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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
FALLS CHURCH, VIRGINIA**

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In the Matter of)	
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)	File No.: A -----
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In removal proceedings)	
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Immigration Judge Honorable Thomas G. Snow

MOTION FOR JOSEPH HEARING AND CUSTODY REDETERMINATION

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I. INTRODUCTION

Respondent, Mr. --- -----, by and through counsel, respectfully moves this honorable Immigration Court to hold a Joseph hearing and release him from immigration detention on his own recognizance. In the alternative, Mr. --- ----- requests a bond of \$1,500.

This court terminated Mr. -----’s removal proceedings and the Department of Homeland Security (“DHS”) has since declined to release Mr. ----- or set a bond. This Court has jurisdiction to hold a Joseph and custody redetermination hearing at any time. 8 C.F.R. § 1003.19(c)(1); 8 CFR § 1003.19(h)(2)(ii); 8 C.F.R. § 1236.1(d)(1); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Given that the Immigration Court has terminated proceedings and Mr. ----- is not prima facie removable, Mr. ----- is certainly not mandatorily detainable and should be released from custody on his own recognizance. In the alternative, Mr. ----- requests the Court

set a bond hearing and reasonable bond. As grounds for this motion, Mr. ----- submits as follows:

II. STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Mr. ----- is a native of ----- . *See* Notice to Appear, Record (“NTA”). He entered the United States on -----, at the age of -----, as a Lawful Permanent Resident. *Id.* He has lived in the United States for nearly ----- years and considers this country his home. He has four children, all of whom are U.S. citizens. Since ----- – for almost ----- months – DHS has detained Mr. ----- at the ICA-Farmville Detention Center in Farmville, Virginia.

On -----, this Immigration Court granted respondent’s motion to terminate, terminating removal proceedings because Mr. -----’s conviction under Virginia Code § 18.2-51 is categorically not an aggravated felony crime of violence under either 18 U.S.C. § 16(a) or § 16(b). *See Exh. A*, I.J. Snow Decision, dated ----- . Mr. ----- has no other deportable offenses. Counsel has made several requests to DHS to release Mr. ----- during the pendency of his ap----- given concerns of Mr. -----’s deteriorating mental and physical health and the serious financial hardship and looming eviction his four U.S. citizen children are facing while he, as the breadwinner, is detained. *See Exh. E* (Medical Evaluation diagnosing Post-Traumatic Stress Disorder arising from history as a victim of childhood sexual abuse). On January 5 and 11, 2016, DHS Supervisory Detention & Deportation Officer James Maddox declined to release Mr. -----.

III. JURISDICTIONAL STATEMENT

The Immigration Court retains jurisdiction to determine whether Mr. ----- is “properly included” within the mandatory detention provision. 8 CFR § 1003.19(h)(2)(ii); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

This Court also has jurisdiction to make a custody redetermination on Mr. -----’s behalf at any time while his case is ap-----ed to the Board of Immigration Ap-----s. 8 C.F.R. § 1003.19(c)(1); 8 C.F.R. § 1236.1(d)(1). The regulations instruct that, if the respondent is detained, “[a]pplications for the exercise of authority to review bond determinations shall be made to...the Immigration Court having jurisdiction over the place of detention.” 8 C.F.R. § 1003.19(c)(1). This Court has jurisdiction over the ICA-Farmville Detention Center. Moreover, after an initial custody determination by DHS, “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...the immigration judge is authorized to exercise the authority in section 236 of the Act...[to] 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...” *Id.* There has been no final order in Mr. -----’s case. Furthermore, Chapter 7.2(a) of the Board Practice Manual affirms Mr. ----- “may ask the Immigration Judge or DHS to change a bond decision.” See also Immigration Court Practice Manual at 9.1, 9.3(b) (“an Immigration Judge generally has jurisdiction to conduct a bond hearing if the alien is in [DHS] custody.”)

IV. MOTION FOR JOSEPH HEARING

In order to demonstrate eligibility for bond, Mr. ----- must show that the government is “substantially unlikely to prevail” on the charge of removability that subjects him to mandatory detention. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).¹ Having already prevailed on the merits of his Motion to Terminate, Mr. ----- easily satisfies this burden.

¹ Although Mr. ----- easily meets the *Joseph* burden in this case, he notes that the *Joseph* standard is – as Judge Tashima of the Ninth Circuit Court of Ap-----s has explained – “simply inconsistent with due process of law.” *Tijani v. Willis*, 430 F.3d 1241, 1243 (9th Cir. 2005) (J. Tashima, concurring). The requirement that the non-citizen establish that the government is “substantially unlikely to prevail” on charges of removability is an unduly heightened burden

DHS is substantially unlikely to prevail on its claim alleging Mr. -----'s removability before the Board of Immigration Ap-----s. This honorable Court found Mr. ----- is not deportable because Virginia Code § 18.2-51 is categorically not an aggravated felony. See Exh. A. Virginia Code § 18.2-51 requires *no* element of physical force whatsoever, as required under 18 U.S.C. § 16 to be a crime of violence. See Exh. A at 3-5. In its briefing before this Court and in similar litigation currently before the Board, DHS has not once disputed that the Commonwealth of Virginia prosecutes conduct under § 18.2-51 including poisoning, child neglect, and facial disfigurement. See DHS Brief in Support of Removability, Record. None of these actions involve force or a substantial risk of force. See Exh. A at 4.

The Board has specifically affirmed the authority of the Immigration Court to rely upon a decision issued on the merits of a case to support a finding of bond eligibility. In *Matter of Joseph*, the Board considered a case where, as in Mr. -----'s case, the Immigration Judge had granted termination of removal proceedings upon finding that the respondent's conviction did not constitute an aggravated felony, but the case continued during the pendency of the government's ap------. *See Joseph*, 22 I&N Dec. at 806. There, the Immigration Judge relied upon his finding on the merits to find Mr. Joseph to fall outside of the mandatory detention statute. *Id.* ("The Immigration Judge here issued his bond ruling after the conclusion of the removal case. As indicated above, the Immigration Judge was entitled to rely on that merits decision in making the related bond determination that the respondent was not properly included in a mandatory detention category.")

that falls short of the basic right to due process in the face of the complete deprivation of liberty constituted by immigration detention. *Id.*

Mr. ----- has not been convicted of any offense that make him inadmissible or deportable, making him prima facie not subject to mandatory detention under INA § 236(c). Therefore, Mr. ----- is eligible for release under INA § 236(a).

V. MOTION FOR A CUSTODY REDETERMINATION

INA § 236(a) expressly authorizes the Immigration Court to release Mr. ----- from detention pending a removal case on (A) conditional parole or (B) a bond of \$1500. Mr. ----- should not be detained because there is *no* risk that he will abscond, that he poses a danger to persons or property, or that he poses a risk to national security. Matter of Adenji, Int. Dec. # 3417 (BIA 1999); Matter of Patel, 15 I & N Dec. 666 (BIA 1976).

A. *The Court Should Release Mr. ----- on His Own Recognizance.*

As the Court terminated proceedings in his case, there is no need for Mr. ----- to be in detention during the pendency of the government's ap------. With U.S. citizen children to provide for, a home to return to with U.S. citizen family, a stable job waiting for him, long time status as a Lawful Permanent Resident, and with a significant interest in the finality of his pending ap-----, Mr. ----- is absolutely not a flight risk nor a danger to the community or national security. With ongoing probation, the Court can also be assured that Mr. ----- will already receive ample supervision in the community. Accordingly, the Court should release Mr. ----- on his own recognizance.

1. Mr. ----- Is Not A Flight Risk

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

- (1) length of residence in the United States;

- (2) family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future;
- (3) whether the alien has a fixed address in the United States;
- (4) employment history;
- (5) record of appearance in court;
- (6) criminal history;
- (7) history of immigration violations; and
- (8) manner of entry to the United States.²

1. Mr. ----- has resided in the U.S. legally for over twelve years. He spent his young adult years with his U.S. citizen family who live in both -----, Virginia and the Bronx, New York. Over four years ago, he moved his U.S. citizen children from New York back to -----, Virginia to provide them a better life and work to support his U.S. citizen sister and brother-in-law, Mrs. ----- and Mr. -----, in their small family auto mechanic business, ----- Transmissions. Upon his release, Mr. ----- will return to -----, Virginia to live at his U.S. citizen sister and brother-in-law's home, where they have his former room waiting for him. See Exh. B, Affidavits from Mrs. ----- and Mr. -----.

2. Mr. ----- has close family ties to the community: his entire family are all U.S. citizens, including his four children – -----, -----, -----, and his newborn child -----, who he is desperate to finally meet in-person. See Exh. C (Drawings from Mr. -----'s U.S. citizen daughters -----and -----); Exh. D (Photographs of Mr. ----- with his U.S. citizen children and family and of his newborn daughter -----). In their affidavits, Mr. -----; his sister Mrs. -----; his brother-in-law, Mr. -----; Chaplain Adam -----; and friend Mr. ----- all attest to Mr. -----'s good character, including his nature of helping others, and desire to return to work and support his four U.S. citizen children who are suffering financially and facing looming eviction while he as the breadwinner of his family is being detained. See Exh. B

² See Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006); Matter of Saelee, 22 I&N Dec. 1258 (BIA 2000); Matter of Drysdale, supra, at 817; Matter of Andrade, 19 I&N Dec. 488 (BIA 1987).

(Affidavits in support of Mr. -----'s release). As Mrs. ----- explains, "when --- lived with me he was very helpful and hardworking, quick to learn, well spoken, polite, respectful, a loving and caring father loving and caring brother and son."). See Exh. B (Affidavit from Mrs. -----). Mr. ----- is already a Lawful Permanent Resident and has a substantial likelihood of being able to continue to reside legally and permanently in the United States in the future with his U.S. citizen family. In addition, Mr. -----'s mental and physical health are deteriorating rapidly while he is detained and separated from his family; he is suffering from significantly increasing chest pain, anxiety, depression. See Exh. E (Medical Evaluation diagnosing Post-Traumatic Stress Disorder arising from history as a victim of childhood sexual abuse).

3. Mr. -----, Mrs. -----, Mr. -----, and the -----s' children reside together at the fixed address of ----- in -----, -----.³ Mr. ----- resided at this address prior to criminal custody and immigration detention and will return to this address upon release in order to reside with his sister and her family.

4. Mr. ----- has worked consistently as a skilled, hardworking auto mechanic and professional barber, among additional jobs, for the many years he has been in the United States to support his family. See Exh. B (Affidavit from Mr. ----- describing Mr. ----- as "very reliable and accountable, he always came to work on time. Even during his down time he would help others as well and developed a good relationship and reputation with other business owners in the area."). In addition to working as an auto mechanic for several years at the -----s' small family auto mechanic business, -----, see Exh. B (Affidavit from Mr. -----) Mr. ----- also previously worked as an auto mechanic at -----when he lived in New York, from 2008 until 2011, until returning to -----, Virginia. Mr. ----- has also held part-time jobs at ----

³ See Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).

--and ----- in -----, -----to be able to financially support his U.S. citizen children as much as possible. Additionally, Mr. ----- has used his skills as a professional barber, a trade he learned in -----, to further support his family on top of his other jobs. See Exh. B (Affidavit from Mrs. -----, describing Mr. ----- as “a very talented barber.”).

5. Mr. ----- in fact has a job waiting for him upon his release from custody in the employ of his brother-in-law, Mr. -----, at the -----s’ small family auto mechanic business in -----, Virginia, ----- Transmissions. See Exh. B (Affidavit from -----).

6. Mr. ----- does not have any convictions that make him inadmissible or deportable. The only conviction DHS charged as a removable offense was an *attempt* offense, under Virginia Code § 18.2-51, which this Court found to not be an aggravated felony. His only convictions are all from a difficult but limited sixteen-month period, including:

- J 8/16/2013 Attempted Unlawful Wounding, VA Code § 18.2-51 (sentence: two years, all suspended);
- J 8/31/2013 Public Swearing/Intoxication, VA Code § 18.2-388 (sentence: none)
- J 9/10/2013 Drinking Alcohol in Public, VA Code § 4.1-308 (sentence: none)
- J 12/2/2014 Probation Violation, VA Code § 19.2-306 (sentence: two years, one year suspended)
- J 12/5/2014 Driving under Revoked/Suspended, VA Code § 46.2-301 (sentence: none)
- J 12/8/2014 Bailee Viol Rel/Pretrial Cond, VA Code § 19.2-13 – *disposition unknown* – (sentence: none)

Mr. ----- has taken significant steps to rehabilitate himself while detained. A deeply religious man, he prays every day and attends the chapel at the Farmville Detention Center twice a day, seven days a week. Mr. -----’s participation and leadership in religious services and community building at Farmville have been so significant as to garner the attention of the facility’s chaplain. See Exh. B, Affidavit from -----; Affidavit from Mr. -----. Mr. ----- regularly volunteers to translate the church's prayers into Spanish so that the Spanish-speaking detainees may participate. See id. He channels his energy into positive activities by frequently

translating documents and letters for other detainees so that he may help others as a means of self-therapy. See Exh. B (Affidavit from Augustus -----, friend of Mr. -----). Mrs. ----- explains, “As an example for how --- is, he is making changes for the better and he is making a difference in other lives in prison, he serves as an interpreter, for those who doesn’t speak the language and interprets for the pastor when visiting the inmates. --- got bapti[zed] in jail recently and is living a converted life, if given the opportunity --- is coming to live with me and we will get him to work in our business again until he gets back on his feet.” See Exh. B (Affidavit from Mrs. ----- -----); see also Exh. F (Baptism Certificate). If given the chance to be released, Mr. ----- plans to volunteer at the community center in his town of -----, Virginia and volunteer his skills as a professional barber at the homeless shelter there, as he has done previously to contribute to his community. See Exh. B (Affidavit from Mr. -----).

Furthermore, Mr. ----- will already be on supervised probation upon release from detention. Counsel will be able to provide DHS direct contact information for his probation officer, allowing DHS to have not only Mr. -----’s address of residence and work but also the details of all of his probation meetings.

7. Mr. ----- has never missed a court appearance or had any immigration violations. As he has a pending appeal to the Board, he will be sure to comply with all court dates and orders to seek finality in his case.⁴ Further, due to the nature of the appeal process and counsel’s already filing of an EOIR-27, no party can cause or is responsible for a delay. The Board’s sustainment of the Immigration Judge’s termination of removal proceedings will render current removal proceedings futile.

⁴ See Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec.488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).

8. When coming to the United States, Mr. ----- entered legally as a legal permanent resident.⁵ He has not left or reentered the country since.

2. Mr. ----- Does Not Pose A Danger To The Community Or Risk National Security

Mr. ----- does not pose a danger to the community nor a risk to national security. He has no aggravated felonies, serious drug trafficking, or controlled substance offense convictions. Mr. ----- has never engaged in persecution of others or terrorism.

B. In the Alternative, the Court Should Grant a Low Bond.

In the alternative, Mr. -----, by and through counsel, respectfully moves this Immigration Court to set a low and reasonable bond. In Matter of Sniliopoulos, the Board held that a \$1,500 bond was appropriate for a Respondent who had overstayed his visitor's visa and had no "family ties that entitled the Respondent to reside here permanently at some future date." 16 I&N Dec. 561, at 563. In contrast, Mr. ----- has never gone out of status and has remained as a Legal Permanent Resident, resided here over twelve years, maintained significant family ties with U.S. citizens in the community including his four U.S. citizen children and U.S. citizen sister and brother-in-law, and has extensive other U.S. citizen family. Because he does not pose a flight risk and will not fail to appear before the Immigration Court or fail to comply with proceedings before the Board, Mr. ----- requests a bond of no more than \$1,500.00, as that is the most that can be raised. Any higher amount is tantamount to denial of bond altogether.

Moreover, Mr. ----- deserves a reasonable bond because of his family's financial situation. While Mr. ----- has been incarcerated for his criminal sentence and detained by DHS for over one year, Mr. -----'s four U.S. citizen children face financial hardship and looming eviction while he as the breadwinner is detained. In addition, Mr. and Mrs. -----'s must

⁵ See Notice to Appear, Record.

struggle to pay for two of their children's college tuition. Mr. -----'s other family members are also struggling to make ends meet and are unable to contribute financially.

A noncitizen should receive a bond hearing within a reasonable time after asserting his right to such a hearing. The regulations and the case law require a prompt custody redetermination. 8 C.F.R. § 3.19. If Mr. ----- continues to be detained without opportunity for a hearing at which he might demonstrate the appropriateness of setting a bond necessary to assure his appearance at future proceedings, he will suffer a deprivation of liberty in being detained without cause, and his ability to promptly and effectively prepare his defense to the charges against him will be delayed and prejudiced.

With his lengthy number of years spent in the U.S., status as a Legal Permanent Resident, extensive U.S. citizen family, consistent record of appearing in court, and lack of any immigration violations, Mr. ----- does not pose a flight risk. He will not fail to appear before the Court or proceedings with the Board when required to do so. He is not a danger to the community, and does not pose a risk to national security. In sum, all relevant considerations support releasing Mr. ----- on his own recognizance, or in the alternative, on a reasonably low bond.

VII. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court grant a Joseph hearing and custody redetermination to release Mr. ----- on his own recognizance. In the alternative, the Court should grant the lowest possible bond.

Respectfully Submitted,

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