

[REDACTED]

NON-DETAINED

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

In the Matter of

File No: A

In Removal Proceedings.

Immigration Judge: Christopher Greer

Next Hearing: May 22, 2019 at 1:00PM

RESPONDENT’S BRIEF IN SUPPORT OF INTERLOCUTORY APPEAL

_____, by and through counsel, seeks interlocutory review of the Immigration Judge's ("IJ's") decision denying her motion for change of venue from Salt Lake City, Utah to the jurisdiction of her attorneys' office and residence, Boise, Idaho.

I. STATEMENT OF FACTS

Respondent is a citizen and national of Guatemala, born on _____. She last entered the United States at El Paso, Texas on or about July 26, 2018 and was put into removal proceedings. Respondent hired undersigned counsel at Immigrant Justice Idaho (IJI) on January 22, 2019 and filed a Motion to Change Venue to Boise, Idaho on the same date. *See* Exh. 1 - Respondent's Motion to Change Venue or, in the Alternative, Motion to Permit Telephonic Representation by Attorney (January 22, 2019). Through counsel, the Respondent indicated that her preference was for her Court proceedings to be conducted in Boise, Idaho, where her attorneys reside. *Id.* However, the Court denied the Respondent's motion on February 4, 2019 for the reason that "the Respondent resides closer to Salt Lake City than Boise." *See* Exh. 2 - IJ Decision.

During Respondent's Master hearing on February 6, 2019, Respondent was represented by IJI Legal Director, Benjamin Stein. Mr. Stein again requested that venue be changed to Boise, Idaho by making an oral motion. Exh. 3 - Affidavit of Benjamin E. Stein. Judge Greer informed Mr. Stein that the motion was denied because the Respondent's home is closer to Salt Lake City, Utah than to Boise, Idaho and that the court was denying her motion based upon the distance "in order to be fair to everybody." *Id.*

Respondent then filed a Non-Opposed Motion to Reconsider the Denial of the Change of Venue on March 6, 2019. Exh. 4. In support of the Motion to Reconsider, the Respondent submitted new facts and referred to relevant law that was not before the Court at the last hearing including a declaration from the Respondent's mother about the efforts she made to find alternate counsel for her minor daughter, and a statement from undersigned counsel explaining the scope of Immigrant Justice Idaho's services and representation. See Exh. 4 - Motion to Reconsider, Tab B (Andrade Aff.)(internal p. 4).

In her declaration, the Respondent's mother, _____, explained that despite her best efforts, she was unable to locate counsel available to represent her daughter at a fee that she can afford. See Exh. 4, Motion to Reconsider, Tab A (_____ Aff.)(internal pp. 1-3). She further explained her understanding that IJI would not be available to represent her further if the case remained in Utah. *Id.* She further explained her willingness to travel an extra 17 miles¹ to Boise, Idaho rather than Salt Lake City, Utah for the benefit of being represented by the counsel of her choice. *Id.* _____ explained that due to the inability to find an affordable attorney who is willing to take her case if she appears before the Utah immigration court, her daughter will be denied the opportunity to be represented by any counsel if the case remains in Utah. She also restated her choice to have IJI continue to represent her daughter. *Id.*

¹ Respondent's mother's affidavit states 30 miles, but the actual difference between the Respondent's city and the two court houses is 17 miles or six minutes of travel time based upon a calculation performed at o www.mapquest.com.

In her declaration, Ms. _____ described the specific steps she took to find counsel in both Utah and Idaho. *Id.* She explained she called all the telephone numbers that appeared on the list of lawyers and agencies that she was provided by the Court, and how every entity she called other than IJI declined the case. *Id.* She further explained that she called private attorneys in Idaho but could not afford their fees. *Id.* These actions demonstrate _____ diligence and responsible actions to ensure that she finds counsel for her daughter.

Ms. _____ claim that she cannot afford to pay market rates for attorneys' fees is substantiated by her sworn statement about her household size and income. *Id.* She stated that her household includes 8 people who live on wages of one full time and the wages of one seasonal worker. *Id.* The full-time wages amount to \$33,600 per year (\$2,800 per month). *Id.* Pursuant to the U.S. Federal Poverty Guideline, the household income is approximately 23% under the federal poverty level for her household size. 2018 Poverty Guidelines, Office of the Assistant Secretary for Planning and Evaluation, U.S. Dept. of Health and Human Services, available at: <https://aspe.hhs.gov/2019-poverty-guidelines>. (last visited 03/05/19).

While her finances are limited, Ms. _____ explained that the expense of paying a person to travel to and from Utah to represent her daughter, and the intangible cost to her daughter of appearing *pro se* at her hearings far outweighs any cost associated with travelling 17 additional miles (requiring an additional six minutes of driving time) to get to Boise, instead of Salt Lake City. *Id.* Ms. _____ attests the cost associated with this travel is not much when compared to what

she will save by having the services of IJI. *Id.* She further recognizes the importance of having an attorney assist her daughter and conveys the emotional impact of worrying if _____ had to appear in court without a lawyer. *Id.*

Immigrant Justice Idaho is located at 3775 W. Cassia St., Boise, Idaho 83705. As a nonprofit organization, IJI represents clients on a low fee and *pro bono* basis. Exh. 4 – Motion to Reconsider, Tab B (IJI Information Sheet) (internal p. 6). IJI is a new organization that relies upon donations, volunteers, and its sliding-scale fees to sustain its operations. IJI has only two full-time attorneys.

Immigration Judge Greer denied the Respondent’s Motion on March 11, 2019 for the “same reason as first denial.” Order (3/11/19)(on file with Board).

Respondent filed this timely Notice of Interlocutory Appeal on April 10, 2019.

II. ARGUMENT

The Board has exercised its authority to entertain interlocutory appeals in instances involving either important jurisdictional questions regarding the administration of immigration laws, or recurring questions in the handling of cases by Immigration Judges. *See* BIA Practice Manual § 4.14(c), citing *Matter of K-*, 20 I&N Dec. 418 (BIA 1991). In the present case, important jurisdictional questions are raised by the IJ’s decision to deny Respondent’s Unopposed Motion for a Change of Venue, and concerns that appear to be recurring are raised by the IJ’s handling of Respondent’s matter. As such, interlocutory review by the Board is appropriate here. *Id.*

- A. BY APPLYING A GENERAL POLICY TO DENY THE RESPONDENT’S CASE AND FAILING TO CONSIDER HOW RELEVANT FACTORS APPLIED TO THE RESPONDENT’S PARTICULAR CASE, THE IJ DECISION IS LEGALLY ERRONEOUS ON ITS FACE.

Where good cause exists, an immigration judge may change the venue of any case to another jurisdiction. 8 C.F.R. § 1003.20(b); *Matter of Dobere*, 20 I. & N. Dec. 188 (BIA 1990). Good cause is determined by a balancing of factors that the Board finds relevant to the venue issue. *Matter of Rahman*, 20 I. & N. Dec. 480, 482-83 (BIA 1992); *Matter of Rivera*, 19 I. & N. Dec. 688 (BIA (1988); *Matter of Velasquez*, 19 I. & N. Dec. 377 (BIA 1986). Balancing of such relevant factors include administrative convenience, expeditious treatment of the case, location of witnesses, and cost of transporting witnesses or evidence to a new location. *Matter of Rahman*, 20 I. & N. Dec. 480, 482-83 (BIA 1992); *Matter of Rivera*, 19 I. & N. Dec. 688 (BIA (1988); *Matter of Velasquez*, 19 I. & N. Dec. 377 (BIA 1986). The IJ failed to apply controlling law to his discretionary decision to deny the Respondent's motion by failing to balance any of the factors relevant to determine whether the movant has established good cause for the motion. Therefore, the IJ abused his discretion in denying the Respondent's Unopposed Motion for Change of Venue.

B. ALL FACTORS WEIGH IN FAVOR OF A FINDING THAT THE
RESPONDENT HAS ESTABLISHED GOOD CAUSE FOR HER MOTION

While an immigration judge enjoys discretion to change venue for good cause, the Board has ruled that an IJ must consider various factors in carrying out the good cause analysis. *Matter of Rahman*, 20 I. & N. Dec. 480 (BIA 1992) citing *Matter of Rivera*, 19 I. & N. Dec. 688 (BIA 1988) and *Matter of Velasquez*, 19 I. & N. Dec. 377 (BIA 1986). Each of the factors that must be considered are addressed below:

Administrative convenience – The Respondent cannot identify any

administrative inconvenience to the court if venue is changed. The Utah EOIR has administrative control of the Idaho docket. Therefore, the very same court and the very same office of attorneys representing DHS has responsibility for this case.

The DHS attorneys and Utah immigration judges regularly appears before the EOIR's Boise Docket from Utah via video teleconference ("VTC"). Whether the Respondent appears in person before the EOIR in Utah, or appears before the EOIR in Utah via VTC from Boise, Idaho, a hearing is going to take place. There is no incremental cost to the government by changing the means which the Respondent appears when the EOIR is regularly hearing cases in Idaho via the VTC from the courtroom in Utah.

As the Department of Justice has recognized, there are administrative benefits flowing from counseled cases that form part of the Department of Justice policy to facilitate the provision of pro bono representation. *See* Exh. 4 - Motion to Reconsider Tab C, (U.S. Dept. of Justice, *Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services* (3/10/08)) (internal pp. 8-13) (noting that counseled cases benefit both the respondent and the court, providing the judge with efficiencies that can only be realized when the respondent is represented in the context of discussing pro bono services). Although IJI agreed to handle the preliminary matters in the case on a "low bono" fee as opposed to completely free while the case was venued in Utah, the efficiencies of all counseled case benefit an overburdened court. *Id.* Tab B (Andrade Aff.)(internal p. 4). Immigrant Justice Idaho has agreed to assist Respondent to seek to change venue and intends to seek a pro-

bono representation for her through a volunteer attorney placement or to consider the case for pro-bono representation directly from Immigrant Justice Idaho. *Id.* However, because IJI has represented to the Department of Justice, its donors, and the public that it would offer pro bono services only to those individuals who appear before the Idaho Immigration Court, the organization will be unable to extend this service to the Respondent if her case remains in Utah.² It was for this reason that Immigrant Justice Idaho charged the Respondent anything at all. *Id.*

The Respondent submits that the policy underlying the March 2008 OPP 08-01 is supports her motion to change venue to Idaho. Exh. 4, Motion to Reconsider Tab C (internal p. 10) (“Judges are strongly encouraged to be flexible with pro bono representatives, particularly in the scheduling of hearings and the setting of filing deadlines.”). As noted below, these policies are particularly applicable to minors, like the Respondent. *Id.* at p. 13. (“Given the particular vulnerability of minor respondents, judges are strongly encouraged to facilitate pro bono representation whenever minors are involved.”). The IJ’s decision does not reflect any concern over administrative convenience and it is difficult to see how it could, given the Utah court’s pre-existing responsibility for this case.

Expeditious treatment of the case – At the last master calendar hearing pleadings were taken, the form of relief was stated, and a filing deadline was imposed by this court. Exh. 3, Affidavit of Benjamin E. Stein. The Court took pleadings, resolved issues of removability, determined the form of relief for which the

² IJI is seeking to withdraw from this case. See section C, *infra*.

Respondent will be requesting, scheduled a date by which the relief should be filed and ensured that the Respondent was advised of the consequences of failing to comply with any of the deadlines. *Id.* Therefore, the Utah court has completed all parts of the case that would be expected to have been done by this stage in the case as required under the Department of Justices' Operating Policy and Procedure Memorandum 01-02 addressing Changes of Venue. EOIR OPPM 01-02: Change of Venue, V, B (10/09/01).

Location of witnesses – No witness resides in Utah. All witnesses reside in either Idaho or abroad. In the event that an expert witness is called, the Respondent anticipates that she would seek to present telephonic testimony.

Cost of transporting witnesses or evidence to a new location – No anticipated witness or evidence needs to be transported. The Respondent has no contacts in Utah and undersigned counsel knows of no evidence originating in Utah.

As most of the above factors are neutral, and there is arguably greater administrative convenience to have this case be counseled as recognized by OPPM 08-01, the Respondent's interest in effecting her right to counsel of her choice should weigh heavily in favor of granting this motion.

Material prejudice to the respondent if venue is not changed - The Respondent is the only person who is prejudiced by the denial of the motion. Her mother desperately seeks to secure counsel for her daughter and has found only one nonprofit organization and low-fee counsel that is able to represent her in her removal proceedings. Exh. 4, Motion to Reconsider, Tab A (_____ Aff.)(internal pp. 1-

3). As she stated in her mother's affidavit, the Respondent will not have counsel if venue is not moved. *Id.* The Respondent submits that this factor alone is a sufficient basis upon which to sustain the appeal, especially where the judge fails to identify any relevant factor that weighs against granting the motion.

In a series of Board cases, several other factors have been identified as relevant, though not required to be evaluated, in determining whether a person seeking to change venue has established good cause therefore. Among them include the provision of the name and address of counsel in the new location if known at the time of filing the motion to change venue. EOIR OPM 01-02: Change of Venue, V, A (10/09/01). Here, the Respondent provided ample evidence of her pre-existing relationship with IJI, her reasons for seeking representation from the entity and her desire to continue to be represented by the entity. Exh. 4, Motion to Reconsider, Tab A (_____ Aff.)(internal pp. 1-3). In addition, the Respondent provided information about the scope of services that IJI offers, and its non-profit status. Exh. 4, Motion to Reconsider (Andrade Aff.)(internal p. 4). The pleadings also indicated that the Respondent would not have funds to pay for counsel from Idaho to travel to appear before the Utah EOIR. Likewise, she submitted evidence that IJI has told the Department of Justice and the public that its free representation is limited to those who appear before the Idaho EOIR. *Id.*

Immigrant Justice Idaho, as a new non-profit entity, does not have the resources to expend the money to travel to and from the Utah EOIR and expend a full day or two away from the office in order to appear at Respondent's current or future

hearings.³ The time away from the office would lead to significant hardship on the organization and impair IJI and Counsel's ability to assist and provide effective representation to other clients over the course of multiple days of travel and court appearances. *See* fn. 3, *supra*. In addition, the external costs of travel and accommodations for the representation of one client on a low fee or *pro bono* basis are prohibitively high and cannot be accommodated in IJI's budget. *Id.* Furthermore, Respondent is unable to pay for Counsel's travel expenses to appear for her hearings in Salt Lake City, Utah. Exh. 4, Motion to Reconsider, Tab A (_____ Aff.)(internal pp. 1-3). The IJ's denial of Respondent's venue motion severely prejudices the Respondent.

By denying the Respondent's motion through applying a general policy, the IJ also failed to consider the hardship on Respondent to either hire a high-cost attorney in Utah or to hire one in Idaho who could travel in order to attend her hearings, present evidence on her behalf, bring witnesses, or her counsel's location in Boise and her counsel's inability to travel to Utah.

Finally, the immigration judge did not consider the fact that DHS did not oppose the Respondent's requests to change venue at any time the issue was raised to the immigration court.

The standard for "good cause shown" for a change of venue is set forth in several board cases and in regulation. 8 C.F.R. § 1003.20(b); *Matter of Rahman*, 20 I & N Dec. 480 (BIA 1992), *Matter of Victorino*, 18 I & N Dec. 259 (BIA 1982). The immigration

³ The undersigned counsel makes this representation as the Executive Director of IJI and as an officer of the court.

judge's failure to apply controlling law to his discretionary decision to deny the Respondent's motion renders his decision unsustainable. There is no way to discern the judge's reasoning or any reason to assume the judge followed Board precedent or controlling circuit court precedent in reaching his decision. In fact, the record establishes that contrary to conducting a fact-based inquiry and balancing of relevant factors, that the immigration judge applied a pre-determined rule that if a person lives closer to the Utah EOIR than the Idaho EOIR, that "to be fair to everybody" he will deny a motion to change venue to Idaho. No such rule or factor has ever been identified by any authoritative source as relevant in determining if a movant has shown she has good cause to change venue.

The immigration had three occasions to review well-established law and follow the as laid out in its various cases addressing motions to change venue. In light the clear legal directives issued by the Board in this matter the Board should sustain this appeal, enter an order directing that proceedings be held in Boise without remand to the immigration judge.

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C. THE RESPONDENT'S RIGHT TO COUNSEL IS UNJUSTIFIABLY INFRINGED UPON BY THE IJ DECISION.

An individual in removal proceedings "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." *See Castro-O'Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1988); INA § 292. In the present case IJI, located in Boise, Idaho, has

agreed to continue to represent the Respondent if her case is moved to Boise. Undersigned Counsel, who works at IJI in Boise, has prepared some of the filings, motions and briefings in Respondent's case. However, due to the IJ's denial of the motion to change venue, IJI is, with the consent of the Respondent, preparing a motion to withdraw representation which will be filed imminently with the immigration court. The Respondent choose not to delay the filing of this brief until a ruling from the EOIR could be obtained with regard the forthcoming motion to withdraw, and she will send a copy of all related filings to the Board as they become available.

While the Respondent has an absolute right under statute to be represented by counsel so long as she pays for it, the right may as well not exist if she is denied the opportunity to accept an offer of affordable legal representation. INA § 240(b)(4)(A). Infringing upon the Respondent's right to effectuate her statutory right counsel can only be justified upon a rigorous analysis of the competing relevant factors. Here, the IJ decision reflects no analysis at all. The Immigration Judge abused his discretion in denying the venue change when the record established that the Respondent will essentially be denied counsel if venue is not changed. *See Castro-O'Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1988). Further, the IJ erred by failing to apply the factors outlined in *Matter of Rahman* to this case.

D. THE FACT THAT ASYLUM AND PROTECTION CASES ARE FIVE TIMES MORE LIKELY TO PREVAIL THAN UNCOUNSELED CASES, AND THAT UNACCOMPANIED MINORS AND MINORS ARE ENTITLED TO UNIQUE CONSIDERATION, THE IJ DECISION VIOLATES THE RESPONDENTS SUBSTANTIVE DUE PROCESS RIGHTS.

The Respondent is seeking asylum and other forms of protection. She is entitled to choose her own counsel and be represented by counsel who can assist her in presenting evidence in support of her case. The Respondent's mother is right to be concerned about her daughter's ability to represent herself, as asylum applicants who are represented by counsel are five times more likely to be successful in their applications on the merits than those appearing *pro se*. *Transactional Records Access Clearinghouse*, Asylum Representation Rates have Fallen Amid Rising Denial rates (<https://trac.syr.edu/immigration/reports/491/>) (Nov. 28, 2017)(last viewed April 24, 2019). Across civil and criminal law, minors are given special consideration in light of their ongoing development and lack of sophistication and maturity in dealing with significant legal matters -- some that are, without exaggeration, a matter of life and death.⁴ The Respondent is entitled to a fundamentally fair hearing under the Due Process clause of the Fifth Amendment. While not all cases have to be counseled for a fundamentally fair hearing to occur, it offends the notion of fundamental fairness to deny a person their statutory right to counsel by giving 100% of all weight to a factor that is irrelevant to the good cause analysis.

III. CONCLUSION

Based on the foregoing and for good cause shown, Respondent respectfully requests that the venue of these proceedings be changed to Boise, Idaho.

Dated: April 24, 2019 in Boise, Idaho.

⁴ Regrettably, there are a number of news articles about minors were removed and found dead shortly thereafter. *E.g.*, Sgtalter, M, *Iowa student killed after being deported to Mexico*, The Hill (6/7/18) available at <https://thehill.com/homenews/news/391275-iowa-student-killed-after-being-deported-to-mexico> (last visited 4/24/19).

[REDACTED]
Attorney for Respondent

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PROOF OF SERVICE

On _____, 2019, I, _____, served a copy of the Respondents' Brief in Support of Interlocutory Appeal and any attached pages to the Department of Homeland Security Counsel, Office of Chief Counsel at the following address:

U.S. Department of Homeland Security Counsel
U.S. Immigration and Customs Enforcement
2975 Decker Lake Drive, Stop C
West Valley City, UT 84119-6098

by the following method:

- ☐ Hand Delivery
- ☐ U.S. Mail, 1st Class postage pre-paid
- ☐ Facsimile
- ☐ Express Mail
- ☐ Electronic Mail:

(SIGNATURE)

(DATE)