**BOARD OF IMMIGRATION APPEALS**

**U.S. DEPARTMENT OF JUSTICE**

**FALLS CHURCH, VIRGINIA**

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**IN THE MATTER OF: )**

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**Diana XXX ) File No.: A 088-659-180**

 **) DETAINED**

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**In Removal Proceedings )**

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**RESPONDENT’S BRIEF IN SUPPORT OF APPEAL**

**MOTION TO REMAND IN THE ALTERNATIVE**

Respondent, Ms. Diana XXX, by and through undersigned counsel, Joy Athanasiou, respectfully submits the instant brief in support of her bond appeal:

**Summary of the Case and Procedural History**

Respondent, Diana XXX was arrested by ICE and transferred to the GEO/ICE Detention Facility following a conviction in Adams County for Driving Under the Influence. ICE issued a Notice to Appear in Removal proceedings on February 29, 2012 and set a bond of $15,000.00. Ms. XXX has been detained at GEO since that time.

On March 6, 2012, Ms. XXX, acting pro se, requested a bond redetermination by the Immigration Judge. In support of her request, Ms. XXX presented several pieces of evidence including vaccination records, student registration summary, verification of enrollment letter from High School program, approximately four school related certificates, and five letters of support from school district personnel.

Upon information and belief, the Office of Chief Counsel orally presented negative evidence of the 2012 Driving Under the Influence conviction for which Ms. XXX received a 12 month suspended sentence, actually served 12 days in jail and was placed on probation for a period of 12 months. The Office of Chief Counsel also submitted evidence of Ms. XXX’ 2008 traffic offense of Driving Without a License for which she was ordered to pay a fine. Neither of Ms. XXX’ offenses constitute a ground of inadmissibility or deportability under the Immigration and Nationality Act.

The Immigration Judge revoked Ms. XXX’ bond and ruled that bond was not warranted in her case based upon her DUI conviction and his finding that she posed a danger to the community. Ms. XXX filed an appeal with the Board of Immigration Appeals regarding the bond determination on date.

Thereafter, new evidence arose constituting a material change in circumstances and Ms. XXX filed a Motion for Bond Redetermination with the Immigration Judge on date. That same day, the Immigration Judge denied the motion based upon his finding that he did not have jurisdiction to entertain a bond redetermination request due to the instant BIA appeal. On date, Ms. XXX filed a Motion for Reconsideration of the Court’s denial asserting that the Immigration Court retains jurisdiction for bond redeterminations during the pendency of a BIA Appeal. Ms. XXX’ motion is still pending with the Immigration Judge at the present time.

**Factual History**

Ms. XXX, a native and citizen of Honduras, entered the United States unlawfully on July 26, 2004 at the age of 11. She has lived in the Colorado area continuously since that time. She has attended elementary, middle and high school in the U.S. She currently attends High School at High School and was scheduled to graduate in date.

The majority of Ms. XXX’ family resides in the U.S. including her mother and three younger siblings, the youngest of whom is a U.S. citizen. Her grandmother, aunts and great-aunts also reside here in TPS status. Her stepfather, to whom she was very close and lived with since age 6, died in a tragic auto accident six years ago.

Ms. XXX’ stepfather’s death impacted her tremendously. Following his accident, she went through a long and difficult grieving process, suffering from depression, social withdrawal and isolation. Ms. XXX was seeing a psychologist for awhile. She also had a tough time at school and initially dropped out of high school in the 10th grade. She returned to High School for the 11th grade and completed the 11th grade and then transferred to the current program on date and has been showing great academic progress since that time.

Prior to her incarceration, Ms. XXX attended school full time and also worked full time for the past two years. In fact, Ms. XXX worked part to full time continuously since age 14. Ms. XXX worked at Hotel Inc, cleaning hotels at the time she was arrested. In addition to her work and studies, beginning invdate, Ms. XXX volunteered as a student assistant at the school 12 hours per week. She is very well loved and respected by the staff and administration at the school.

Ms. XXX was in her final class at school at the time of her arrest. She excels in math and computers. She plans to start at Community College upon High School graduation to study nursing and eventually go on to medical school to become a Pediatrician.

On date, Ms. XXX admittedly drank a six pack of beer and then drove her car, resulting in her DUI conviction and subsequent incarceration at GEO. This was a very isolated incident for Ms. XXX. Earlier that day, Ms. XXX had an argument with her mother, became very upset over their disagreement. Ms. XXX had been feeling for some time that her mother had been going out too often and Ms. XXX expressed concern that her mother wasn’t spending enough time at home with her younger siblings. This was a very tender subject for both mother and daughter. Ms. XXX played a significant role in raising her younger brothers from a very early age, particularly following the death of her stepfather. She regularly acted as the primary parent to her younger brothers by feeding them, getting them up and ready in the morning, taking them to school, interacting with the teachers and school administrators for all purposes, caring for them in the evening and putting them in bed at night. At the same time, her mother carried a lot of guilt over the fact that she has spent little time with her children because she has had to work two jobs to support the family since the death of her husband.

On the day of her arrest, Ms. XXX’ mother said several things to Ms. XXX that hurt her very deeply. She was very upset and went to a friend’s house, drank beer, and then committed the crime of driving after she had been drinking. She understands the seriousness of her actions and accepts responsibility for what happened.

**Standard of Review**

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a “clearly erroneous” standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of A-S-B-,* 24 I&N Dec. 493, 496 (BIA 2008). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii); and *Matter of Almanza-Arenas,* 24 I&N Dec. 771 (BIA 2009).

Bond redetermination proceedings are considered separate and apart from removal proceedings, and typically no recording of the proceedings is made. 8 CFR § 1003.19(d); *Matter of R-S-H-*, 23 I. & N. Dec. 629, 630 n. 7 (B.I.A. 2003)

**Legal Argument**

**Whether the Immigration Judge’s determination that Ms. XXX should be detained without bond because she posed a danger to the community was reasonable?**

After DHS makes an initial custody determination, the alien, assuming he is not an “arriving alien” subject to INA § 235(b)(1)(B)(iii)(IV), may seek a change in custody status at any time before he or she is subject to a final order of removal. Bond hearings before immigration judges are strictly separate from the removal proceeding. Section 236 of the Immigration and Nationality Act provides:

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General-

(1) may continue to detain the arrested alien; and

(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; but

(3) may not provide the alien with work authorization (including an “employment authorized” endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

In a bond redetermination hearing, an immigration judge must make findings about: 1) whether the noncitizen is a flight risk; and 2) whether the noncitizen represents a danger to the community. The criteria that an immigration judge considers includes: whether a noncitizen has a fixed address in the U.S.; length of residence in the U.S.; family ties in the U.S; whether any family ties may entitle the noncitizen to reside in the U.S.; record of appearances in court; employment history or lack thereof; criminal record, including the extensiveness of any criminal activity, recency, nature, and seriousness of the offenses; any pending criminal charges; history of prior immigration violations; attempts to flee prosecution or otherwise escape from any authority; manner of entry or admission into the U.S.; community ties; immoral acts or participation in subversive activities; and financial ability to post bond. See *Matter of Patel*, 15 I. & N. Dec. 666 (B.I.A. 1976); *Matter of Guerra*, 24 I. & N. Dec. 37 (B.I.A. 2006), discussed in 83 Interpreter Releases 2135 (Oct. 9, 2006); and *Matter of San Martin*, 15 I. & N. Dec. 167 (B.I.A. 1974). The original standard for setting bond declared in *Matter of Patel,* 15 I&N Dec. 666 (BIA 1976) was thatan 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, *Carlson v. Landon*, 243 U.S. 524, (1952), or a poor bail risk, *Matter of Andrade*, 19 I&N Dec. 102 (BIA 1967), *Matter of S-Y-L*, 9 I&N Dec. 575 (BIA 1962). 8 C.F.R. § 236.1(c)(8) changed the presumption that was set forth in the BIA's decision in Matter of Patel. Now, the regulation states that to secure release "the alien must demonstrate to the satisfaction of [INS] that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." In 2006, the BIA in *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006), clarified the standard for setting bond based upon the new regulation and found that the alien must establish to the satisfaction of the IJ that the alien does not present a danger to others, a threat to national security, or a flight risk, the IJ has wide discretion in deciding the factors that may be considered.

However, even in light of the *Guerra* decision, the Immigration Judge should refer various enumerated factors when considering the appropriateness and amount of bond in a particular case. The IJ Benchbook, under the Bond and Custody heading, instructs judges to consider the following factors and weigh them against flight risk and dangerousness:

1) Fixed address in the United States. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of Patel*, 15 I&N Dec. 666 (BIA 1979), 2) Length of residence in the United States. *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), 3) Family ties in the United States, particularly those who can confer immigration benefits on the alien. *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), 4) Employment history in the United States, including length and stability. *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), 5) Immigration Record. *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 San Martin*, 15 I&N Dec. 167 (BIA 1974); *Matter of Moise*, 12 I&N Dec. 102 (BIA 1967), 6) Attempts to escape from authorities or other flight to avoid prosecution. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of Patel*, 15 I&N Dec. 666 (BIA 1979); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974), 7) Prior failures to appear for scheduled court proceedings. *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); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974), 8) Criminal record, including extensiveness and recency, indicating consistent disrespect for the law and ineligibility for relief from deportation/removal. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987). IJ Benchbook, Bond & Custody, (I)(H).

In the instant case, the Immigration Judge found that Ms. XXX poses a danger to the community and denied bond. When reviewing the record as a whole, however, it becomes apparent that Ms. XXX doesn’t present a danger to the community and the Immigration Judge abused his discretion by failing to consider all of her positive factors in her immigration, criminal and personal history. If the Immigration Judge had considered each of the factors listed in the Immigration Judge Benchbook listed above, all of the positive factors clearly outweigh Ms. XXX’ conviction. Further, her conduct must be viewed with an eye to whether that incident indicates a propensity for violence in the future. For Ms. XXX, it was an isolated incident. It wasn’t part of an ongoing criminal scheme, there weren’t any other actors, she didn’t harm another person or exhibit aggressive behavior. A single driving under the influence conviction doesn’t show a propensity for violent or criminal behavior in the future. Prior immigration decisions have found that criminal history alone may be insufficient to justify detention, and a history of largely nonviolent prior bad acts do not demonstrate a propensity for future dangerousness. *See* *Matter of Guerra*, 24 I. & N. Dec. 37 (B.I.A. 2006). The BIA has further ruled that an immigration judge (IJ) must make a “precise finding whether the respondent has demonstrated that he would not pose a danger to property or persons ….” Matter of Urena, 25 I. & N. Dec. 140, 141, 2009 WL 3983103 (B.I.A. 2009). In that case, when the Immigration Judge only concluded that a respondent posed a *potential* danger to the community, the BIA remanded the case back to the IJ for a determination as to whether the respondent had met his burden of proving that, if released, he would pose no such danger.

In the present case, when Ms. XXX’ conviction is viewed in the context of her entire history in the U.S., there are no indicators that she poses a danger to the community. In fact, it is unfair to paint individuals with a single conviction for driving under the influence as a danger to the community without some specific, additional factors present within a particular individual that would indicate some instability or propensity of violence. If one conviction for driving under the influence equated to a danger to the community, many of the most distinguished civic, business, medical, academic and other pillars of our community, including prominent U.S. leaders, would be considered dangerous. A recent study revealed that there are 147 million self-reported episodes of alcohol-impaired driving among U.S. adults each year. Shults RA, Beck L, Dellinger AM. *Self-Reported Alcohol-Impaired Driving Among Adults in the United States*, 2006 and 2008. Presented at: Safety 2010 World Conference: 2010 Sept. 21-24, London, ENG (Presentation #0264).

Most people would agree that that it is simply unfair to characterize each and every one of the drivers who admitted to an episode of drinking and driving as inherently dangerous to the community it the future. Likewise, it would be ludicrous to assert that the Driving Without a License conviction, a regulatory infraction arising from the inability of most individuals without lawful status to obtain a license under current law, as any type of indicator of whether a person poses a danger to the community.

A review of Ms. XXX’ character and her history shows that she is anything but a danger to the community. She has a long, stable residence in the U.S., a strong academic record, a history of working since the age of 14, and extensive family ties in the U.S. This young woman has the determination to pursue her academic and career goals and has worked very hard towards those goals, impressing many people along the way, while continuing to help support the family and take an active role in raising her younger siblings. There is a complete absence of negative immigration history other than her entry without inspection as a child. She has fully cooperated with the authorities throughout the entire court process. If the noncitizen demonstrates that he or she is neither a flight risk nor a danger to the community, then a bond should be set or he or she should be released on conditional parole (also known as “on recognizance”).

Ms. XXX understands the seriousness of the Driving Under the Influence conviction and the importance of not driving without a license, however, given all of her positive factors, Ms. XXX clearly merits release from immigration detention upon the posting of a minimum bond. Release from custody would allow Ms. XXX to return to her family, resume her schooling, help care for her younger siblings and recuperate from her medical ordeal (discussed below) in the comfort and safety of her own home.

**2) In the alternative, The Board of Immigration Appeals should remand the matter back to the Immigration Court for ruling on the Motion for Reconsideration of Bond Redetermination**

Since the prior determination by the court and the filing of the BIA appeal, new evidence has arisen which was not previously available, and which constitutes a material change in circumstances pursuant to 8 C.F.R. §1003.19(e). If the alien is detained, to the Immigration Court that has jurisdiction over the place of detention is the proper venue for the redetermination. See Matter of Sanchez, 20 I&N Dec. 223, 225 (BIA 1990). In the instant case, however, The Immigration Court denied that it had jurisdiction to consider a bond redetermination. Therefore, Ms. XXX respectfully requests that this Court remand the appeal back to the Immigration Judge for reconsideration of the bond redetermination request.

The Board of Immigration Appeals recognized in *Matter of Valles*, 21 I & N Dec. 769 (BIA 1997), that the Immigration Judge retains jurisdiction for bond redeterminations during the pendency of a bond appeal with the Board of Immigration Appeals. The IJ BenchBook instructs Immigration Judges that they retain jurisdiction over bond redeterminations as follows:

WHILE A BOND APPEAL IS PENDING: When appropriate, an Immigration Judge may entertain a bond redetermination request, even when a previous bond redetermination by the Immigration Judge has been appealed to the Board of Immigration Appeals (BIA). *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997). If a bond redetermination request is granted by an Immigration Judge while a bond appeal is pending with the BIA, the appeal is rendered moot. Id. If an Immigration Judge declines to change the amount or conditions of bond, the DHS must notify the BIA in writing, with proof of service on the opposing party, within 30 days, if it wishes to pursue its original bond appeal. IJ Benchbook, Bond & Custody, section (I)(D).

Following the Judge’s denial of bond, Ms. XXX was victim of serious substandard medical care at GEO on Tuesday, April 3, 2012. On that day, Ms. XXX underwent molar extraction surgery at GEO, performed by the contract dentist. Complications arose during the procedure because the tooth broke apart. Two to three pieces became stuck and wouldn’t come out. In order to try to get the rest of the tooth extracted, the dentist continued to pry and pull the pieces out over a total time of approximately two hours and forty minutes. During that time, Ms. XXX was bleeding heavily and the anesthesia began wearing off causing her enormous pain. From approximately 2:15 minutes, the Dentist, Dental Assistant and Geo officer(s) present began arguing because all parties, except the Dentist, were concerned about Ms. XXX’ worsening condition and wanted to have Ms. XXX transported to the hospital. The Dentist refused to sign the paperwork for the transfer and insisted that she could complete the extraction with a little additional time. The Lieutenant was called in and the Dentist persuaded him to give her a few additional minutes to try.

Meanwhile, Ms. XXX continued bleeding, her blood pressure began dropping and she began to experience intense pain. She was also extremely sore and swollen as her mouth had been pried open for over two hours. The Dentist, against established safety protocols, attempted to give another round of anesthesia to Ms. XXX until the medical assistant convinced her that it would be too dangerous. After two hours and forty minutes, the Dentist decided that the tooth couldn’t be extracted in GEO and would have to be finished at the hospital but decided that it would be best to wait a few days to allow Ms. XXX to stabilize.

Due to the blood loss and low blood pressure, Ms. XXX couldn’t be given powerful pain medication initially. She was given Ibuprofen & Tylenol and sent to the medical unit to recuperate. That evening and night she suffered from extreme pain, which was exacerbated by the pieces of tooth still remaining. She continued to bleed and her blood pressure spiked. Shortly after midnight she was given Vicodin for the pain, along with a small bowl of oatmeal.

At approximately 1:30 am, Ms. XXX felt nauseous and attempted to walk to the bathroom. She became dizzy, had double vision, began gasping for air and then fainted and stopped breathing altogether. Medical personnel rushed in, revived her and called an ambulance. When she came to, she was cold, had chest pains, a very weak pulse and still couldn’t breathe. She had to have oxygen administered (which was made more difficult because the machine was mistakenly not turned on for the first few minutes). Ms. XXX was taken by ambulance to the emergency room, given a complete cardiac workup, administered two different types of cardiac medication and kept there until she stabilized. She returned to GEO at approximately 6:00 am Wednesday. Ms. XXX had to wait until the following Tuesday to have the rest of her molar extracted, a full week later. During that time, she suffered from tremendous pain due to the complications from the first extraction and the partially remaining tooth and root.

Ms. XXX is now very nervous about remaining at GEO. She is very afraid that something could happen to her again. Additionally, many of the GEO personnel know of her story and are talking about her. Some GEO employees actually encouraged her to make a formal complaint against the Dentist. Ms. XXX believes in the importance of filing an incident report and filed a report. At least two GEO officers who were present during the incident told Ms. XXX that they filed reports substantiating the inferior medical care. Undersigned counsel is attempting to obtain copies of those reports but has not been able to as of this date.

Filing the report took an enormous amount of courage by Ms. XXX. She has heard many credible stories about mistreatment of detainees in retaliation for making complaints as well as individuals receiving substandard medical care. Numerous articles have been written about the conditions of detention and, in particular, the lack of medical care. Since October 2003, at least 104 noncitizens have died while detained in DHS custody. See, e.g., Ramshaw, “Detaining Care, Part One: Mental Hell,” The Texas Tribune, Nov. 16, 2009, available at http:// www.texastribune.org/stories/2009/nov/16/psychiatrists-mental-health-care-absent-immigration-detention-centers/; Ramshaw, “Detaining Care, Part Two: Health Scare,” The Texas Tribune, Nov. 17, 2009, available at http:// www.texastribune.org/stories/2009/nov/17/health-care-failing-immigrants-texas-detention-centers/; Ramshaw, “Detaining Care, Part Three: Andre's Story,” The Texas Tribune, Nov. 18, 2009, available at http:// HYPERLINK "http://www.texastribune.org" www.texastribune.org /stories/2009/nov/18/detaining-care-part-3-andres-story/. See Bernstein, “Officials say fatalities of detainees were missed,” The New York Times, Aug. 18, 2009; Barry, “A death in Texas casts cold light on America's privatized immigration prisons,” Boston Review, Oct. 23, 2009.

 Additionally, the U.S. Supreme Court recently granted writs of certiorari and consolidated two cases involving a lawsuit filed by survivors of former noncitizen detainee Francisco Castaneda, who died from penile cancer after being released from U.S. Immigration and Customs Enforcement (ICE) custody; the case involves the Federal Torts Claim Act, *Bivens* claims, and claims of lack of adequate and appropriate treatment of Mr. Castaneda while in DHS custody. See *Henneford v. Castaneda*, case no. 08-1547, 2009 WL 1725914, 130 S.Ct. 49, cert. granted (Sept. 30, 2009), and consolidated with *Migliaccio v. Castaneda*, case. 08-1529, 130 S. Ct. 49, 174 L. Ed. 2d 632 (2009); decision below, *Castaneda v. U.S. et al.*, 546 F.3d 682 (9th Cir. 2008). For a discussion about the facts and the procedural history in the *Castaneda* case before the federal district court, See *Castaneda v. U.S.*, 538 F. Supp. 2d 1279 (C.D. Cal. 2008), discussed in 85 Interpreter Releases 2790 (Oct. 20, 2008).

Ms. XXX remains understandably concerned about her safety and security as a result of her complaint. She is also terrified that she will have additional medical problems and experience future mistreatment at GEO. The medical incident, aftermath of the incident and Ms. XXX’ actions of filing a report and exposing herself to possible repercussions constitutes a material change in circumstances justifying a second bond re-determination under 8 C.F.R. §1003.19(e). Based upon the new evidence, we respectfully request that the Board remand the bond appeal back to the Immigration Judge for a ruling on her pending Motion for Reconsideration of Bond Redetermination and find that Ms. XXX merits a minimal bond in the present case.

**Conclusion**

Based upon the failure of the immigration judge to weigh both positive and negative factors in support of Ms. XXX’s bond request, along with the new circumstances regarding Ms. XXX’s substandard medical care in detention, Ms. XXX respectfully requests that the Board of Immigration Appeals overrule the Immigration Judge’s decision and grant Ms. XXX bond or, in the alternative, remand the case back to the Immigration Court to address the pending Motion for Reconsideration.

Respectfully submitted this date

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 Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Respondent’s Brief in Support of Appeal and all supporting documentation were mailed via U.S. Mail on date to:

Department of Homeland Security

Office of the Chief Counsel

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