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

In the Matter of:	
K[redacted], A[redacted]	File No. **A[redacted]**
In Bond Proceedings	

RESPONDENT'S BRIEF IN SUPPORT OF APPEAL

This is a case in which an Immigration Judge ("IJ") denied to set a bond in the case of a Respondent who holds two masters degrees in business administration, was shot at by the Pakistani Taliban because of his work with organizations promoting youth education and health, and who if released from detention would live with his U.S. citizen cousin who is a contractor for the U.S. Department of the Treasury. The IJ's decision denying bond is not only legal error, but completely disregards over 75 pages of evidence based upon which any reasonable adjudicator would have found that Respondent was not a flight risk. The decision below makes it abundantly clear that no recent-entrant asylum seeker can obtain bond from this IJ regardless of the evidence, and must therefore be reversed.

Here, Respondent Mr. A[redacted] K[redacted] ("Mr. K[redacted]" or "Respondent") was denied bond as a flight risk despite demonstrating a fixed address, family ties in the United States, and a strong likelihood of permanent immigration relief based on his pending asylum claim. The IJ's decision denying bond failed to cite recent relevant Board of Immigration Appeals ("BIA") precedent, and did not appropriately apply the bond factors the Court considered. The IJ also ignored important documentation of the claim that was submitted to court, including Mr. K[redacted]'s positive credible fear determination, and failed to consider additional important factors that are relevant

to Mr. K[redacted]'s likelihood of flight. This Board must reverse the IJ's determination and grant Mr. K[redacted] a bond of $1500. Because the appropriate standards for determining immigration bond are an issue of on-going importance and will provide guidance to immigration courts nationwide, this Board should publish its opinion.

JURISDICTION & STANDARD OF REVIEW

This appeal was timely filed on July 21, 2017; therefore, this Board has jurisdiction pursuant to 8 C.F.R. §§ 1003.1(b)(3) and 1003.1(b)(7). This Board may review all questions of law, discretion, and judgment in appeals from decisions of IJs *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii). The Board reviews an IJ's factual findings to determine if they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). The facts in this case are not in dispute. As this case presents questions of law and discretion, this Board exercises *de novo* review.

REVIEW BY A THREE-MEMBER PANEL

A review by a three-member panel is requested and appropriate in this case because it presents the need to reverse the decision of an IJ other than under 8 CFR § 1003.1(e)(5); to review a clearly erroneous factual determination by an IJ; to establish a precedent regarding the appropriate application of *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006), to recent-entrant asylum-seekers; and to review an IJ decision that is not in conformity with applicable BIA precedent decisions. 8 C.F.R. § 1003.1(e)(6).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Respondent entered the United States near [redacted] California, and was taken into custody on February 11, 2017. He entered the United States because he feared for his life in

Pakistan. On March 3, 2017, an asylum officer conducted a Credible Fear Interview pursuant to INA §235(b). The asylum officer found a "significant possibility" that Respondent could establish eligibility for asylum under section 208 of the Immigration and Nationality Act ("the INA" or "the Act"). INA § 235(b)(1)(B)(v).In making this finding, the asylum officer relied on testimony elicited during an extensive interview conducted through an Urdu interpreter that lasted more than an hour, and on other such facts as were known to the asylum officer, including country conditions information. *See* INA §235(b)(1)(B)(v) (providing that asylum officers shall make credible fear determinations based on "such other facts" known to them). The asylum officer found that Mr. K[redacted]'s assertions were credible and determined that Mr. K[redacted] had a credible fear of persecution or torture in Pakistan on account of his political opinion.

By operation of regulation, the expedited removal order was vacated and Mr. K[redacted] was issued a Notice to Appear ("NTA") on or about March 8, 2017. 8 C.F.R. §208.30(f). The NTA charged him with removability under section 212(a)(7)(A)(i)(I) of the Act, alleging that Mr. K[redacted] applied for admission to the United States without a valid entry document. Mr. K[redacted] subsequently filed a motion for bond and an I-589 application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT") before the Stewart Immigration Court.

On July 14, 2017, IJ Randall Duncan conducted Mr. K[redacted]'s bond hearing. Mr. K[redacted]n was represented by a pro bono attorney with the Southeast Immigrant Freedom Initiative.[1] Mr. K[redacted] presented extensive supporting documents, including his identity documents, police certificates establishing his lack of any criminal record, letters and award certificates from former employers

[1] The Southeast Immigrant Freedom Initiative (SIFI), led by the Southern Poverty Law Center, provides *pro bono* legal representation to immigrants who are detained in the southeastern United States. SIFI endeavors to protect the due process rights of detained immigrants in removal proceedings and to ensure the success of every meritorious claim for removal relief. *See* Southeast Immigrant Freedom Initiative, available online at https://www.splcenter.org/our-issues/immigrant-justice/southeast-immigrant-freedom-initiative.

attesting to his good character and work ethic, educational certificates and postgraduate degree diplomas, a letter from Mr. K[redacted]'s cousin stating he will sponsor and support Mr. K[redacted], an affidavit by Mr. K[redacted] attesting to his relationship to his cousin, identity documents for Mr. K[redacted]'s cousin including evidence of his employment as a U.S. government contractor, earnings statements and invoices demonstrating Mr. K[redacted]'s cousin's ability to financially support him, a declaration by Mr. K[redacted] discussing threats from his persecutors, a report describing the presence and violent acts of the Taliban in Pakistan, a copy of Mr. K[redacted]'s credible fear determination, and a copy of Mr. K[redacted]'s Form I-867A. Through his *pro bono* attorney, Mr. K[redacted] requested a grant of *de minimis* bond as he was not mandatorily detained, had no criminal record, and was not a flight risk. Mr. K[redacted] emphasized his family and community ties in the United States and the strength of his pending asylum claim, as supported by his positive credible fear determination and additional corroborating documents submitted to the court.

The IJ denied bond at the conclusion of the hearing and Mr. K[redacted] reserved appeal. Mr. K[redacted] filed a timely appeal this Board on July 21, 2017. Mr. K[redacted] remains detained at the Stewart Detention Center while his appeal is pending, and now submits the instant brief on support of his appeal. His individual hearing is currently scheduled for September 19, 2017.

II. THE IMMIGRATION JUDGE'S DECISION

On July 14, 2017, the IJ denied bond based on his conclusion that Mr. K[redacted] was a flight risk. The IJ produced a non-contemporaneous bond memorandum on July 31, 2017 (hereinafter "Bond Order"). In his written decision, the IJ noted that Mr. K[redacted] was not found to be mandatorily detained and was not found to be a danger to the community. However, the IJ determined that Mr. K[redacted] failed to meet his burden of proving that he is not a flight risk. The

decision provides compelling evidence that it is impossible for any recent-entrant asylum-seeker to obtain bond from this IJ regardless of the evidence submitted.

In assessing Mr. K[redacted]'s potential risk of flight, the IJ identified the key factors bearing on Mr. K[redacted]'s potential risk of flight as his community ties, length of time in the United States, and the likelihood that he will be entitled to relief. Bond Order at 3-4. The IJ found that having a cousin who is a United States citizen with a fixed address and ability to support Mr. K[redacted] did not constitute sufficiently significant community ties, and that Mr. K[redacted]'s recent entrance into the United States did not constitute a sufficient length of presence. Bond Order at 4. The IJ also discussed the potential success of Mr. K[redacted]'s asylum application and found that "given the evidence currently before the Court, the likelihood of success on the merits…is speculative at this time, especially with regards to nexus to a protected ground." Bond Order at 3.

Based on his conclusion that Respondent had not met his burden of showing that he was not a flight rise, the IJ denied bond.

STATEMENT OF FACTS

Mr. K[redacted] is a thirty-one-year-old citizen of Pakistan. Bond Motion, Tab A. He fled Pakistan to seek protection in the United States because while working in Pakistan to support education for women and provide aid to the poor, Tehrik-e-Taliban ("TTP" or "Taliban"), a well-known terrorist group operating throughout Pakistan, repeatedly threatened his life. Bond Motion, Tabs N, P.

Mr. K[redacted] has acquired multiple advanced degrees from both Pakistan and the United Kingdom. Bond Motion, Tab H. After finishing his education in the United Kingdom, Mr. K[redacted] returned to Pakistan seeking to improve the lives of the poor in the area he is from. Bond Motion, Tabs N, P. In the region called Federally Administered Tribal Areas (FATA), near Mr. K[redacted]'s

home province of Khyber Pakhtunkhwa, education is limited, especially for women, due to cultural and religious restraints and Taliban presence and control in the area.[2] *Id*. Thus, Mr. K[redacted] sought to work to improve the conditions in these areas. *Id*.

In January 2016 Mr. K[redacted] began working for Youth Welfare, a non-governmental organization ("NGO") that focuses on blood donations to help with medical needs of the poor, children's education, and women's education and empowerment.[3] Bond Motion, Tabs N, P. However, sometime after February 20, 2016, Mr. K[redacted] received a threatening phone call telling him to stop working for Youth Welfare and that he would not be spared if he continued to do so. *Id*. The caller also accused Mr. K[redacted] of advancing a foreign agenda with America's funds and destroying Pakistan's cultural and religious values. *Id*.

From March through May 2016, he received more threatening calls. Bond Motion, Tabs N, P. During the second call, the caller identified himself as a member of TTP and again threatened Mr. K[redacted]'s life. *Id*. He also told Mr. K[redacted] that "there is no hiding place in Pakistan, where you would hide form us" and "we have operating cells all over" Pakistan. *Id*. He said "you could be easily found and get executed. So you cannot hide from us." *Id*. In his final call, the caller warned that next time "I will show you some live action." *Id*. On May 29, 2016, TTP fired shots at a Youth Welfare vehicle Mr. K[redacted] was in, and the driver was struck with a bullet on his hand. *Id*. Luckily, Mr. K[redacted] and other passengers were able to escape, and sustained only minor injuries. *Id*. The next day, Mr. K[redacted] and the Youth Welfare director went to the local police to report the incident. *Id*. The police did not take any action or file a report due to their fear of the

[2] TTP's presence in the region and its opposition to women's education is well known. The widely reported shooting of Malala Yousafzai in Swat alley of Khyber Paktunkhwa is one example of the Taliban's attacks on activists for women's education. *See* Mishal Husain, *Malala; The girl who was shot for going to school*, BBC NEWS (Oct. 7, 2013), http://www.bbc.com/news/magazine-24379019; Declan Walsh, *Taliban Gun Down Girl Who Spoke Up for Rights*, The New York (Oct. 9, 2012), http://www.nytimes.com/2012/10/10/world/asia/teen-school-activist-malala-yousafzai-survives-hit-by-pakistani-taliban.html.

[3] Youth Welfare Organization, http://www.ywo.org.pk/ (last visited June 18, 2017).

Taliban. *Id*. The police inspector advised Mr. K[redacted] to leave the country if possible due to the danger to his life. *Id*. Mr. K[redacted] also sought help from the military police, but the military police did not help him and gave him a similar answer telling him to hide. *Id*. In August, Mr. K[redacted] fled Pakistan for the U.S. to seek safety from his persecutors in Pakistan. *Id*. He believes he will be killed or tortured by TTP if he returns to Pakistan. *Id*.

ARGUMENT

Mr. K[redacted] should be released from custody because he is neither a danger to the community nor a flight risk. To the extent that any risk of flight exists, there are conditions of release that will reasonably assure his appearance in court. Reviewing the matter *de novo*, this Board should order Mr. K[redacted] released on the posting of a $1500 bond. *See* INA § 236(a)(2)(A) (providing for a monetary bond of $1500); 8 C.F.R. § 1236.1(d) (providing for review of custody).

Under BIA precedent, "[a]n alien generally is not and 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." *Matter of Patel*, 15 I&N Dec. 666, 666 (BIA 1976); *see also Stack v*. *Boyle*, 342 U.S. 1, 5 (1951) (finding that in the criminal context, "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant"). This Board has also found that "an assessment of [an] alien's danger to property or persons is a relevant consideration" in determining release on bond. *Matter of Adeniji*, 22 I&N Dec. 1102, 1103 (BIA 1999) (citing 8 C.F.R. § 236.1(c)(8)). In *Matter of Guerra*, 24 I&N Dec. at 40, this Board delineated nine nonexclusive factors that may be considered by an immigration judge in determining whether to grant bond and the amount of bond that is appropriate:

> (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the

> future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.

These factors are similar to the bond factors considered in the federal criminal context "in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." *See* 18 U.S.C. 3142(g); *U.S. v. Salerno*, 481 U.S. 739, 742–43 (1987) (noting with approval that the specification of relevant factors ensures that a "judicial officer is not given unbridled discretion in making the detention determination").

It is undisputed that Mr. K[redacted] is not a danger to the community. Applying the *Matter of Guerra* factors *de novo*, it is also clear that Mr. K[redacted] does not pose a flight risk. *See* 24 I&N Dec. at 40. The IJ therefore erred in denying bond based on Mr. K[redacted]'s risk of flight, and this Board must reverse the IJ's decision, grant Mr. K[redacted] release on a $1500 bond, and issue a published precedent decision strongly condemning the Stewart Immigration Court's practice of categorically denying bond to all recent-entrant asylum-seekers regardless of the evidence presented.

I. RESPONDENT IS NOT A DANGER TO THE COMMUNITY

The Department has not alleged that Mr. K[redacted] is a danger to society, and IJ did not discuss the issues of danger to society in his Order, such that there is no dispute that Mr. K[redacted] is not a danger to society. *See* Bond Order.

II. RESPONDENT IS NOT A DANGER TO NATIONAL SECURITY

During his credible fear interview, Mr. K[redacted] was found to be credible and to have a credible fear of persecution from the TTP on account of his imputed pro-Western political opinions. Respondent submits that his activities in Pakistan supporting access to healthcare for those living in poverty and the education of women and girls in rural areas evidence values that very much align with those publicly espoused by the United States, such that he could fairly be said to be an asset to the community and the nation rather than a danger to it. In any event, the IJ did not discuss any potential danger to national security in his Order, and there can therefore be no dispute now that Mr. K[redacted] is not a danger to national security. Bond Motion, Tab P.

III. RESPONDENT IS NOT A FLIGHT RISK AND THERE ARE CONDITIONS OF RELEASE THAT WILL REASONABLY ASSURE HIS APPEARANCE AT ALL FUTURE HEARINGS

The totality of factors presented in this case, as assessed below, plainly indicate that Mr. K[redacted] is not a flight risk. *See Matter of Guerra*, 24 I&N Dec. at 40. To the extent there is any bail risk, there are conditions of release, such as the posting of a $1500 bond, that will reasonably assure his appearance at all future hearings. *See Matter of Drysdale*, 20 I&N Dec. 815, 817–18 (BIA 1994) (noting that flight risk is a flexible standard under which an IJ should set bond "according to his assessment of the amount needed to motivate the respondent to appear in light of the considerations deemed relevant to bond determinations").

In the case at bar, the IJ failed to so much as even cite *Matter of Guerra* in his decision, failed to justify his reliance on certain discretionary release factors over others, and failed to appropriately assess those factors that he did rely upon. A *de novo* review of the *Matter of Guerra* factors compels the conclusion that Respondent is not a flight risk and therefore merits release on a *de minimis* bond. Respondent will now address each of these arguments in turn.

A. The IJ failed to cite *Matter of Guerra* and failed to justify his reliance on certain discretionary factors over others.

In his decision, not only did the IJ fail to cite *Matter of Guerra*, one of the most recent precedential Board decisions setting forth the appropriate standards to guide immigration bond determinations, but he also completely failed justify his emphasis on certain flight risk factors over others, and failed to appropriately assess and weigh those factors he did emphasize. The Eleventh Circuit has affirmed that *Matter of Guerra* provides IJs with "standards to guide them" in implementing bond regulations. *See Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1220 (11th Cir. 2016). By omitting any reference to these standards, the IJ failed to exercise his discretion in an appropriate manner.

Moreover, this Board has recognized that while an IJ "has broad discretion in deciding the factors that he or she may consider in custody redeterminations," the Judge must be "reasonable" in choosing to weigh certain factors over others. *Guerra*, 24 I&N Dec. at 40. Here, the IJ identified the availability of relief, community ties, and Respondent's length of time in the United States as the key factors bearing on Respondent's potential risk of flight, and based his conclusion that Respondent did not meet his burden of showing he was not a flight risk on *those three factors alone*. Bond Dec. 4. However, the IJ provided no explanation for selecting these factors over the many other factors that militated in Respondent's favor, and cited to forty-year-old Board precedent rather than to the more recent and directly applicable *Matter of Guerra*. *Id*.

Respondent submits that the overwhelming weight of the nine specifically enumerated *Guerra* factors compels the conclusion that he is in fact not a flight risk, (*see* Sections III.C.1 – III.C.11, *infra*) and that the IJ's arbitrary selection of and emphasis on certain factors to the exclusion of all others and without any explanation of such selection and emphasis is an abuse of discretion which this Board must reverse. IJs are responsible for "the substantive completeness

of the decision" below. *Matter of A-P-*, 22 IN Dec. 375, 477 (BIA 1999). An order that "does not meaningfully reflect any individualized assessment of the law applicable to the respondent's case" may leave this Board "without adequate means of performing its primary appellate function of reviewing the bases stated for the Immigration Judge's decision in light of the arguments advanced on appeal." *Id*. at 474. Here, the IJ has provided the Board with insufficient bases to justify his selection of and emphasis on certain discretionary release factors above others, and the Board must therefore give no significant weight to the decision below in conducting its *de novo* review.

B. The IJ failed to appropriately assess the key factors he relied upon.

Even assuming *arguendo* that the IJ's selection of certain discretionary release factors to the exclusion of others were reasonable, he failed to appropriately assess and weigh those factors that he did choose. While identifying community ties as an important factor, the IJ discounted that Respondent has a cousin who is a United States citizen and a contractor with the U.S. Department of the Treasury, and with whom Mr. K[redacted] would live at his fixed address of [redacted], Arlington, Virginia, [redacted]. Bond Motion, Tab I. In support of his family ties and fixed address, Respondent submitted (1) a signed letter from his cousin that he would provide housing and financial support for Respondent, (2) a notarized affidavit describing is relationship to his cousin, (3) his cousin's U.S. passport, (4) a photocopy of his cousin's U.S. government contractor identification, and (5) six pages of financial records documenting his cousin's income and corroborating his address. Bond Motion, Tabs I-M. Instead of correctly weighing this in Respondent's favor, the IJ opined that Respondent's cousin "provides no information as to how he knows Respondent and to what extent." Bond Order, 4.

Not only is requiring a respondent to establish how well he knows his own cousin far beyond what this Board could have intended with its reference to "family ties" in *Matter of Guerra*, but in fact this statement by the IJ betrays the superficiality of his familiarity with the evidence submitted in support of bond. The signed notarized affidavit of Respondent submitted as Tab J of his bond motion describes the relationship in detail, and establishes that Mr. Kh[redacted] is the son of Respondent's maternal uncle [redacted] Bond Motion, Tab J. The affidavit also recites the names of Mr. Kh[redacted]'s wife and children, and describes him as Respondent's "Cousin Brother," attesting to the closeness of their relationship. The IJ's assertion that there is no information as to how well and to what extent Mr. Kh[redacted] knows Respondent is therefore clearly erroneous, and must be reversed.

The IJ also opined that Respondent's "connection to Mr. Kh[redacted] is too attenuated to guarantee his presence for future hearings." Bond Order, 4. Whether or not Respondent's family connections in the U.S. are in and of themselves sufficient to "guarantee" a respondent's presence at future hearings is not a requirement that has ever been set forth by this Board as appropriate to a flight risk inquiry. Respondent is an adult man who fled his home country in fear for his life. Whether his cousin can guarantee his appearance at future hearings is irrelevant. Respondent can be relied upon himself to attend those hearings.

With regards to his assessment of Respondent's length of time in the United States, the IJ merely noted that "Respondent is a recent arrival to the United States, having only entered the United States on or about February 10, 2017." *Id*. This factor should not weigh against a grant of bond, however, as Respondent entered the United States in order to seek refuge from persecution in Pakistan following death threats received by himself from the Taliban.

The IJs assessment of the discretionary factors he did choose to analyze in this matter was therefore deeply flawed, and should be given no weight by this Board in conducting its *de novo* analysis.[4]

C. A *de novo* review of the *Guerra* factors compels the conclusion that Respondent is not a flight risk.

The IJ's discretionary denial of bond is erroneous in its assessment of Respondent's risk of flight. In addition to failing to apply relevant precedent, failing to appropriately assess the key factors he relied upon, and impermissibly overemphasizing and incorrectly analyzing Respindent's likelihood of immigration relief, the IJ failed to appropriately address the totality of this Board's *Matter of Guerra* factors relevant to Respondent's flight risk. Applying the *Matter of Guerra* factors *de novo*, it is clear Respondent does not pose a flight risk. *See* 24 I&N Dec. at 40. The totality of factors presented in this case, as assessed below, plainly indicate that Respondent is not a flight risk, and would have compelled any reasonable adjudicator to so conclude. *See Matter of Guerra*, 24 I&N Dec. at 40. Respondent will now address the nine factors enumerated by this Board in *Guerra* in turn.

1. Mr. K[redacted] has a fixed address in the United States

If released on bond, Mr. K[redacted] will reside with Mr. A[redacted] Kh[redacted], his cousin, at the fixed address of [redacted]. Bond Motion, Tab I. A fixed address is a weighty factor in favor of a reasonable bond. His cousin has attested in a signed letter that he will take "full responsibility for [his] cousin". *Id*. He also states that he will financially support Mr. K[redacted] and ensure that "[Mr. K[redacted]] will not become a burden on our economy." *Id*.

[4] The IJ's impermissible overemphasis on the viability of Respondent's asylum claim as a release factor is addressed separately in Section III.D, *infra*.

2. Mr. K[redacted]'s length of residence in the United States is a neutral factor in this case.

Respondent's length of residence in the United States is a neutral factor in this case. In *Matter of Guerra*, this Board considered the case of a native and citizen of the Dominican Republic who was admitted to the United States as a nonimmigrant visitor and was charged with removability for remaining in this country longer than his period of authorized stay. 24 I&N Dec. at 37. By contrast, Mr. K[redacted] is a recent entrant to the United States who entered with the explicit purpose of seeking asylum. Given Mr. K[redacted]'s distinction from the respondent in *Matter of Guerra* and his desire to seek refuge in the United States, his length of residence in the United States should not be considered in determining his suitability for bond and is, thus, a neutral factor.

3. Mr. K[redacted] has family ties in the United States.

Mr. K[redacted]'s cousin, A[redacted] Kh[redacted], resides in [redacted]. Bond Motion, Tab I. His cousin has attested that he will support Mr. K[redacted] upon his release from detention. *Id*.

4. Whether Respondent has family members from whom he can obtain legal status in the U.S. is irrelevant in light of his asylum claim.

The third *Matter of Guerra* factor this Board articulated is "the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future." *Guerra*, 24 I&N Dec. at 40. At a most fundamental level, the entire immigration bond process and the factors that IJs are to analyze in making bond determinations are based on creating and analyzing a series of incentives to ensure a respondent's appearance at future hearing. Whether or not a non-citizen's family ties in the U.S. may entitle him or her to permanent residence in the United States is admittedly an incentive to appear for future hearings (although this Board only mentioned this factor in passing in *Guerra* and did not analyze it), but

it is only one-half of a nonexclusive nine-factor test the *Guerra* opinion establishes, and Respondent submits that comparable and superseding incentives to appear for future hearings can be established by other factors unrelated to whether family ties provide a path to permanent residence.

While Mr. K[redacted]'s family ties in the United States do not currently provide a path to immigration relief, he is eligible for relief removal in the form of asylum, and has at least two distinguishable legal claims due to persecution on account of (1) his political opinion that runs contrary to the Taliban's beliefs, with respect to his work expanding and supporting women's education; and (2) his imputed political opinion of advancing an "American agenda." His pending asylum claim therefore offers an equally compelling route to permanent residence in the United States that fulfills the underlying purpose of this factor.

In his decision, the IJ wrote that there "is no evidence that any relative residing within the United States has filed an application for relief on Respondent's behalf." Bond Order, 4. This inquiry is irrelevant, and strongly suggests that the Court was merely looking for factors it could use to justify its bond denial rather than conducting a bona fide analysis of Respondent's actual risk of flight.

5. Mr. K[redacted]'s employment history is a positive factor.

Mr. K[redacted]'s employment history is a positive factor in this matter. Mr. K[redacted] was employed in Pakistan with an NGO dedicated to health and education. He holds a Master of Business Administration in Human Resource Management degree from Preston University in Pakistan, a Master of Business Administration degree from the University of Wales, and a Postgraduate Diploma in Business and Management from the London School of Commerce. Bond Motion, Tabs F-G. He worked as an operational controller for STM Security London in 2010-2011, and

was later promoted to Operational Supervisor. Bond Motion, Tab N. Due to his recent arrival and immediate detention, Mr. K[redacted] has no previous employment in the United States. However, this Board in *Guerra* did not address the question of whether "employment history" refers to employment within the U.S. or outside of it. Respondent submits that his employment history in Pakistan and the United Kingdom is compelling evidence of overall stability, which this Board should view as a positive factor with regard to bond.

6. Mr. K[redacted] has never failed to appear for a hearing.

Mr. K[redacted] has never failed to appear for his Immigration Court hearings. This is a neutral or positive factor because he was detained directly upon entry into the United States. However, if it is permissible for the Court to conclude that the length of time a detained recent-entrant asylum seeker has spent in the United States is a negative factor, by the same logic it must still view the fact that the same detained recent-entrant asylum seeker has never missed a Court appearance as a positive factor, despite those Court appearances taking place on a detained docket.

7. Mr. K[redacted] has no criminal record anywhere in the world.

Mr. K[redacted] has no criminal record in either the United States, Pakistan, or the U.K. Although it has already been established that he is not a danger, this Board's *Guerra* decision also indicated that the presense or absence of a criminal record should be considered as part of the Court's flight risk analysis, such that the fact that Respondent has no criminal is a positive factor in this Board's *de novo* analysis of his risk of flight.

8. Mr. K[redacted]'s entry without inspection is a neutral factor because of his intent to seek asylum.

Mr. K[redacted]'s entry without inspection is a neutral or positive factor in this case because he was entering the United States in order to seek asylum. Unlike BIA precedent in which a pattern

of legal violations has been found to "indicate a consistent disrespect for the law of the United States," *Matter of Andrade*, 19 I&N Dec. at 490, Mr. K[redacted]'s entry was a single occurrence intended solely to seek refuge. Under Article 31(1) of the Refugee Convention, the United States is prohibited from penalizing refugees for irregular entry.[5] As Mr. K[redacted]'s flight from persecution is sanctioned as a matter of United States and international law, his intention to seek refuge in the United States is sufficiently "substantial countervailing evidence" that his manner of entry should not negatively impact the assessment of his flight risk. *See Matter of D–J–*, 23 I&N Dec. at 581.

9. Mr. K[redacted] has never attempted to flee prosecution or otherwise escape from authorities.

Mr. K[redacted] has never attempted to flee prosecution or to otherwise escape from authorities in either the United States or Pakistan.

10. Mr. K[redacted]'s manner of entry was intended to seek protection in the United States.

For the reasons articulated in Section II.C.8, *supra*, the manner of Mr. K[redacted]'s entry to the United States does not militate against a grant of bond as he was exercising his well-recognized right to seek asylum under United States and international law.

11. Other factors particular to Mr. K[redacted]'s case demonstrate that he is not a flight risk.

In addition to the nine *Matter of Guerra* factors, 24 I&N Dec. at 40, additional factors in Mr. K[redacted]'s case further demonstrate that he is not a flight risk. Mr. K[redacted] is known to have a good moral character and excellent work ethic, as evidenced by his multiple degrees and

[5] *See* United Nations High Commission for Refugees, 1951 Convention Relating to the Status of Refugees, 29, available at http://www.unhcr.org/en-us/3b66c2aa10.

supported by his former employers. Bond Motion, Tabs F, G, H. In his letter, the Director of Youth Welfare, Mr. J[redacted] J[redacted], describes Mr. K[redacted] as "hard working," "devoted and motivated," "sincere, reliable," and "trustworthy," in addition to describing Mr. K[redacted] as having qualities demonstrating good character. Bond Motion, Tab F. Mr. K[redacted] also submitted award letters from former employers recognizing his hard work. Bond Motion, Tab G. Mr. K[redacted] has clearly demonstrated that he is an educated man with a strong work ethic, of trustworthy and reliable character. These factors all weigh strongly in favor of Mr. K[redacted] not being a flight risk.

In addition, Respondent has obtained *pro bono* counsel, Attorney [redacted] to represent him in his asylum claim. Representation by counsel has a significant impact on flight risk. In a 2015 study of over 1.2 million immigration removal cases, 93% of non-detained respondents represented by counsel appeared for their immigration court dates over a six-year period. Eagly & Shafer, "A National Study of Access to Counsel in Immigration Court," 164 U. Pa. L. Rev. 1, 73 (2015). Representation by counsel also increases the likelihood of success in a meritorious claim for immigration relief, a factor the BIA has recognized as relevant to the determination of flight risk. *See Matter of X–K–*, 23 I&N Dec. at 736; Section II.C.2, *infra*. In the same study, among similarly situated non-detained immigrants, individuals with counsel were eight times more likely to successfully obtain immigration relief compared to their *pro se* counterparts. Eagly & Shafer, 164 U. Pa. L. Rev. at 57.

As delineated above, the totality of factors in this case clearly show that Mr. K[redacted] is not a flight risk. *See Matter of Guerra*, 24 I&N Dec. at 40. "Once it is determined that an alien does not present a danger to the community or any bail risk, then no bond should be required." *See Matter of Drysdale*, 20 I&N Dec. at 817; *see also Matter of Patel*, 15 I&N Dec. at 666. To the extent that any risk does exist, it is minimal. *See Matter of Drysdale*, 20 I&N Dec. at 818 (noting

that under the flexible standard for evaluating flight risk, the "[t]he likelihood, or probability, of appearance could vary from none to great"). The posting of bond in the amount of $1500 would thus reasonably assure Mr. K[redacted]'s appearance at future court dates. *See id*. at 817–18.

D. The IJ impermissibly overemphasized Respondent's eligibility for relief as a flight risk factor, gave insufficient weight to respondent's positive credible fear determination, and misanalysed Respondent's asylum claim in the process.

In the case at bar, the IJ failed to appropriately exercise his discretion by overemphasizing the importance of Respondent's potential immigration relief as a flight risk factor, giving insufficient weight to the asylum officer's positive credible fear determination, and in any event misanalysing the nature and facts of Respondent's asylum claim.

1. The IJ placed undue weight on Respondent's eligibility for relief in analyzing his risk of flight.

In two particular cases, this Board has noted that the likelihood of future relief may be considered as a factor in an IJ's flight risk analysis. In *Matter of X-K-,* this Board held that "[s]ome aliens may demonstrate to the Immigration Judge a strong likelihood that they will be granted relief from removal and thus have great incentive to appear for further hearings." *Matter of X-K*, 23 I&N Dec. 731, 736 (BIA 2005). Similarly, in *Matter of Andrade,* this Board held that a "respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation hearing than one who, based on a criminal record or otherwise, has less potential of being granted such relief." *Matter of Andrade,* 19 I&N Dec. 488, 490 (BIA 1987). Of particular note is that neither of these cases hold - nor can their plain language be read to support a conclusion - that a respondent who has not fully proven his claim for relief in the context of a bond hearing is *per se* a flight risk. Respondent submits that the IJ in this case seems to have completely reversed the logic of *X-K-* and *Andrade* to find that because

"[g]iven the evidence currently before the Court, the likelihood of success on the merits of Respondent's claim" was, in his view "speculative at this time," Respondent automatically presented such an extreme risk of flight that no amount of bond would be sufficient to secure his appearance at future hearings. Bond Dec. 4. Neither *X-K-* nor *Andrade* support such an interpretation. In fact, Respondent submits that the plain language of those two cases provides only for a downward deviation in bond for those respondents with "great incentive" or "greater motivation" to appear due to their "strong likelihood" or "greater likelihood" of being granted relief from removal. *X-K,* 23 I&N Dec. at 736; *Andrade,* 19 I&N Dec. at 490. *Nowhere* do these two cases provide for an increased bond amount for those whose claims to relief are, at the time the bond hearing is held, viewed as weak or unproven, let alone for an outright denial of bond based on the fact that the claim for relief had not yet been fully proven.

Respondent strongly cautions this Board against proceeding down the slippery slope of allowing bond hearings to become essentially "mini-merits" hearings. Here, the IJ went so far as to say that Respondent's relief claim was speculative "especially with regards to nexus to a protected ground." Bond Dec. 4. If this Board affirms the IJ's bond denial based on the "speculative" nature of the nexus to a protected ground in his underlying asylum claim, it would pave the way for detainees to also be required to "pre-litigate" all other merits issues such as, *inter alia*, the reasonableness of internal relocation, or the willingness and ability of national authorities to protect them. A bond hearing is not the appropriate time or context for a nexus analysis, and Respondent urges this Board to strongly discourage Immigration Courts from requiring such in-depth showings as to the merits of a detainee's relief claim during custody hearings. It cannot have been the Board's intent in *Matter of X–K–* or *Matter of Andrade* to lead Immigration Courts to such a high level of scrutiny of detainees' underlying asylum claims. *See*

23 I&N Dec. at 736; 19 I&N Dec. at 490. This Board should thus condemn this practice in a published precedent decision to prevent further progress toward every bond hearing becoming a full individual hearing on the merits of detained respondents' relief claims.

This Board has held that in some contexts an IJ's "broad interpretation of what constitutes an 'adverse factor' . . . could result in requiring a bond of almost every alien who is held in deportation proceedings." *Matter of Patel*, 15 I&N Dec. 666, 667 (BIA 1976) (ordering respondent-appellant released on his own recognizance when the IJ denied bond based on a limited focus on the respondent's immigration status and possible relief). Here, IJ Duncan's arbitrary overemphasis on immigration relief in cases of recent-entrant asylum-seekers could result in (and, in undersigned counsel's experience, *is* resulting in) the categorical denial of bond to all such respondents before Judge Duncan's Court.[6]

The custody provisions of the INA at section 236(a) establish that detainees must receive an "individualized," rather than mechanistic, application of factors common to all Section 236 detainees. *Leslie v. U.S. Att'y Gen.*, 678 F.3d 265, 271 (3d Cir. 2012); *cf*. *Sopo*, 825 F.3d at 1214 (affirming entitlement of § 236 detainees to an "individualized bond hearing"). Categorically denying bond to all recent-entrant asylum seekers is thus contrary to the statute and the language of *Sopo*, and this Board must preclude Immigration Courts from turning their premature assessments of respondents' ultimate chances of success on the merits of their asylum claims - based on limited or no evidence about the case-in-chief – into the dispositive inquiries in their bond analyses.

2. Even assuming relief were appropriately weighed as a release factor, the IJ failed to give appropriate weight to Respondent's positive credible fear determination.

[6] Respondent notes that even the section title of the IJ's flight risk analysis, "Respondent Cannot Show He is Not a Flight Risk," (rather than simply "Respondent Did Not Show He is Not a Flight Risk") implies the IJ's belief that no amount of flight risk evidence could possibly qualify him for a grant of bond.

It is especially true that an IJ should not be able to opine, based on very limited preliminary evidence presented at or prior to a bond hearing, that a respondent's relief claim is "speculative" when an asylum officer has already made a legally significant finding that said respondent has a "significant possibility" of establishing eligibility for asylum or withholding. *See* INA § 235(b)(1)(B)(v). Under the INA, asylum officers have a statutory duty to determine whether an individual has a credible fear of returning to his home country that entitles him to a full asylum hearing on the merits of his case. INA § 235(b)(1)(B). In making a positive credible fear determination, the asylum officer determined that "[t]here is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing" and that there was a "significant possibility" that Respondent could establish eligibility for asylum under section 208 of the Act. *See* INA § 235(b)(1)(B)(v). Bond Motion, Tab P.

The strict rules of evidence are not applicable in immigration proceedings. *Matter of Wadud*, 19 I&N 182 (BIA 1984). However, relevance and fundamental fairness *are* bars to admissibility of evidence in deportation cases, and therefore relevant considerations to an IJ in accepting and assessing evidence. *Matter of Ponce-Hernandez*, 22 I&N 784 (BIA 1999); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980). Similarly, while Respondent acknowledges that the principle of *res judicata* does not directly apply in removal proceedings, he submits that, as an issue of fundamental fairness, an IJ cannot be permitted to summarily dismiss an asylum officer's conclusion, in this case based on more than an hour of credible sworn testimony, that Respondent had a "substantial possibility" of establishing eligibility for asylum. This is especially true where the IJ himself has taken no additional testimony or received into evidence anything that might serve to negate the asylum officer's conclusion. Here, the asylum officer was

in a much better position to evaluate the strength of Respondent's asylum claim (indeed, that is the very purpose of a credible fear interview), and his or her determination is owed much more deference that the Court's conclusory remark that Respondent's asylum claim was "speculative." The IJ thus erred by wholly disregarding Respondent's positive credible fear determination in assessing the strength of his available immigration relief.

3. In any event, the IJ misanalysed Respondent's asylum claim.

Rather than deferring to the credible sworn testimony elicited by the asylum officer's meticulous questioning over a two-and-a-half hour period, the IJ further erred by ignoring or misanalysing the facts of Respondent's asylum claim as documented in the record. The IJ conducted no real analysis whatsoever of Respondent's asylum claim to support his conclusion that Respondent's likelihood of obtaining relief was "speculative." Had he in fact reviewed Respondent's asylum claim, he would have concluded that Respondent is in fact overwhelmingly likely to prevail.

Under The REAL ID Act, to show a "nexus" to a protected ground, the Respondent must prove that the protected ground was or will be "*one central reason*" for the persecution. P.L. 109-13. The Eleventh Circuit has provided little guidance on the application of the "one central reason" standard, but has stated that under this standard, the protect ground "need not be the sole reason" for the persecution. *Mohamed v. U.S. Atty Gen.*, 591 Fed.Appx. 804 (11th Cir. Dec. 1, 2014). The BIA has instructed that a protected ground is "one central reason" for the persecution where it is not it cannot be "incidental, tangential, superficial, or subordinate." *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

The language of the "at least one central reason" test encompasses respondents who are persecuted for mixed motives, so long as *one* central reason for their persecution is a protected

ground. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. at 213. This Board has looked with favor on a situation where a persecutor has been "motivated in meaningful part" by a respondent's asserted protected ground. *J-B-N- & S-M-*, 24 I&N Dec. at 214; *see also Cece v. Holder*, 733 F. 3d 662, 672 (7th Cir. 2012) (citing *Mustafa v. Holder*, 707 F.3d 743, 751 (7th Cir. 2013)).

Here, the IJ's conclusion that Respondent's claim for relief was speculative "especially with regards to the nexus to a protected ground" further exposes his lack of familiarity with the actual facts of the case, and the *pro forma* nature of his bond denial. Respondent in this case fact was shot at by the Pakistani Taliban, *who explicitly told him that his perceived pro-Western views were the reason they were trying to kill him*. Bond Motion, Tab P. If an explicit statement by Respondent's persecutors that they were going to harm him because of his political opinion amounts to a "speculative" nexus, then undersigned counsel confesses he is at a loss to describe what *would* establish nexus in an asylum case.

Resistance to join a particular group or follow their command has been deemed political. *Martinez-Buendia v. Holder*, 606 F.3d 711 (7th Cir. 2010) (refusal to comply with FARC's demands); *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997) (refusal to make payments to Shining Path); *Regalado-Escobar v. Holder*, -- F.3d --, 2013 WL 2420770 (9th Cir., June 5, 2013) (opposition to FMLN's violence can be political opinion). Furthermore, adopting beliefs or values that run contrary to those of a particular group can be a political statement for an asylum claim. *Seving v. Ashcroft*, 85 Fed.Appx. 620 (9th Cir. 2004) (woman adopting Western customs was an anti-Taliban political statement that met prima facie showing of eligibility for asylum); *Nehad v. Mukasey* ,535 F.3d 962 (9th Cir. 2008) (evidence of imputed political opinion of supporting the U.S. government, *inter alia*, was sufficient to show a plausible chance of proving a well-founded fear of persecution by the Taliban).

In addition to his work to expand and support women's education, Mr. [redacted] was targeted by the Taliban due to his imputed political opinion of advancing an "American agenda." Bond Motion, Tab N; *Vera-Valera v*. *INS*, 147 F.3d 1036 (9th Cir. 1998) (recognizing imputed political opinion as a basis for asylum regardless of whether victim actually held that opinion). During the threatening calls to Mr. K[redacted], TTP accused Mr. K[redacted] of having a Western mindset and being funded by the United States. Bond Motion, Tab N. Thus, because TTP targeted him for his work that espouses American ideals, a grant of asylum for Mr. K[redacted] would be consistent with U.S. anti-Taliban foreign policy and efforts. Mr. K[redacted] need only show that his (real or imputed) anti-TTP political opinion was "one central reason" for the past persecution he suffered and the persecution he fears in order to establish *prima facie* eligibility for asylum. The IJ's conclusion that Respondent's likelihood of obtaining relief was "speculative" is wholly unsupported by the record.

Along with overemphasizing the importance of the viability of relief as one part of a broad flight risk analysis the Court was required to engage in, the IJ also inappropriately discounted the asylum officer's positive credible fear determination, and did not properly analyze Respondent's asylum claim in any event. Due to all of the aforementioned errors, the IJ incorrectly concluded that Respondent had not met his burden of proving that he is not a flight risk. Bond Order at 4. Had the IJ fully considered the evidence before the Court and given proper weight to the asylum officer's positive credible fear determination, he would have concluded that Respondent's asylum claim and all other factors far outweigh any already minimal risk of flight he may present. The IJ having failed to make such a determination, it is incumbent upon this Board to do so now.

CONCLUSION

For all of these reasons, this Board should SUSTAIN this appeal, REVERSE the IJ's decision, and GRANT Mr. K[redacted] bond in the amount of $1500.

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