EXHIBIT B

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

(b)(6) A (b)(6)

Respondent

FILED
Apr 11, 2023

ON BEHALF OF RESPONDENT: N. David Shamloo, Esquire

IN BOND PROCEEDINGS
On Appeal from a Decision of the Immigration Court, Tacoma, WA

Before: Malphrus, Deputy Chief Appellate Immigration Judge; Liebowitz, Appellate Immigration Judge; Brown, Temporary Appellate Immigration Judge[1]

Opinion by Deputy Chief Appellate Immigration Judge Malphrus

MALPHRUS, Deputy Chief Appellate Immigration Judge

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's January 12, 2023, bond order. The Immigration Judge issued a memorandum setting forth the reasons for his bond decision on January 18, 2023. The record will be remanded.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge determined that the respondent is subject to mandatory detention under section 235(b)(2)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1225(b)(2)(A). We will remand the record to the Immigration Judge for further fact-finding and analysis.

Section 235(a)(1) of the INA, 8 U.S.C. § 1225(a)(1), defines "an applicant for admission" in relevant part as an "alien present in the United States who has not been admitted." Section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), provides (subject to certain exceptions not relevant here) that "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under" section 240 of the INA, 8 U.S.C. § 1229a.

[1] Temporary Appellate Immigration Judges sit pursuant to appointment by the Attorney General. *See generally* 8 C.F.R. § 1003.1(a)(1), (4).

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Section 236(a) of the INA, 8 U.S.C. § 1226(a), provides that 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." Subject to exceptions provided in section 236(c) of the INA, 8 U.S.C. § 236(c), the Attorney General "may continue to detain" a noncitizen arrested pursuant to such a warrant or release him on bond or conditional parole. INA § 236(a)(1)-(2), 8 U.S.C. § 1226(a)(1)-(2).

It is undisputed that the respondent is present in the United States, has not been admitted, and that an immigration officer has found that he is not clearly and beyond a doubt entitled to be admitted (IJ at 2-3; Exh. 2 at 4-5).[2] Under these circumstances, the respondent could be subject to mandatory detention under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), as an applicant for admission as defined by section 235(a)(1) of the INA, 8 U.S.C. § 1225(a)(1). *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1197 (9th Cir. 2022) (explaining that section 235(b)(2) "'serves as a catchall provision'. . . which mandates detention" for applicants for admission who do not have a credible fear of persecution and are not clearly and beyond a doubt entitled be admitted) (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018)). However, the Record of Deportable/Inadmissible Alien ("Form I-213") indicates that the respondent may have been arrested by Immigration and Customs Enforcement ("ICE") officers pursuant to a warrant of arrest issued in conjunction with a notice to appear (Exh. 2 at 3).[3] *See* 8 C.F.R. §§ 236.1(b), 1236.1(b) (explaining the procedures for the issuance and execution of a warrant for arrest). If the respondent was arrested pursuant to such a warrant, he would be subject to detention under section 236 of the INA, 8 U.S.C. § 1226, instead of section 235(b)(2) of the INA, 8 U.S.C. 1225(b)(2).[4] *See Jennings*, 138 S. Ct. at 846 (Section 236(a) "creates a default rule for those aliens [already present in the United States] by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings."); *Matter of M-S-*, 27 I&N Dec. 509, 515 (A.G. 2019) ("Section 236 . . . permits detention only on an arrest warrant issued by the Secretary [of Homeland Security].").

The Immigration Judge did not make a factual finding as to whether the respondent was arrested by ICE officers pursuant to a warrant issued under section 236(a) of the INA, 8 U.S.C. § 1226(a), and 8 C.F.R. §§ 236.1(b), 1236.1(b). Given our limited fact-finding ability on appeal, 8 C.F.R. § 1003.1(d)(3)(iv), we will remand the record for the Immigration Judge to make this finding in the first instance. He may permit the parties to supplement the record for this purpose if necessary. If the Immigration Judge finds that the respondent was arrested pursuant to a warrant, he should adjudicate the respondent's request for custody redetermination under section 236 of the

[2] The record does not indicate that the respondent is a noncitizen subject to expedited removal under section 235(b)(1)(A) of the INA, 8 U.S.C. § 1225(b)(1)(A), or an "arriving alien" as defined by 8 C.F.R. § 1001.1(q).

[3] The record does not contain a copy of an arrest warrant.

[4] A warrant is not required to detain a noncitizen under section 235(b)(2)(A) prior to the initiation or during the pendency of removal proceedings conducted under section 240. *See Jennings*, 138 S. Ct. at 854; 8 C.F.R. § 1235.6(a)(1)(i).

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INA, 8 U.S.C. § 1226, its attendant regulations. In remanding, we express no opinion on the ultimate outcome of these proceedings.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.