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**UNITED STATES DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**IMMIGRATION COURT**

**TACOMA, WASHINGTON**

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| In the Matter of XXX Respondent. |  **A XX XXX XXX** **IN BOND PROCEEDINGS** |

**Bond Hearing: October, 2017 at 10:30 a.m.**

**Immigration Judge Tammy Fitting**

# RESPONDENT’S PRE-HEARING STATEMENT

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| In the Matter of XXX Respondent. |  **A XXX XXX XXX** **PRE-HEARING STATEMENT IN** **BOND PROCEEDINGS** |

# I. introduction

The respondent, NAME, is a 23-year-old native and citizen of Mexico. She came to the United States when she was 1 years old. From the age of 6 to 12, Name was sexually abused by her father, who would also sell her for sex to his friends. The abuse only stopped when her dad was deported when she was 12 years old. On the basis of this abuse, it is likely that Name is eligible for VAWA cancellation of removal and a T visa. Name now lives in Idaho with her mother, who has serious health issues, her 18-year-old brother, who is autistic. Name helps her mother by taking her shifts at the dairy when she is unable to get out of bed, and is also a caretaker for her brother, helping him get to and from school and do basic daily tasks, such as bathing. Her only conviction does not subject her to mandatory detention, as it is categorically not a controlled substance offense. Given the equities in Name’s case, and her family’s limited ability to pay a bond, we ask that the Court grant her conditional parole, or in the alternative, set a bond of $1,500.

# II. STATEMENT OF FACTS

Name came to the United States when she was 1 year old, and for the first years of her life, she endured serious abuse at the hands of her father. *See* Respondent’s Bond Evidence Packet (“Bond Packet”), Tab A, Declaration. When she was between the ages of 6 and 12, her father sexually abused her, and sold her for sex to his friends. *Id.* at ⁋ 3. As she believes her father to be a lawful permanent resident, it is likely that she is eligible for VAWA cancellation of removal, in addition to a T visa, based on sex trafficking.

Name has lived in Idaho for nearly her entire life. Prior to her detention, she lived with her mother and her 18-year-old brother. Her mother works at a dairy, but is sometimes unable to work because of a condition that causes her legs to swell and requires liquid to be drained from her joints. *Id.* at ⁋ 4. Name will then cover her mother’s shift at the dairy to help with the finances. *Id.* Name also helps care for her autistic brother, attending parent-teacher conferences, and helping him calm down when he gets agitated. In her declaration, she states: “I talk to him in a respectful, calm tone and he can have normal conversations with me. I think I’m better at calming him down than my mom is.” *Id.* at ⁋ 5. If she is released, she will live with her mother and name, Idaho, with whom she has always lived. *Id.* at ⁋ 2, Bond Packet Tab B. Her mother is the only relative who could pay the bond, and her mom would be unable to afford a bond of more than $1,500. Her brother’s partner and mother attest to the fact that Name is a primary caretaker of H, and that she is responsible, and that she is the one who has helped H through his daily activities. *See* Bond Packet, Tabs C, D.

# III. Argument

## Name is not subject to mandatory detention

Name’s 2017 conviction for possession of drug paraphernalia in Idaho is not a removable offense, and therefore, it is substantially unlikely that DHS will be able to demonstrate that she is subject to mandatory detention. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999) (holding that if a detainee could demonstrate that DHS was substantially unlikely to establish that she is inadmissible under 212(a)(2), she is not subject to mandatory detention). An individual is subject to mandatory detention under 236(c) if they are detained when released from custody after serving time for an offense which renders them inadmissible pursuant to 212(a)(2). INA § 236(c). Although Name was detained by DHS upon her release from custody for this conviction, this offense does not render her indamissible, and thus, she is not mandatorily detained.

Under INA § 212(a)(2)(A)(i)(II), a violation of any law “relating to a controlled substance (as defined in section 802 of Title 21)” renders an individual inadmissible. In *Mellouli*, a noncitizen was convicted of a drug paraphernalia possession in Kansas, and the Department of Homeland Security thus charged him as being deportable under INA § 237(a)(2)(B)(i), a provision which also covers offenses “relating to a controlled substance (as defined in section 802 of Title 21).” *Mellouli v. Lynch*, 135 S. Ct. 1980, 1983-84 (2015). Because the Kansas drug schedules contained drugs not listed in the federal schedules (section 802 of Title 21), the Supreme Court held that a conviction under the Kansas paraphernalia offense was not a removable offense, as “the state law under which he was charged categorically ‘related to a controlled substance,’ but was not limited to substances ‘defined in § 802.’” *Id.* at 1988.

Here, Idaho’s drug paraphernalia statute is similarly overbroad, and thus not a removable offense. The statute reads:

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

I.C. § 37-2734A(1).[[1]](#footnote-1) The elements of the offense are (1) the use or possession with intent to use (2) drug paraphernalia to somehow introduce a “controlled substance” into the human body. *See* I.C. Jury Instructions 408 (Possession of Drug Paraphernalia), attached here. The term “controlled substance” is further defined in Idaho’s six drug schedules. *See* I.C. §§ 37-2734A; 37-2701(e) (defining controlled substance as those defined in “schedules I through VI of article II of this chapter).

 Just as with the Kansas controlled substance law at issue in *Mellouli*, Idaho’s list of controlled substances contains substances not listed on the federal schedules. The attached list contains more than 50 substances are delineated, which appear on the Idaho schedules but not on the federal schedules. As such, the Idaho paraphernalia statue, although relating to controlled substances, is not limited to offenses involving substances “defined in § 802.” *Mellouli*, 135 S. Ct. at 1988. Therefore, it is “substantially unlikely” that DHS would be able to demonstrated that Name is inadmissible under 212(a)(2). *Joseph*, 22 I&N Dec. 799. Accordingly, Name is not subject to mandatory detention, and is eligible for release under conditional parole or a bond.

## Name is not a danger or a flight risk and should be released on conditional parole

Name’s possession of paraphernalia is her only conviction. *See* I-213. Moreover, she has a number of positive equities that demonstrate that she is not a flight risk. She has lived in the United States for 22 years, almost her entire life, and has extensive family ties here, including two U.S. citizen brothers. *See* Bond Packet, Tab A. She has a fixed address, and will live with her mother and brother if she is released from detention. *See* Bond Packet Tabs A, B. Moreover, she is likely eligible for multiple forms of relief—she may be eligible for VAWA cancellation of removal and a T visa, given the abuse she suffered at her father’s hands. *See* Bond Packet Tab A.

## If the Court elects to set a bond, her ability to pay should be considered.

Name’s indigent economic status should be considered in setting her bond. The Ninth Circuit recently recognized that due process likely requires a consideration of an individual’s financial circumstances. *Hernandez v. Sessions*, --- F.3d. ---, No, 16-58629, 2017 WL 4341748 at \*10 (9th Cir. Oct. 2, 2017). As the purpose of a bond is to ensure future appearance in court, the Ninth Circuit recognized that “the amount of bond that is reasonably likely to secure the appearance of an indigent person obviously differs from the amount that is reasonably likely to secure a wealthy person’s appearance.” *Id.* The Ninth Circuit held that a requirement to consider ability to pay “follows directly from the Supreme Court’s dictate that immigration detention bear a reasonable relation to its purpose.” *Id.* at 17, citing *Zadyvdas v. Davis*, 121 S. Ct. 2491 (2001) (quotations omitted).

Name is being represented *pro bono* in these proceedings. *See* E-28. In her declaration, she attests to her mother’s earnings and expenses. *See* Tab A at ⁋ 6. As such, we ask that the Court order her release on conditional parole. In the alternative, if the Court finds a bond necessary to secure her future appearance, we request a bond of $1,500.

Dated: October XX, 2017 By:

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| Alison HollenbeckNorthwest Immigrant Rights Project*Attorney for Name NAME in bond-only proceedings* |

**CERTIFICATE OF SERVICE**

I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_, hereby certify that I served a true and correct copy of the attached **Pre-Hearing Statement in Bond Proceedings** by placing it in the ICE drop box at:

Department of Homeland Security

Office of the Chief Counsel

Northwest Detention Center

1623 East J Street, Suite 2

Tacoma, WA 98421

|  |  |  |
| --- | --- | --- |
| Signature |  | Date |

1. This statute is almost identical to the Kansas statute at issue in *Mellouli*: “(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to… (2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.” *See* Kan. Stat. Ann. § 21-5709(b)(2). If anything, the Idaho statue is even broader than the Kansas statute, as it reaches the paraphernalia which plants, propagates, cultivates, grows, harvests, manufactures, compounds, converts, produces, prepares, tests, analyzes, repacks. [↑](#footnote-ref-1)