive a bond hearing that does not comply with the law). In this respect, they have "suffered the same injury," and their claims "depend upon a common contention" that is "capable of classwide resolution." Wal-Mart, 131 S. Ct. at 2551. Plaintiff's claim is typical of her class members', given that the class faces the same injury from the same policy. See Parsons v. Ryan, 754 F.3d 657, 685 (9th Cir. 2014). Finally, the Court is convinced that plaintiff and plaintiff's experienced counsel would fairly and adequately protect the interests of this class, especially given the fact that plaintiff's interests in this action are in line with those of the other class members.

4. Rule 23(b)(2) Requirements

Fed. R. Civ. P. 23(b)(2) permits certification of a class seeking declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." This action concerns a single policy applicable to the entire class that (if unlawful) subjects class members to unnecessary detention. The Rule's

requirements are satisfied. See Parsons, 754 F.3d at 689 (Rule 23(b)(2) satisfied where state department of corrections established policies and practices that placed "every inmate in custody in peril" and all class members sought essentially the same injunctive relief).

The following class will be certified:

> All individuals who are or will be subject to detention under 8 U.S.C. § 1226(a), and who are eligible for bond, whose custody proceedings are subject to the jurisdiction of the Seattle and Tacoma Immigration Courts; excluding those who (a) are being detained without bond following a bond determination and (b) those who have been released from custody.

D. Exhaustion

Defendants note that plaintiff failed to exhaust her administrative remedies because she filed this lawsuit before the BIA rendered its decision in her bond appeal, and argue that this necessitates staying or dismissing her case. Dkt. # 35 at 10-11. The Court disagrees.

On habeas review, exhaustion is a prudential rather than jurisdictional requirement. Singh, 638 F.3d at 1203 n. 3.[8] Courts may require prudential exhaustion if (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; or (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review. Puga v. Chertoff, 488 F.3d 812, 815 (9th Cir. 2007). Even if these factors weigh in favor of prudential exhaustion, waiver of exhaustion may be appropriate "where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." Laing v. Ashcroft, 370 F.3d 994, 1000 (9th Cir. 2004) (citation and quotation marks omitted). When a petitioner fails to exhaust prudentially required administrative remedies and exhaustion is not excused, "a district court should either

[8] Leonardo v. Crawford, 646 F.3d 1157, 1159 (9th Cir. 2011), cited by defendants, also suggests that exhaustion is prudential in this case. See id. (affirming dismissal of habeas petition challenging bond determination for failure to exhaust administrative remedies, but holding that the Court had jurisdiction over this claim); see also Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004).

dismiss the petition without prejudice or stay the proceedings until the petitioner has exhausted remedies[.]" Leonardo, 646 F.3d at 1160.

The Court waives the exhaustion requirement in this case. First, a record of administrative appeal is not necessary to resolve the purely legal question presented. See Singh, 638 F.3d at 1203 n. 3. Second, the discreteness of the legal question presented and plaintiff's request for classwide relief suggest that relaxing the exhaustion requirement in this case will not encourage future habeas petitioners to bypass the administrative scheme, as the issue here will not arise again (at least in this District) once the Court rules on it. See id.; El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 747 (9th Cir. 1991) ("[R]elaxing the exhaustion requirement would not significantly encourage bypassing the administrative process because the district court will have jurisdiction only in the rare case alleging a pattern or practice violating the rights of a class of applicants.") (citation and quotation marks omitted).

Third, the Court is sufficiently convinced that pursuing administrative review further would have been futile. Recourse to administrative remedies is considered "futile" where the agency's position on the question at issue "appears already set," and the Court can predict the "very likely" outcome. El Rescate, 959 F.2d at 747. Other courts have found unpublished BIA holdings highly probative of whether the Board has come to a decision on an issue. See Sulayao v. Shanahan, 2009 WL 3003188, at *3 (S.D.N.Y. Sept. 15, 2009); Cox v. Monica, 2007 WL 1804335, at *2 (M.D. Pa. June 20, 2007). The BIA has twice clearly indicated that IJs may not grant conditional parole, reversing IJ rulings to this effect. See In re Gregg, 2004 WL 2374493, at *1 (BIA Aug. 3, 2004); In re Suero-Santana, 2007 WL 1153879, at *1 (BIA Mar. 26, 2007). Plaintiff has presented compelling evidence – including the EOIR's Immigration Judge Benchbook – that as a matter of policy, IJs will not consider conditional parole.[9] Dkt. # 1 (Exh.

[9] On the basis of the record before it, the Court finds sufficient evidence to support plaintiff's claim that IJs in Seattle and Tacoma refuse to consider granting conditional parole in § 1226(a) bond hearings.

B) (Benchbook Oct. 2001); Dkt. # 3 (Hausman Decl.) ¶¶ 12-13 (no aliens were granted conditional parole by the Seattle and Tacoma Immigration Courts between April 1, 2013 and April 1, 2014); Dkt. # 7 (Warden-Hertz Decl.) ¶ 7 (primary legal service provider for Tacoma detainees unaware of any detainee's release on conditional parole). The agency has adopted a clear position on this issue. See Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227, 1234 (9th Cir. 2007) (exhaustion not required where "[T]he agency has spoken clearly through the policy statement contained in the Interoffice Memorandum and its application of this policy in a number of cases.").

The fact that the BIA in Vincente-Garcia specifically requested briefing on the central issue in this case suggests the possibility that it will reconsider the issue (assuming that it does not dismiss the case as moot, the other issue on which it requested briefing). However, this alone cannot outweigh the fact that the agency has to date made its position very clear, leaving the Court to conclude that the likely outcome of plaintiff's BIA appeal would be a denial consistent with agency policy. The Court waives prudential exhaustion.

E. Prudential Ripeness

Defendants argue that this Court should decline to exercise jurisdiction on prudential ripeness grounds. Dkt. # 28-1 at 18-22. Prudential ripeness inquiry turns on (a) the fitness of the issues for judicial review and (b) the hardship to the parties of withholding court consideration. Alaska Right to Life Political Action Comm. v. Feldman, 504 F.3d 840, 849 (9th Cir. 2007) (citation and quotation marks omitted). This case presents a purely legal question of statutory interpretation on which the agency has made its position clear, and no further factual development is necessary. For reasons already provided, the Court finds a definite and concrete dispute. This action is fit for review. Because the first factor in prudential ripeness inquiry is satisfied, it is not necessary to consider the hardship to the plaintiff class by delaying review (although the Court notes that delay would further expose class members to the risk of

unnecessary prolonged detention). See Oklevueha Native Am. Church of Hawaii, Inc. v. Holder, 676 F.3d 829, 838 (9th Cir. 2012). Defendants' prudential ripeness argument is rejected.

F. Whether to Stay Action or Grant Requested Relief

Defendants argue that because Vicente-Garcia is before the BIA, and the BIA may issue a precedential finding on the conditional parole issue to which the Court would have to give Chevron deference, this action should be stayed.[10] Dkt. # 18 at 3. This Court must defer to the BIA's interpretations of ambiguous provisions of the INA in its precedential adjudications so long as these interpretations are reasonable. See Mendoza v. Holder, 623 F.3d 1299, 1303 (9th Cir. 2010) (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)); see also INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999). Plaintiff counters that this Court need not stay this case or defer to the BIA's decision because § 1226(a) is unambiguous, which precludes Chevron deference. Dkt. # 29 (Pl. Resp. Stay) at 3. Plaintiff further argues that it is speculative whether the BIA will hear Vicente-Garcia, rule on the issue in this case or issue a precedential opinion. Plaintiff contends that staying her case would simply force class members to endure unnecessary detention.[11] Dkt. # 33 at 18-19.

The Court sees no reason to stay the instant case, because it finds § 1226(a) unambiguous. While defendants emphasize that the statute, regulations and precedent fail to define "conditional parole," § 1226(a) clearly presents it as an alternative to releasing

[10] At oral argument, counsel for defendants asked the Court to delay ruling on this motion for 60 days in order to give the BIA an opportunity to rule on Vicente-Garcia. That request is also denied.

[11] In support of their motion to stay, defendants cite cases applying the "ordinary remand rule" articulated in INS v. Orlando Ventura, 537 U.S. 12, 16-17 (2002), which provides that, in reviewing the decision of an administrative agency, a court must remand the matter back to the agency where the agency has not yet considered the issue presented, except in "rare circumstances." In Neguise v. Holder, 555 U.S. 511, 517, 523-24 (2009), the Court remanded a case where the BIA had not yet interpreted an ambiguous provision of the INA. Defendants emphasize that the BIA has never squarely addressed the question presented in this case. Plaintiff argues that the agency has already made its position clear, emphasizing that the ordinary remand rule does not require remand where the agency has already considered the issue, see, e.g. Almaghzar v. Gonzales, 457 F.3d 915, 923 n. 11 (9th Cir. 2006). As the Court finds the statute unambiguous, defendants' reliance on Neguise is unpersuasive.

an alien subject to a bond. Defendants have not articulated a coherent alternative reading of the statute. In its brief in Vicente-Garcia, ICE adopted this very interpretation:

> A reading of the plain language of INA § 236(a)(2)(A) and (B) together clearly shows that an Immigration Judge can release an alien without bond or with bond. If releasing an alien with the imposition of a monetary bond, the Immigration Judge must set the monetary bond at a minimum of $1,500 under the plain language of INA § 236(a).

Dkt. # 38-1 (Gov. Supp. Br. Vincente-Garcia) at 13. As the BIA noted in Navarro-Solajo, 2011 WL 1792597, at *1 n. 2, release without bond could be subject to other conditions aimed at ensuring the alien's presence at the hearing. § 1226(a) unambiguously states that an IJ may consider conditions for release beyond a monetary bond. Plaintiff's IJ mistakenly believed he had no such authority, a misunderstanding that conflicted with the law.

IV. CONCLUSION

For all of the foregoing reasons, the Court DENIES defendants' motion to stay, Dkt. # 18; DENIES defendants' motion for summary judgment, Dkt. # 28-1; GRANTS plaintiff's motion to certify a Rule 23(b)(2) class, Dkt. # 2; and GRANTS plaintiff's motion for summary judgment, Dkt. # 25.

Plaintiff is entitled to declaratory and injunctive relief. The Court finds that § 1226(a) permits IJs to consider conditions for release beyond a monetary bond. Immigration Judges in Seattle and Tacoma presiding over bond hearings conducted pursuant to 8 U.S.C. § 1226(a) must henceforth consider whether to grant conditional parole in lieu of imposing a monetary bond.

The Court will not yet enforce this Order with respect to aliens who have been detained following their bond hearings. The Court is not aware of the logistical steps necessary to carry out the necessary reviews and rehearings for these aliens, and therefore requests additional information from the parties. By May 22, 2015, defendants shall file under seal (with a copy served on class counsel) a list containing the name and alien number (or other identifying number) of all aliens currently being detained after having bonds imposed by Seattle and Tacoma Immigration Judges in § 1226(a) bond hearings. This list should indicate the amounts

of these detainees' bonds, the dates of their previous bond hearings, the dates of any scheduled future bond hearings, and information concerning whether these aliens are currently represented by counsel. The Court understands that detainee populations will inevitably fluctuate while this data is being collected. Aliens who have been detained without bond or have been released subject to a bond are not eligible for new bond hearings under this Order, and thus the Court does not need additional data concerning these aliens.

By June 5, 2015, the parties shall submit briefs to the Court (not to exceed twelve pages) proposing how bond rehearings may be scheduled and carried-out, and providing reasonable estimates as to how long it will take to schedule and complete rehearings for all class members. These proposals will be noted for consideration on June 19, 2015. Opposition briefs challenging the other party's proposal (not to exceed twelve pages) will be due Monday, June 15, 2015; and replies (not to exceed six pages) will be due Friday, June 19, 2015. It appears sensible to prioritize scheduling rehearings for those aliens who (a) have been given the minimum bond and (b) have been in detention the longest. The Court understands that some detainees in the class will not receive immediate relief under this Order; however, the Court must consider the impact of this Order on both the class members and on the United States, and must implement the Order in a pragmatic fashion that is fair to both parties.

DATED this 13th day of April, 2015.

Robert S. Lasnik
United States District Judge

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:

[redacted]

In bond proceedings

File No.: A[redacted]

DEPARTMENT OF HOMELAND SECURITY
SUPPLEMENTAL BRIEF ON APPEAL

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INTRODUCTION

The U.S. Department of Homeland Security (Department or DHS), U.S. Immigration and Customs Enforcement (ICE) hereby submits this brief on the November 20, 2014, bond decision by the Immigration Judge redetermining the respondent's bond from the "no bond" determination of ICE to a bond of $2,000. The matter is currently pending before the Board of Immigration Appeals (BIA or Board) on certification by the Immigration Judge. On December 22, 2014, the Board requested supplemental briefing from the parties to address whether an Immigration Judge has authority to grant conditional parole and release an alien on recognizance; whether, given that the respondent has posted bond and been released, the Board should adjudicate the merits of the bond appeal or dismiss the appeal as moot; and what impact, if any, the procedures set forth in 8 C.F.R. §§ 1236.1 (d)(l), (2), and (3) (2014), which relate to the District Director's authority to ameliorate the terms and conditions of release, have on the previous question.

In the instant matter, the respondent, who is detained under section 236(a) of the Immigation and Nationality Act (Act or INA), requested that the Immigration Judge release her on conditional parole. The Immigration Judge asked the respondent what conditions she would like the Immigration Judge to set; the respondent was unable to suggest any conditions. The Immigration Judge found, without making explicit findings on whether the respondent posed a danger to the community or was a flight risk, that setting a monetary bond was appropriate in light of the respondent's misrepresentations to immigration officers as to her identity and nationality, and because she declined the Immigration Judge's offer of the earliest available hearing date for her hearing on the merits of her relief claim. In light of the facts and procedural posture of this case, the Immigration Judge set a bond in the amount of $2,000, and the

respondent reserved appeal. The respondent was released from the custody of the Department of Homeland Security Immigration and Customs Enforcement (Department or DHS) on November 25, 2014 after posting the required bond. In the Bond Memorandum, the Immigration Judge requested certification to the Board on the issue of whether the Immigration Judge has authority to release an alien on his or her recognizance under 8 C.F.R. § 1240.1(a)(2), and the Board subsequently requested supplemental briefing.

For the reasons explained in detail below, the Department asks the Board to affirm the Immigration Judge's bond decision on its merits, even though Immigration Judges have authority to release aliens held under INA § 236(a) from custody on recognizance. The Department further provides a suggested framework for when the Board should dismiss certain other bond appeals as moot pursuant to *Matter of Valles-Perez*, 21 I&N Dec. 769, 773 (BIA 1997) and *Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 753 (BIA 1999).

ISSUES PRESENTED

- Whether an Immigration Judge has authority to release an alien held under INA § 236(a) from custody on conditional parole without monetary bond on his or her own recognizance?

- If an alien has appealed the amount of bond, but has since posted the full bond and been released, should the Board adjudicate the merits of the bond appeal as a prudential matter, or is it required to dismiss the appeal as moot?

- Do the procedures set forth in 8 C.F.R. §§ 1236.1(d)(l), (2), and (3), relating to the Department's authority to ameliorate the terms and conditions of release, serve to limit the Board's authority in deciding bond appeals?

- In finding that the respondent warranted a monetary bond rather than release on conditional parole based on her recent entry to the United States, her limited family ties, her false statements to immigration officers including an alias and claiming that she was a native of Mexico rather than Guatemala, and the respondent's refusal of the earliest possible hearing date for her merits hearing, did the Immigration Judge establish a reasonable foundation for the respondent's $2,000 bond?

STANDARD OF REVIEW

Whether certain bond appeals may be dismissed as moot as a prudential matter is an issue within the Board's administrative discretion. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The factual findings that serve as the predicate for the bond are subject to the "clearly erroneous" standard. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "A fact finding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the fact finder." Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,899 (Aug. 26, 2002) (Supplementary Information) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)). Whether the Immigration Judge properly found that the respondent warranted a monetary bond rather than release on conditional parole based on her recent entry to the United States, her limited family ties, and her false statements to immigration officers including an alias and claiming that she was a native of Mexico rather than Guatemala, is a factual matter subject to *de novo* review.

SUMMARY OF THE ARGUMENT

The respondent was detained under section 236(a) of the Act. The Immigration Judge had authority under section INA § 236(a) to release a respondent on her own recognizance and pursuant to conditional parole, as opposed to setting a monetary bond with a minimum amount of $1,500. No authority precludes an Immigration Judge from releasing a respondent on conditional parole under INA § 236(a)(2)(B), if the circumstances warrant release without a monetary bond.

Many circumstances resulting in an alien's release from Department custody will remove all practical significance from the alien's bond appeal, such as that addressed by the Board in *Matter of Valles-Perez*, 21 I&N Dec. at 773, in which the Board held that a grant of bond in a second bond redetermination hearing rendered the bond appeal of the first bond redetermination hearing moot. However, this respondent's appeal from the Immigration Judge's November 20, 2014 grant of bond in the amount of $2,000 is not such a circumstance, because the respondent retains a financial interest in the outcome of the bond appeal even though she has been released, and particularly since the merits of her removal case may not be decided in the immediate future. The Immigration Judge's decision nevertheless should be affirmed on its merits, since she provided a reasonable basis for her decision that the respondent's recent arrival to the United States, minimal ties, and misrepresentations to immigration officers regarding her identity, warranted payment of monetary bond. Moreover, the Immigration Judge set a bond higher than the $1,500 bond floor, which supports the conclusion that this respondent is not a proper candidate for release on recognizance pursuant to conditional parole.

The Immigration Judge appropriately found that release on conditional parole was not warranted in the instant case due to the facts and posture of the case. Although the Immigration Judge did not expressly deem the respondent a flight risk in the Bond Memorandum, the circumstances of the respondent's case demonstrate that she poses some flight risk and has a diminished likelihood to appear at future hearings. The respondent's recent entry to the United States, her limited family ties, her misrepresentation to immigration officers of her identity and nationality, and her refusal of an immediately available hearing date for the relief phase of her proceedings were all appropriate factors for the Immigration Judge to consider in setting an appropriate monetary bond in the broad exercise of the Immigration Judge's discretion. I.J. at 3-

4. Accordingly, the Immigration Judge properly set bond in the amount of $2,000, rather than either the minimum $1,500 bond or release on recognizance. *Id.*

STATEMENT OF FACTS

The respondent is a [redacted] year-old native and citizen of the Guatemala. Bond Exh. 1 (I-213 Record of Deportable/Inadmissible Alien). On June 25, 2014, the respondent was encountered by a U.S. Customs and Border Protection (CBP) Border Patrol Agent in the District of Arizona, within one hundred air miles of the United States' border with Mexico. *Id.* The Border Patrol Agent determined that the respondent had entered the United States within fourteen days prior to the encounter. *Id.* The respondent represented to the Border Patrol Agent that she was a Mexican citizen, and she was transported to the Douglas, Arizona Port of Entry. *Id.* A representative of the Mexican Consulate interviewed the respondent and determined that she was actually a citizen of Guatemala. *Id.* The respondent admitted her true nationality and that she had initially provided a false name to CBP. *Id.*

On July 11, 2014, the respondent represented to a Border Patrol Agent that she had a fear of returning to Guatemala. CBP referred her to the U.S. Citizenship and Immigration Services Asylum Office for a reasonable fear determination. On July 16, 2014, because the Asylum Office could not obtain a Mam language interpreter, a timely reasonable fear determination could not be made, so the Asylum Office proceeded as though a positive reasonable fear determination had been made and issued a Notice to Appear to the respondent.

Per the respondent's request, a bond redetermination hearing was held by the Tacoma Immigration Court on November 20, 2014. I.J. at 1. The Department had initially set the conditions of the respondent's release at "no bond." *Id.* The respondent, through counsel, requested release on recognizance, pursuant to conditional parole. *Id.* The Immigration Judge requested that

respondent's counsel articulate what conditions she was requesting on parole to assure the respondent's appearance at future immigration court hearings. Counsel was unable to identify any specific requested conditions. *Id.* at 4. The Immigration Judge also offered to advance the individual merits hearing to the following day, November 21, 2014, in order to accommodate the respondent, but the respondent's counsel turned down the offered merits hearing date. *Id.* After considering that the respondent was a recent entrant to the United States, had made false statements about her name and country of citizenship to CBP, and that she did not have any family in the United States, the Immigration Judge found that a $2,000 bond was appropriate. *Id.* The respondent reserved appeal, while the Department waived appeal. The respondent posted her $2,000 bond on November 25, 2014, and was released from custody. On December 10, 2014, the Immigration Judge certified this case to the Board on the issue of whether an Immigration Judge has authority to release an alien under INA § 236(a) on recognizance pursuant to conditional parole without requiring the posting of a monetary bond. *Id.* at 1.

ARGUMENT

I. INA § 236(A)(2)(B) PROVIDES IMMIGRATION JUDGES WITH AUTHORITY TO RELEASE ALIENS ON CONDITIONAL PAROLE IF CIRCUMSTANCES WARRANT RELEASE WITHOUT PAYMENT OF A MONETARY BOND.

An Immigration Judge has authority under INA § 236(a)(2) to release a respondent on her own recognizance under conditional parole, without a minimum bond of $1,500. No authority precludes an Immigration Judge from releasing a respondent on conditional parole under INA § 236(a)(2)(B), if the circumstances warrant release without bond. The Board arguably disposed of this question in *Matter of Castillo-Padilla*, 25 I&N Dec. 257, 259 (BIA 2010), when it held that an alien released from custody following payment of a $12,000 bond had not been afforded "conditional parole" under section 236(a)(2)(B) of the Act, nor had he been "paroled" into the

United States for humanitarian or other purposes as that term is used in section 212(d)(5) such as might make him eligible for adjustment of status. Distinguishing the multiple conditions that aliens paroled into the United States under section 212(d)(5) face, the Board observed that release under section 236(a)(2)(B)'s conditional parole "does not place any such restrictions on an alien… The alien is merely released from detention 'pending a decision on whether the alien is to be removed from the United States.' Section 236(a) of the Act.") *Matter of Castillo-Padilla, id.*

Under INA § 236(a), the Attorney General or the Secretary of Homeland Security can (1) detain an alien, (2) release on bond of at least $1,500, or (3) release on conditional parole, pending the completion of proceedings. The term "conditional parole," used in INA § 236(a)(2)(B), is not defined in the Act; however, it is a concept that has existed in practice since at least 1950. Prior to 1950, section 20 of the Immigration Act of 1917 gave the Attorney General discretion to release an alien on no less than $500 bond during proceedings, conditioned on the alien being produced for hearings. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917).

Section 23(a) of the Internal Security Act of 1950 added a provision for release of a deportable alien from immigration custody without bond and termed it "conditional parole." *United States ex rel. Lee Ah Youw v. Shaughnessy,* 102 F. Supp. 799, 800-01 (S.D.N.Y. 1952), citing Act of September 23, 1950, c. 1024, Title I sec. 23, 64 Stat. 1010, 8 U.S.C. § 156(a). In 1952, the phrase was adopted into the custody provisions of the Immigration and Nationality Act at former INA § 242(a), the predecessor to INA § 236(a). Act of June 27, 1952, Ch. 477, 66 Stat. 163, 208 (Immigration and Nationality Act or McCarran-Walter Act). "Conditional parole" referred to the release of a deportable alien from immigration custody without bail. *See*

Rubenstein v. Brownell, 206 F.2d 449, 455 (D.C. Cir. 1953) ("Section 242(a) authorizes the Attorney General to keep an alien in custody, release him on bond, or release him on conditional parole."). Thus, under former INA § 242(a), a deportable alien could be released on "conditional parole" pending a final determination on deportability. The three options with regard to custody during the pendency of proceedings in former INA § 242(a) are very similar to the current pre-final order custody provisions of INA § 236(a).[1]

Prior to detention mandates enacted in 1996 and codified in INA § 236, there existed a longstanding presumption of bond eligibility for non-criminal aliens. *See Matter of Patel*, 15 I&N Dec. 666, 666 (1976) ("[a]n alien generally ... should not be detained or required to post bond except on a finding that he is a threat to the national security ... or that he is a poor bail risk.") (citing cases omitted) (superseded by statute with regard to criminal aliens, as stated in *Matter of Valdez-Valdez*, 21 I&N Dec. 703, 703-04 (BIA 1997)). The Supreme Court acknowledged this practice of releasing noncriminal aliens from immigration custody without bond or on their own recognizance. *Carlson v. Landon*, 342 U.S. 524, 533 n.31 (1952) (noting that the Government's custody status list, pending on the date of the enactment of the Internal Security Act, September 23, 1950, indicated that "the modest bonds or personal recognizances of the far larger part of the aliens remained unchanged after the bond amendment to the Immigration Act."); *Demore v. Kim*, 538 U.S. 510, 557 n.12 (2003) ("The INS releases many noncriminal aliens on bond or on conditional parole under § [236(a)(2)] pending removal proceedings").

Since 1996, 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. §§

[1] The 1996 amendment to INA § 236(a) increased the minimum bond amount from $500 to $1500.

1236.1(c)(8). This regulation reversed the longstanding presumption of bond eligibility for non-criminal aliens recognized by the Board in *Matter of Patel, supra; see* 62 Fed. Reg. 10312, 10313 (Mar. 6, 1997). 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. 37, 39-40 (BIA 2006).

The regulations further clarify that Immigration Judges have authority to "detain the alien in custody, release the alien, and determine the amount of bond, *if any*, under which the respondent may be released." 8 C.F.R. § 1236.1(d) (emphasis added). While INA § 236(a)(2)(A) requires release on a bond not lower than $1,500, INA § 236(a)(2)(B) permits release on conditional parole; thus, INA § 236 is internally consistent, and the statute and regulations are harmonious. In interpreting statutory language, if the intent of Congress is clear, the Board "must give effect to the unambiguously expressed intent of Congress." *Matter of Nolasco-Tofino*, 22 I&N Dec. 632, 636 (BIA 1999) (quoting *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Congressional intent is determined from the language of the statute, "the specific context in which that language is used, and the broader context of the statute as a whole." *Matter of Castillo-Padilla*, 25 I&N Dec. at 260 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). A reading of the plain language of INA § 236(a)(2)(A) and (B) together clearly shows that an Immigration Judge can release an alien without bond or with bond. If releasing an alien with the imposition of a monetary bond, the Immigration Judge must set the monetary bond at a minimum of $1,500 under the plain language of INA § 236(a).

The 1952 enactment of the INA also included the addition of the word "parole" to a separate section of the Act – § 212(d)(5) – which provided for the discretionary parole of

excludable aliens. The term "parole" codified in INA § 212(d)(5) referred to a procedure to allow excludable aliens into the United States and which the legacy Immigration and Naturalization Service (INS) had utilized for many years prior to the codification of the term in INA § 212(d)(5) in 1952. *Matter of R-*, 3 I&N Dec. 45, 46 (BIA 1947) ("Parole is an administrative device of long standing."). Prior to the 1952 Act, the enlargement of inadmissible aliens into the United States on parole had been "fashioned out of necessity and without statutory sanction." *Matter of Conceiro*, 14 I&N Dec. 278, 279-80 (BIA 1973). Under the 1952 regime, deportable aliens were not eligible for § 212(d)(5) parole. *See Matter of K-H-C-*, 6 I&N Dec. 295, 298 (BIA 1954) ("The authority to continue to detain aliens in, or release them from custody, provided by [INA § 242] relates solely to an alien apprehended in deportation proceedings. . . . Since this authority relates solely to aliens apprehended in deportation proceedings, it has no application to an alien detained in an exclusion proceeding. Provision for the release of an excluded alien is found in section 212(d)(5)."). Therefore, while lexically similar, the terms "conditional parole" and "parole" referred to two wholly distinct concepts applicable to separate classes of aliens.[2] *See Matter of Castillo-Padilla*, 25 I&N Dec. at 260 (relying on plain language of INA § 236(a)(2)(B) and § 212(d)(5)).

"Conditional parole" under INA § 236(a)(2) is separate and distinct from "parole" under INA § 212(d)(5)(A). *Matter of Castillo-Padilla*, 25 I&N Dec. at 260. Parole under INA § 212(d)(5)(A) is a discretionary authority exclusively held by DHS, to be exercised on a case-by-case basis and restricted to circumstances where urgent humanitarian reasons justify the parole or where a significant public benefit will result from the parole. *Id.* at 261. By contrast, a release on conditional parole under INA § 236(a)(2)(B) may be justified by factors that would not be

[2] In 1996, the enactment of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) expanded the class of aliens eligible for parole under § 212(d)(5), but did not eliminate the distinction between "conditional parole" under INA § 236 and "parole" under section 212.

adequate for parole under section 212(d)(5)(A). *Id.*; *see also Matter of Guerra*, 24 I&N Dec. at 40 ("An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody redeterminations."). For example, a release under INA § 236(a)(2)(B) could be predicated on no more than a determination that the alien does not present a danger to persons or property, is not a threat to national security, and does not pose a flight risk. *See Matter of Guerra, supra*; *Matter of Adeniji*, 22 I&N Dec. 1102, 1111-13 (BIA 1999). A release on conditional parole under INA § 236(a)(2) need not be for humanitarian reasons or for a significant public benefit.

Although sections 212(d)(5)(A) and 236(a)(2) both provide detained aliens a means of securing temporary release from the physical custody of immigration officials, these provisions are separate and distinct, and the legal status of an applicant released under INA § 236(a)(2) is not identical to that of an applicant paroled under INA § 212(d)(5)(A).

Thus both the historical development of the detention statutes and the plain language of section 236(a)(2) of the Act establish that Immigration Judges have authority to either release a detained alien on a monetary bond or, if conditions warrant, to release an alien on conditional parole without requiring the posting of a bond.

II. PRUDENTIAL CONSIDERATIONS WARRANT DISMISSAL OF BOND APPEALS WHERE THERE IS NO ISSUE LEFT FOR THE BOARD TO DECIDE, RESULTING IN AN APPEAL THAT HAS NO PRACTICAL SIGNIFICANCE.

As an administrative tribunal, the Board is not subject to the case-or-controversy requirement of Article III, and therefore its jurisdiction is not governed by the constitutional "mootness doctrine" jurisprudence. *Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 753 (BIA 1999); *see also Matter of Garcia-Garcia,* 25 I&N Dec. 93, 94 (BIA 2009) (same). Nevertheless, the concept of mootness still has a place in Board decision-making as a prudential consideration.

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"[W]here a controversy has become so attenuated or where a change in the law or an action by one of the parties has deprived an appeal or motion of practical significance, considerations of prudence may warrant dismissal of an appeal or denial of a motion as moot." *Luis-Rodriguez, id.*, citing *Valles.*

"Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "[F]ederal courts may not 'give opinions upon moot questions or abstract propositions.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "This means that, throughout the litigation, the [petitioner] 'must have suffered, or be threatened with, an actual injury traceable to the [respondent] and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)); *see also Murphy v. Hunt* ("Hunt"), 455 U.S. 478, 481 (1982) (per curiam) ("In general, a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.") (citations and internal quotation marks omitted). For cases in Article III courts, mootness is a threshold jurisdictional issue. *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 537 (1978); *North Carolina v. Rice*, 404 U.S. 244, 246, (1971) (per curiam); *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007), *cert. denied*, 552 U.S. 1188 (2008). Although the Board is not limited on jurisdictional grounds from considering any pending bond appeal, prudential considerations warrant dismissal of appeals as moot under certain circumstances as a matter of discretion.

A. Where an Alien has been Lawfully Removed Pursuant to a Final Order of Removal, or has been Released from Department Custody without Paying a Bond, the Board Should Dismiss the Bond Appeal as Moot in the Exercise of its Discretion.

1. Lawful Removal Pursuant to a Final Order of Removal Renders a Bond Appeal Moot Because Overturning the Immigration Judge's Bond Decision Would Have No Practical Significance for the Alien.

The Board addresses bond appeals and appeals from the merits of removal cases separately. *Matter of Chirinos*, 16 I&N Dec. 276 (BIA 1977) (holding that bond hearings shall be held separate and apart from deportation hearings); 8 C.F.R. § 1003.19(d). The Board should find, as a prudential matter and in the exercise of its discretion, that an alien's removal from the United States pursuant to the execution of a final order of removal warrants dismissal of an alien's bond appeal, because the challenged bond order has no legal significance since the alien is no longer in Department custody. *See, e.g. Ferry v. Gonzales*, 457 F.3d 1117, 1132 (10th Cir. 2006) (alien's challenge to legality of his immigration detention mooted by his administrative removal from the United States), citing *Soliman v. United States*, 296 F.3d 1237, 1243 (11th Cir. 2002); *Ortez v. Chandler*, 845 F.2d 573, 575 (5th Cir. 1988).

Challenges to immigration detention through habeas petitions filed by aliens who were subsequently removed require a showing of "collateral consequences" as a result of that removal before federal courts will find they have continuing jurisdiction. *Abdala v. INS*, 488 F.3d 1061, 1063 (9th Cir. 2007), *cert. denied*, 552 U.S. 1267, 128 S.Ct. 1671, 170 L.Ed.2d 371 (2008). "For a habeas petition to continue to present a live controversy after the petitioner's release or deportation, however, there must be some remaining 'collateral consequence' that may be redressed by success on the petition." *Id.* at 1064; *see also Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005) ("[B]ecause Handa's petition for a writ of habeas corpus was filed before his

physical removal and because there are collateral consequences as a result of that removal, jurisdiction remains." (footnote omitted)); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1049 (9th Cir. 2004) ("Although the INS has removed [petitioner] to Portugal, and he is therefore no longer in custody, we continue to have jurisdiction because he filed his habeas petition before his removal and 'continues to suffer actual collateral consequences of his removal.'").

Similar prudential considerations apply in the interplay between immigration removal proceedings and bond appeals. But unlike a habeas petition in federal court, which seeks release or to address conditions of custody, there are no collateral consequences to an Immigration Judge's bond order that would survive the alien's removal from the United States following a final order. Any collateral consequence that might attach to an alien's removal occurs as a result of the removal itself, not as a result of the Immigration Judge's denial of bond. *See, e.g., Abdala*, 488 F.3 at 1065 (alien's challenge to length of immigration detention mooted by deportation; no collateral consequences or controversy left for court to decide because alien's deportation "cur[ed] ... complaints about the length of his INS detention"); *compare Zegarra-Gomez v. INS*, 314 F.3d 1124, 1125-27 (9th Cir. 2003) (challenge to denial of section 212(c) waiver resulted in collateral consequence that survived after alien's deportation, because alien's inadmissibility due to conviction would bar return); *Matter of Luis-Rodriguez*, 22 I&N Dec. at 752 (alien's departure to Cuba pursuant to stipulation with deportation proceedings still pending did not moot government's appeal).

A challenge based on collateral consequences to the removal itself remains viable despite the alien's physical removal, so the alien is not without remedies. An alien who has been removed from the United States may be entitled to continue to challenge his removal through a petition for review despite their physical removal from the United States. *See Coyt v. Holder*,

593 F.3d 902, 907 (9th Cir. 2010) (physical removal of petitioner by United States does not preclude petitioner from pursuing motion to reopen); *Nken v. Holder*, 556 U.S. 418, 424 (2009) (noting that Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–612, lifted prior ban on adjudication of petition for review once alien has been deported).

There is simply no practical reason for the Board to adjudicate the merits of a bond appeal once an alien has been removed from the United States pursuant to a final order. As a prudential matter the Board should dismiss such bond appeals as moot.

2. Release from Custody on Recognizance While an Alien's Bond Appeal is Pending Moots the Appeal Because the Alien Already Obtained the Relief Sought.

The same reasoning applies to bond appeals filed by aliens who were subsequently released from Department custody on their own recognizance. "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and ... the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *Burnett v. Lampert*, 432 F.3d 996, 999 (9th Cir. 2005). Similarly, an alien appealing an Immigration Judge's bond order challenges the legality of that bond order and seeks release from Department custody, either by eliminating the requirement of paying a bond or by reducing the bond amount. If release from custody has already occurred because the Department reconsidered its position on bond, the bond appeal is moot, because the alien is no longer in custody and retains no financial interest in the outcome since he has not paid a bond to be released. *See Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991) (alien's release from custody is same relief sought in habeas, so "there is no further relief [the court] can provide."); *Sayyah v. Farquharson*, 382 F.3d 20, 22 n. 1 (1st Cir. 2004) (claim of indefinite detention

mooted by release from custody); *Riley v. INS*, 310 F.3d 1253, 1257 (10th Cir. 2002) ("Appellant's release from detention moots his challenge to the legality of his extended detention.").

As with aliens already removed following final orders, there is no reason for the Board to adjudicate the merits of a bond appeal if the Department has exercised its authority to release the alien on recognizance. Similarly, the Board need not entertain on the merits an appeal from an alien following the Immigration Judge's decision to release that alien on recognizance under INA § 236(a)(2)(B) (providing for release on "conditional parole") when the Immigration Judge has neither required any minimal bond under INA § 236(a)(2)(A) nor placed other restrictions on release, because there would be no conditions for the Board to ameliorate. *See Matter of Castillo-Padilla*, 25 I&N Dec. at 259 ("In contrast, section 236(a) does not place any such restrictions on an alien who is released on conditional parole. The alien is merely released from detention 'pending a decision on whether the alien is to be removed from the United States.' Section 236(a) of the Act.") As a prudential matter the Board should dismiss such bond appeals as moot.

3. An Alien's Release from Custody after a Second Bond Hearing Likewise Moots an Appeal Pending from an Immigration Judge's First Bond Hearing.

Unlike appeals from the merits of removal cases, in which the Immigration Judge loses jurisdiction once an appeal is filed with the Board, aliens may file successive motions for bond redetermination without regard to a pending appeal of a previous bond order. The regulations allow for successive bond requests if the alien can establish a material change in the alien's circumstances since the prior bond redetermination, and as long as a final order of removal has not been entered. 8 C.F.R. §§ 1003.19(e), 1236.1(d)(3)(i); *Matter of Valles-Perez*, 21 I&N Dec.

at 772. Should the second bond redetermination hearing result in the alien's release from custody, with or without payment of a bond, any appeal pending from the first bond redetermination hearing should be deemed moot. *Id.* at 773. Should the alien wish to challenge the conditions set by the Immigration Judge at the second bond hearing, the proper avenue would be a second bond appeal.

B. The Board Need Not Dismiss as Moot Bond Appeals in Which an Alien or the Alien's Obligor has Paid an Immigration Bond and the Alien has Been Released, Since the Appeal Has Practical Significance.

In contrast, an alien's release from Department custody following payment of a cash bond or a surety bond paid through a bail bondsman does not necessarily "deprive [the] appeal ... of practical significance." *Luis-Rodriguez*, 22 I&N Dec. at 753. Aliens, or their obligor(s), who have paid an immigration bond are required to either pay cash or to locate and pay an agent (immigration bond company) to post the bond. If the alien or the alien's obligor pays a cash bond, funds are held by the Department, the beneficiary of the bond, until after an alien's removal proceedings have been completed, preventing the alien or the alien's obligor from using these funds for other purposes. If an alien secures his immigration bond through an agent, that agent may charge a non-refundable fee, in addition to interest or an annual premium. In either scenario, an alien's successful challenge to the amount of bond ordered by an Immigration Judge could result in a re-negotiation of the bond amount paid, freeing up funds for the alien or the alien's obligor to use for other purposes.

The Department does not ask the Board to dismiss the instant bond appeal as moot, because the respondent retains a financial interest in the outcome of the bond appeal even though

she has been released from custody and given that the merits of her removal case may not be decided in the near future.[3]

III. THE PROCEDURES SET FORTH IN 8 C.F.R. §§ 1236.1(D)(1), (2), AND (3) RELATING TO THE DEPARTMENT'S AUTHORITY TO AMELIORATE THE TERMS AND CONDITIONS OF RELEASE DO NOT LIMIT THE BOARD'S AUTHORITY TO DECIDE BOND APPEALS.

A. Applicable Regulations Grant the Board Broad Jurisdiction over Bond Appeals.

An Immigration Judge's authority to conduct a bond hearing is governed by statute, regulation, the binding authority of this Board's published decisions and those of the Attorney General, and the published authority of the geographically relevant Circuit Court of Appeals. In the context of custody proceedings, an Immigration Judge's authority to redetermine conditions of custody is set forth in INA § 236 and 8 C.F.R. § 1236.1(d). Generally speaking, an Immigration Judge only has authority to issue a bond when a Notice to Appear has been filed with the Immigration Court. *Matter of A-W-*, 25 I&N Dec. 46-47 (BIA 2009).

The Board's authority to set bond conditions on appeal from an Immigration Judge's order derives from the Immigration Judge's underlying authority to redetermine conditions of custody, and is governed by the various regulations addressing custody and bond determinations. *Matter of Adeniji*, 22 I&N Dec. at 1105, citing to 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), and 1236.1(d)(3)(i). As part of its general appellate role, the Board also has independent authority to assess the record and make its own bond determination under current law. *Matter of Adeniji*, 22 I&N Dec. at 1106, citing to *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994).

[3] As of the date of this brief, the respondent's removal case remains on the non-detained calendar but does not have a future hearing date set.

B. 8 C.F.R. § 1236.1(d) More Specifically Defines the Board's Appellate Jurisdiction in Bond Proceedings, but Does Not Otherwise Limit it.

The regulation at issue provides several paths for an alien to challenge the Department's initial bond determination made under INA § 236(a) depending on the timing and circumstances. An alien may ask an Immigration Judge to redetermine the Department's custody decision at any time prior to an administratively final order of removal. 8 C.F.R. § 1236.1(d)(l). If the alien has been released from Department custody, the Immigration Judge may consider a request to ameliorate the terms of release if the request is filed within seven days after release. *Id.* If an alien has been released from Department custody and seven days have passed, the alien may ask the Department to review the conditions of its initial bond determination. 8 C.F.R. § 1236.1(d)(2). Finally, an alien may appeal the Immigration Judge's or the Department's decision to the Board. 8 C.F.R. § 1236.1(d)(3).[4]

The Board has addressed this regulation in several published cases, holding that an Immigration Judge lacks jurisdiction to consider an alien's request for amelioration of terms of release following release from Department custody if the alien fails to make the request within 7

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[4] 8 C.F.R. § 1236.1(d) states in relevant part:
(d) Appeals from custody decisions—(1) Application to immigration judge. After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 1240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in §1003.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.
(2) Application to the district director. After expiration of the 7-day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.
(3) Appeal to the Board of Immigration Appeals. An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:
(i) In accordance with §1003.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.
(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

days of release as required by 8 C.F.R. § 1236.1(d)(1); *Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 753 (BIA 2009); but that where such a request for amelioration of bond conditions is timely made, the Immigration Judge had jurisdiction to consider an alien's request to have the Department's electronic monitoring bracelet removed. *Matter of Garcia-Garcia*, 25 I&N Dec. at 95-96.

Nothing in the language of this regulation or the Board decisions discussing it limits the Board's authority to decide bond appeals as a prudential matter. Other regulations cross-reference § 1236.1(d); *see* 8 C.F.R. § 1003.1(b)(7) governing the Board's general appellate jurisdiction; but are less specific in scope and do not provide additional guidance.

In practical terms, if an Immigration Judge ameliorates the Department's bond conditions following an alien's release from custody under this regulation, the request had to have been made within seven days of release. 8 C.F.R. § 1236.1(d)(1). If the alien subsequently files an appeal and the relief sought by the alien through the appeal was obtained instead by the Immigration Judge's amelioration of bond conditions, the Board could appropriately dismiss such appeal as moot. However, as a practical matter this scenario is unlikely unless the alien filed the appeal before seeking amelioration of the Department's bond conditions from the Immigration Judge. The same logic would apply if amelioration was instead granted by the Department after seven days had passed since the alien's release. That is, if the same relief sought at the Immigration Judge bond hearing was granted instead by the Department under section 1236.1(d)(2), then the Board should find the bond appeal moot as a prudential matter.

Conversely, if the basis for the bond appeal of the initial Immigration Judge bond order was different from the post-release amelioration granted by either the Immigration Judge or the Department, the bond appeal would not necessarily be moot.

Guerra, 24 I&N Dec. at 40.

The respondent was a recent entrant to the United States when she was encountered by CBP near the United States' border with Mexico on June 25, 2014. The respondent initially claimed she was a citizen of Mexico. CBP only learned that the respondent is actually a citizen of Guatemala after the she was interviewed by an official from the Mexican Consulate who determined that she was a citizen of Guatemala. The respondent also misrepresented her name to CBP. She lacks any family ties in the United States. She has no work history in the United States, but no criminal or prior immigration history. Due to the respondent's recent immigration history, including her deception at the border concerning her country of citizenship, and her non-existent family ties, the Immigration Judge appropriately determined that setting a monetary bond rather than releasing the respondent on conditional parole was appropriate in this matter. The Immigration Judge properly determined that bond in the amount of $2,000 was appropriate in light of the facts of the respondent's case.

Given the respondent's admissions that she lied to immigration officers about her identity and nationality, the Immigration Judge's resulting bond order of $2,000 was eminently reasonable. As the Immigration Judge observed, the Board allows judges to deny bond as a matter of discretion even if an alien has established that she is not a danger to the community or a flight risk. I.J. at 3, citing *Matter of Guerra*, 24 I&N Dec. at 39; *Matter of D-J-*, 23 I&N Dec. at 575-76. As such, the Immigration Judge's decision to require payment of a modest monetary bond based on the respondent's admissions to lying to immigration officers, and her declining the earliest available hearing date, was reasonable. Moreover, the respondent was able to post the bond and has been released from custody.

CERTIFICATE OF SERVICE

Case Control Name: [redacted]

File No.: A[redacted]

I hereby certify and declare under penalty of perjury that, on January 20, 2015, I caused to be served the attached documents:

DEPARTMENT OF HOMELAND SECURITY
SUPPLEMENTAL BRIEF ON APPEAL

☒ by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed by first class mail to the person at the address set forth below;

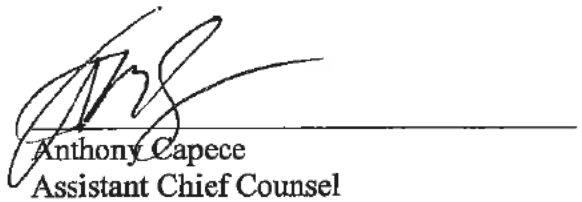
☐ by causing to be personally delivered a true copy thereof to the person at the address set forth below;

☐ by electronic filing, in accordance with applicable regulations, to the person at the address set forth below;

☐ by FEDERAL EXPRESS to the person at the address set forth below;

☐ by telefaxing with acknowledgment of receipt to the person at the address set forth below:

Elizabeth Benki, Esq.
Northwest Immigrant Rights Project
402 Tacoma Ave. South, Suite 300
Tacoma, WA 98402



Anthony Capece
Assistant Chief Counsel
1623 East J Street, Suite 2
Tacoma, WA 98421

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

Adams, Matt
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98104

DHS/ICE Office of Chief Counsel - TAC
1623 East J Street, Ste. 2
Tacoma, WA 98421

Name: V [redacted], E [redacted] **A [redacted]**

Date of this notice: 9/14/2015

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Malphrus, Garry D.
Grant, Edward R.
Guendelsberger, John

TranC
Userteam: Docket

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A[redacted] – Tacoma, WA Date: SEP 14 2015

In re: E[redacted] V[redacted] aka E[redacted] R[redacted] M[redacted] a.k.a. E[redacted] M[redacted]

IN BOND PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Matt Adams, Esquire

ON BEHALF OF DHS: Anthony Capece
Assistant Chief Counsel

APPLICATION: Custody Redetermination

The Immigration Judge requested certification of the following issue to the Board: whether she has authority under section 236(a)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1226(a)(2)(B), to grant the respondent conditional parole—that is, release on her own recognizance—or whether an Immigration Judge is required in bond proceedings to set a minimum $1,500 bond. In her decision, the Immigration Judge found that, based on the facts of the case, a $2,000 bond was appropriate to ensure the respondent's appearance at future proceedings. The Immigration Judge did not address whether she had the authority under the Act to release the respondent on her own recognizance, or whether conditional parole was appropriate. The respondent has paid the $2,000 bond and is currently awaiting a hearing on the merits of her case.

The regulations require an Immigration Judge to enter an initial decision regarding the issue on certification prior to certifying the case to Board. *See* 8 C.F.R. § 1003.7 (providing that an Immigration Judge may certify a case only after an initial decision has been made). Because the Immigration Judge did not address whether she has authority to grant conditional parole under section 236(a)(2)(B) of the Act prior to certifying this case, the Board finds that it is not prudent to review the issue on certification at this time. As a consequence, the Board will, in its discretion, deny the Immigration Judge's request for certification. *See* 8 C.F.R. § 1003.1(c) (stating that the Board may, in its discretion, review any case by certification without regard to the regulatory provision set forth at 8 C.F.R. § 1003.7). Moreover, neither party appealed the Immigration Judge's bond order and the respondent has apparently posted the $2,000 bond and is no longer detained.

ORDER: The Immigration Judge's request for certification is denied.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 EAST J STREET, SUITE 3
TACOMA, WASHINGTON 98421

In the Matter of _____ (print your name here) Respondent.	A _____ (write your A number here) IN REMOVAL PROCEEDINGS DETAINED

MOTION REQUESTING HEARING FOR CUSTODY REDETERMINATION

I am the Respondent and I am pro se. I respectfully request that the Court grant me release on recognizance under INA § 236(a)(2)(B). I have no ability to pay a monetary bond and thus am not requesting a bond under § 236(a)(2)(A), but instead release under § 236(a)(2)(B). Section 236(a) of the Act provides for either the posting of a monetary bond or "conditional parole" as follows:

> Except as provided in subsection (c) of this section and pending such decision, the Attorney General—
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole;

INA § 236(a); *see also* 8 C.F.R. § 1236.1(d)(1). As a federal court recently declared in providing declaratory and injunctive relief, "[INA § 236(a)] unambiguously states that an [Immigration

Judge] may consider conditions for release beyond a monetary bond." *Rivera v. Holder*, --- F.R.D. ----, 2015 WL 1632739, at *12 (W.D. Wash. 2015). *See also In re Joseph*, 22 I. & N. Dec. 799, 800, 809 (BIA 1999) (upholding the Immigration Judge's order releasing individual on his own recognizance after determining that he was properly considered for release on recognizance under INA § 236(a)); *Matter of Patel*, 15 I. & N. Dec. 666, 667 (BIA 1976) (ordering, under former INA § 242(a), that the "respondent shall be released from custody on his own recognizance").

I am not a flight risk or danger as required for either a bond or release on conditional parole. *See* 8 C.F.R. 1236.1(c)(8) (an official may release a person "under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceedings."). As I have no resources or assets in the United States, I am unable to pay the minimum bond. Therefore, I am only requesting release under INA § 236(a)(2)(B).

I have a stable location to live and support to ensure I will attend all future court hearings. My record also shows that I would not pose a danger to property or persons, such that I should be denied bond or conditional parole.

I submit the following documents in support of custody redetermination:

No.	**Document**
1	
2	
3	
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I have these family members in the United States:

Name	**Relationship**	**Status**	**Address**

If I am released, I will reside at the following address:

_____

_____

_____

Respectfully submitted on: _____

Date

_____

Signature
Respondent, *pro se*

I _____, certify that I mailed a copy of this document to:
(print your name here)

Office of the Chief Counsel
Immigration and Customs Enforcement
_____
_____

_____ _____

Signature Date

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 EAST J STREET, SUITE 3
TACOMA, WASHINGTON 98421

In the Matter of	A _____ (write your A number here)
_____ (print your name here)	IN REMOVAL PROCEEDINGS
Respondent.	DETAINED

MOTION REQUESTING HEARING FOR CUSTODY REDETERMINATION

I am the Respondent and I am pro se. I respectfully request that the Court release me under conditional parole as provided by INA § 236(a)(2)(B); or, in the alternative, grant me a minimum bond of $1,500 as provided under INA § 236(a)(2)(A).

As a federal court recently declared in providing declaratory and injunctive relief, "[INA § 236(a)] unambiguously states that an [Immigration Judge] may consider conditions for release beyond a monetary bond." *Rivera v. Holder*, --- F.R.D. ----, 2015 WL 1632739, at *12 (W.D. Wash. 2015). *See also In re Joseph*, 22 I. & N. Dec. 799, 800, 809 (BIA 1999) (upholding the Immigration Judge's order releasing individual on his own recognizance after determining that he was properly considered for release on recognizance under INA § 236(a)); *Matter of Patel*, 15 I. & N. Dec. 666, 667 (BIA 1976) (ordering, under former INA § 242(a), that the "respondent shall be released from custody on his own recognizance").

I submit the following documents in support of custody redetermination:

No.	Document
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I have these family members in the United States:

Name	Relationship	Status	Address

I have lived in the United States for _____ years. If I am released, I will reside at the following address:

_____

_____

_____

Respectfully submitted on: _____
Date

_____
Signature
Respondent, *pro se*

I _____, certify that I mailed a copy of this document to:
(print your name here)

Office of the Chief Counsel
Immigration and Customs Enforcement
_____
_____

_____ _____
Signature Date

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 EAST J STREET, SUITE 3
TACOMA, WASHINGTON 98421

In the Matter of	A _____ (write your A number here)
_____ (print your name here)	IN REMOVAL PROCEEDINGS
Respondent.	DETAINED

MOTION REQUESTING HEARING FOR NEW CUSTODY REDETERMINATION

I am the Respondent and I am pro se. I respectfully request that the Court provide a new custody redetermination because circumstances have changed materially since my prior bond hearing. *See* 8 C.F.R. § 1003.19(e). I also ask that the Court grant me release on recognizance under INA § 236(a)(2)(B). I have no ability to pay a monetary bond and thus am not requesting a bond under § 236(a)(2)(A), but instead release under § 236(a)(2)(B).

On _____ (date), this Court held a bond hearing and granted me release on _____ (amount) bond. However, because I lack the adequate financial means, I have been unable to post bond and remain in detention. On April 13, 2015, a federal district court held that "[INA § 236(a)] unambiguously states that an [Immigration Judge ("IJ")] may consider conditions for release beyond a monetary bond" and granted declaratory and injunctive relief requiring that IJs consider requests for release on conditional parole as an alternative to a monetary bond. *Rivera v. Holder*, --- F.R.D. ----, 2015 WL 1632739, at *12 (W.D. Wash. 2015) (construing INA § 236(a)(2)(B)). *See also In re Joseph*, 22 I. & N. Dec. 799, 800, 809 (BIA 1999) (upholding the

IJ's order releasing individual on his own recognizance after determining that he was properly considered for release on recognizance under INA § 236(a)); *Matter of Patel*, 15 I. & N. Dec. 666, 667 (BIA 1976) (ordering, under former INA § 242(a), that the "respondent shall be released from custody on his own recognizance"). The federal court's ruling is a material change in circumstances that warrants a new custody redetermination where this Court can consider my request for conditional parole. *See* 8 C.F.R. § 1003.19(e).

I am not a flight risk or danger as required for either a bond or release on conditional parole. *See* 8 C.F.R. 1236.1(c)(8) (an official may release a person "under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceedings."). As I have no resources or assets in the United States, I am unable to pay the minimum bond. Therefore, I am only requesting release under INA § 236(a)(2)(B).

I have a stable location to live and support to ensure I will attend all future court hearings. My record also shows that I would not pose a danger to property or persons, such that I should be denied bond or conditional parole.

I submit the following documents in support of custody redetermination:

No.	**Document**
1	
2	
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I have these family members in the United States:

Name	**Relationship**	**Status**	**Address**

If I am released, I will reside at the following address:

_____

_____

_____

Respectfully submitted on: _____

Date

_____

Signature
Respondent, *pro se*

I _____, certify that I mailed a copy of this document to:
(print your name here)

Office of the Chief Counsel
Immigration and Customs Enforcement
_____
_____

_____ _____

Signature Date