UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter,

FILE NO: A 203 085 029

Of

IN REMOVAL PROCCEDING

Rogerio Chaves Scotton,
Appellant.
_____/

APPELLANT'S BRIEF IN SUPPORT OF APPLICATION FORM EOIR 26 (APPEAL THE IMMIGRATION JUDGE DENYING BOND)

Comes now, Rogerio Chaves Scotton, ("APPELLANT"), by and through prose, respectfully moves this Honorable Board of Immigration Appeals Court with this brief in support of his application, form EOIR 26 and 26A. In support of his brief, the Appellant Scotton states as follows:

As an initial matter, the Appellant respectfully request, as a prose litigant, that this Court construe his motion liberally pursuant to *HAINES vs. KERNER, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972),* accepts all factual allegations contained herein and as detailed under this appeal application as true, and evaluates all reasonable inferences derived from those facts in the light most favorable to the Appellant. *TANNENBAUM vs. UNITED STATES, 148 F.3d 1262 (11th Cir. 1998).* Indeed, the Appellant reminds the Court that this is a prose motion that should be deserving of the less stringent standard of consideration mandated under *UNITED STATES vs. JONES, 125*

F.3d 1418, 1428 (11th Cir. 1997), and the Court "must look beyond the labels of petition filed by prose detainees to interpret them under whatever statute would provide relief". *MEANS vs. ALABAMA, 209 F.3d 1241, 1242 (11th Cir. 2000)(per curiam)*; *ANDREW vs. UNITED STATES, 373 U.S. 334, 337-38, 83 S. Ct. 1236, 10 L. Ed. 2d 383(1963)*. "[A]djudication upon the underlying merits of claims is not hampered by reliance upon the titles Appellants put upon their documents". *(quotation omitted)*. This practice acknowledges the importance of allowing meritorious claims to be heard and decided regardless of mere pleading defects introduced by legally unsophisticated litigants as the Appellant Rogerio Chaves Scotton.

I. CASE SUMMARY

On November 13, 2019, January 1, 2020 and, March 12, 2020, the Department of Homeland Security ("DHS") issued three administrative final removal orders notices against the Appellant Rogerio Chaves Scotton. These final administrative notices were served on November 15, 2019, January 29, 2020 and, March 13, 2020.

Under all three final administrative removal order notices, the DHS alleged that the Appellant is an aggravated felon under § 1101(a)(43)(M)(i) which DHS's conclusion was based solely on the restitution imposed on the Appellant during his sentencing, by the Southern District of Florida. See, *UNITED STATES vs. ROGEIRO CHAVES SCOTTON, case no, 12-CR-60049-KMW*.

The Appellant was released from federal prison on February 27, 2020 and placed under ICE custody based on the detainer lodged against him eight years ago, meaning, March 3, 2012.

The last final administrative removal order was served on the Appellant at Irwin County Detention Center on, March 13, 2020 with the same charged mentioned on the final administrative removal order that was served on November 15, 2019 and January 20, 2020.

On two occasion, the Appellant filed to the Eleventh Circuit his petition for judicial review which he challenges the DHS decision to classified him as an aggravated felon under § 1101(a)(43)(M)(i) based solely on the restitution imposed. See, *ROGERIO CHAVES SCOTTON vs. WILLAIM P. BARR, case no: 19-14756; 20-11181*.

On April 3, 2020, the Immigration Judge ("IJ") for the Atlanta Division, denied the Appellant motion for bond stating that he is an aggravated felon who is not entitled to bond. The IJ did not specify which record or records he referred to during the hearing that he made his findings, In fact, the IJ stop the hearing momentarily when it was discovered that he did not have all the documents pertaining to the Appellant's criminal case. There was no explanation given to the Appellant which document the IJ rely by clear, unequivocal convincing evidence that Appellant's conviction form the base for an aggravated felony.

The Appellant contend that the IJ abuse his discretion by refusing to properly review the records, and address the Appellant question made under the law 1101(a)(43)(M)(i). The IJ further stated at the conclusion that the Appellant was not entitled to adjustment of status under 212(h) (extreme hardship) concurrently with a waiver, stating that the Appellant is an aggravated felon.

The appellant asserts that he is entitled to bond and adjustment of status as a matter of law and in the interest of justice.

II. OVERVIEW

The Appellant Rogerio Chaves Scotton came to the United States for the first time on November 13, 1989 under visa B1/B2 through JFK, New York, NY.

On May 8, 2014, the Appellant was sentenced in Southern District of Florida to a total imprisonment term of 108 months, three years of supervised release and a judicial finding order to

pay $2,582,935.60 in restitution for the alleged offense of mail fraud, pursuant to 18 U.S.C. § 1341.

The DHS have charged the Appellant with administrative removability and the DHS officer found the Appellant removable for having been convicted of an "AGGRAVATED FELONY".

The Appellant asserts that his conviction did not qualify as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M)(i) based solely on the restitution order.

This Honorable Court will see that the restitution order was the only document that referred to any loss in the Appellant conviction of mail fraud. And as such, was based on judicial findings regarding conduct and loss amount that were not charged, proven beyond reasonable doubt, or admitted by the appellant, nor, was mentioned under the indictment or the twenty-seven counts of conviction.

Because the Southern District of Florida Judge based its restitution order on judicial findings made by lower standard of proof, it was an error, as a matter of law, for the DHS officer to concluded that the restitution order, standing alone, constituted "clear, unequivocal and convincing" proof necessary under the section 1101(a)(43)(M)(i) to transform the Appellant's conviction an aggravated felony.

The appellant respectfully moves this Honorable Board Immigration Appeals Court to request an order reversing the IJ order denying bond, and the Appellant's release without any further delay. This because, **1)** the Appellant is not an aggravated felon; **2)** he has lived in the United States for over three decades, **3)** has family ties here, **4)** he filed his application to adjustment of status concurrently with a waive, based on the approved I-130 petition filed by his U.S. citizen mother on his behalf; **5)** he will be placed under federal supervise release upon release, meaning he will be constantly monitored by a probation officer, **6)** the Appellant is almost 50 years old and is

under contamination risk for the corona virus and, **7)** he is not a flight risk and does not poses any danger to any person or any danger to the community.

III. ARGUMENT OF AUTHORITY

A) Whether the Appellant is an aggravated felon under the 101(a)(43)(M)(i) of the INA act 8 U.S.C. § 1101(a)(43)(M)(i).

During the bond hearing, the IJ made his judicial findings that the Appellant is an aggravated felon without specifying on record which document he relied on to make his decision clear, unequivocal and convincing evidence, that the appellant is an aggravated felon under 1101(a)(43)(M)(i).

The Appellant Scotton was administratively ordered to be removed based on his conviction of mail fraud and restitution under 8 U.S.C. § 1227(a)(2)(A)(iii), however, he asserts that the fraud offense of with which he was convicted did not meet the definition of an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).

The Appellant argued that removal based on an aggravated felony of fraud in which the loss to the victim exceeded $10,000 was improperly applied to him, because the amount of loss mentioned under the restitution order was not an element of the alleged counts of conviction.

Appellant sought appeal review of the decision of the IJ denial his bond application and his findings that the Appellant is not entitled to adjustment of status under 212(h) concurrently with waiver based on approved I-130 filed by his U.S. citizen on his behalf. The Appellant's restitution order was based on factual findings regarding conduct and loss amounts that were not charged, proven or admit; therefore, it was an error for IJ to conclude that the restitution order standing

alone, constituted "clear, unequivocal and convincing" proof of the loss necessary to transform the Appellant's conviction into an aggravated felony.

The appellant contends that BIA should review the denial of a motion for bond for abuse of discretion. *ASSA'AD vs. UNITED STATES AG, 332 F.3d 1321, 1341 (11th Cir. 2003)*. A motion for bond must specify the errors of law or fact on which the previous order was based. 8 U.S.C. § 1229a(c)(6). "[A] mistake of law is, by definition, an abuse of discretion". *UNITED STATES vs. HOFFER, 129 F.3d 1196, 1200 (11th Cir. 1997)(citation omitted)*. Whether the Appellant's Scotton conviction qualifies as an "aggravated felony" is a question of law that BIA should review DE NOVO. See, *UNITED STATES vs. HOOSHMAND, 931 F.2d 725, 737 (11th Cir. 1991)*; *BOLOGUN vs. UNITED STATES AG, 425 F.3d 1356, 13600 (11th Cir. 2005)*. To determine whether the Appellant's prior conviction constitutes an aggravated felony, the IJ must first look to the language of the statute of conviction. See, *In re Akami, 22 I&N. Dec. 949, 950 (BIA 1999)*. If the statutory language contains some offenses that would qualify as aggravated felonies and others that would not, then the statute is "divisible", and the IJ must look to "the record of conviction, meaning, the indictment, plea, verdict, and sentence, to determine the offense of which the alien was convicted". *Id.*; *JAGGERNAUTH vs. U.S. AG, 432 F.3d 1346, 1349 n.1 (11th Cir. 2005)*. The IJ determination that a prior conviction constitutes an "aggravated felony" must be supported by "clear, unequivocal and convincing" evidence. *WOODBY vs. INS, 385 U.S. 276,286, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966)*; *8 U.S.C. § 1229a(c)(3)(A)*.

In this particular case, the Appellant Scotton was charged with mail fraud in violation of 18 U.S.C. § 1341 and was convicted after five weeks by a jury. The Appellant challenges the IJ's determination during the bond hearing, that his conviction qualifies as an aggravated felony based solely on the loss amount mentioned under the restitution order.

In this case, the element of the mail fraud with which the Appellant was charged did not require that any loss amount be proved. "Unless", such increase Appellant's punishment. Indeed, and by law, any factor that increase punishment were element which the jury must find guilty beyond a reasonable doubt under, *ALLEYNE vs. UNITED STATES, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)*; *SOUTHERN UNION CO. vs. UNITED STATES, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (212)*; *APPRENDI vs. NEW JERSAY, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*. "The significant increased sentencing range triggered by…the finding of a purpose to loss amount", means that the purpose "must be treated as a material element [that] **MUST** be found guilty by a jury beyond a reasonable doubt.". *Id. at 30 731 A. 2d at 498*. The dissenters conclude that "there can be little doubt that the sentencing factor applied to Applied during his sentence for the purpose of loss amount to a victim or victims, must fairly be regarded as an element of the crime requiring inclusion in the indictment, and proof beyond a reasonable doubt". *159 N.J. at 51, 731 A. 2d at 512*.

[A]t stake in this case, as well as under the Appellant criminal case, there are constitutional protections of surpassing importance which proscription of any deprivation of liberty without "due process of law" and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury". Taken together, these rights indisputably entitled a criminal defendant to "a jury determination that [he] is guilty "beyond a reasonable doubt" of every element of the crime with which he is **"CHARGED" BY "INDICTMENT"**. *UNITED STATES vs. GAUDIN, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995)*; See also, *SULLIVAN vs. LOUISIANA, 508 U.S. 275, 278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993)*; *WINSHIP, 397 U.S. at 364 ("the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which*

he is charged"). Restitution is not a form of judicial punishment dependent upon factfinding by the jury, but if it increases the defendant punishment, it must be taken back to the jury to be found guilty or innocent beyond a reasonable doubt.

The trial Court's factual finding as to the alleged loss amount caused by the Appellant in his criminal case, violated *APPRENDI*, *ALLEYNE* and *SOUTHERN UNION CO*, and Appellant's sixth amendment rights to a jury determination, because the criminal restitution order was a judicial findings not related to the twenty-seven counts of conviction. Such judicial findings was an error in the underlying criminal case because seriously prejudice the Appellant. As such, his imposed sentence was substantially increased. *(SOUTHERN UNION CO. SUPRA, 132 S. Ct. at pp. 2350-2352)*. The trial Court have unlawfully increased the Appellant punishment beyond the jury's verdict under the twenty-seven counts mentioned on indictment. The Appellant's constitutional rights were violated.

The second superseding indictment did not specify any loss amount nor, have the twenty-seven counts of conviction. Indeed, the Appellant was not charged with any loss amount and did not admit to any loss during the trial or during his sentencing hearing.

Moreover, there is no loss amount attributable to the twenty-seven-count charged in the indictment, to which the Appellant was charge and found guilty at trial. Contrary to the IJ's conclusion, there was no evidence that the mail fraud counts of conviction with which the Appellant was charged "alleged other losses". In fact, the prosecutor didn't indicate any loss under the indictment whatsoever. The IJ therefore could not have relied on the statutory element of the offense, the indictment, the trial or sentence records to conclude that the Appellant was convicted of an aggravated felony, as defined in the INA act.

The IJ was also not entitled to rely solely on the loss amount mentioned in the restitution order as "clear, unequivocal and convincing" evidence that the Appellant was convicted of an aggravated felony. On its face, the restitution order of $2,582,935.60 was not linked to the count of conviction and only requested that such must be payed to three companies, FedEx, UPS and DHL. The restitution order was not a finding made based on the twenty-seven counts of conviction nor, its related to the twenty-seven counts mentioned under the indictment. Rather, the order was based on additional conduct that was alleged only under unverified and inaccurate spreadsheets unlawfully introduced at trial and unproved conduct mentioned under the PSI. The Appellant objected to the PSI's assertion that he had caused losses to FedEx, UPS and DHL over the twenty-seven packages (counts of conviction) undelivered associated with the losses mentioned on the restitution. And further objected to the total loss amount mentioned under the PSI not charged by the indictment and not link to the counts of conviction. The Appellant, therefore, did not admit, adopt, or assent to the factual findings that formed the basis for the restitution order.

Furthermore, while a sentencing, the Court in the criminal context may order restitution nor only for convicted conduct, but also for a broad range of relevant conduct. The plain language of the INA requires that an alien have been convicted of an aggravated felony to be removable. The INA does not authorize removal on the basis of the relevant conduct that may be considered at sentencing. Rather, what constitutes an aggravated felony for purpose of the INA must be tethered to convicted conduct. Relevant conduct for sentencing purposes, on the other hand, may include criminal conduct that was not charged. See, *UNITED STATES vs. IGNACIO MUNIO, 909 F.2d 436, 438-39 (11TH Cir. 1990)*. Relevant conduct may also include acquitted conduct. *UNITED STATES vs. WATTS, 519 U.S. 148, 117 S. Ct. 633, 136 L. ed. 2d 554 (1997)*; *UNITED STATES vs.*

AVERI, 922 F.3d 764, 765-66 (11th Cir. 1996). See also, *UNITED STATES vs. DICKERSON, 370 F.3d 1330, 1342-43 (11th Cir. 2004)*.

In *DICKERSON*, the Eleventh Circuit rejected the argument that a restitution order based on conduct that could not be prosecuted was inconsistent with the defendant's plea to a conspiracy charge, observing that "[c]ounsel confuses the separate issues of conviction and restitution". *370 F.3d at 1343, n.20*.

Similarly, here, the IJ confuse the issues of conviction and restitution. There was no basis in the record from which the IJ could have found by "clear, unequivocal and convincing" evidence that the restitution order was link to the twenty-seven counts of conviction or that such was based on admission. See, e.g., *KNUTSEN vs. GONZALES, 429 F.3d 733, 739-40 (7th Cir. 2005)(vacating removal order based on admission of loss caused by relevant conduct and contained in restitution order; holding that inquiry should focus narrowly on losses "particularly tethered to conviction counts alone.")*. See also, *KHALAYLEH vs. INS, 287 F.3d 978, 979-80 (10th Cir. 2002)(conviction constituted aggravated felony where although defendant pled guilty to only one count in the indictment, that count incorporated by reference a scheme to defraud that admittedly caused losses in excess of $10,000)*; *CHANG vs. INS, 307 F.3d 1185, 1191 (9th Cir. 2002)(vacating removal order based on restitution award in excess of $10,000 where amount of loss admitted in the plea agreement was less than the requisite amount)*; *MUNROE vs. ASCROFIT, 353 F.3d 225, 227 (3rd Cir. 2003)(conviction constituted aggravated felony where defendant pled guilty to fraud charges that alleged loss in excess of $10,000, even though sentencing Court later reduced restitution amount to $9,999); FEREIRA vs. ASHCROFT, 390 F.3d 1091, 1099 (9th Cir. 2004)(conviction constituted aggravated felony where charging document alleged loss, and plea agreement set restitution at $22,305 for fraud conviction); CONTEH vs. CONZALES, 461 F.3d 45, 55-56 (1st*

Cir. 2006)(conviction constituted aggravated felony where defendant was convicted if a conspiracy charge which also alleged overt act in furtherance of the conspiracy that caused losses in excess of $10,000).

Moreover, the restitution order was insufficient, as a matter of law, for the DHS to have met his burden to show that the conviction constitutes an aggravated felony under the INA Act (as an offense of fraud or deceit involving a loss in excess $10,000) by "clear, unequivocal and convincing" evidence. The restitution order in this case, was the only document that referred to any loss amount, and it is not linked to the twenty-seven counts of the indictment, does not refer to the twenty-seven counts of conviction. The restitution order was based only on factual findings regarding conduct and loss amount that were not charged, proven or admitted. The IJ , on the other hand, had to find that the Appellant has been convicted of an offense of fraud or deceit involving a loss in excess of $10,000 by clear, unequivocal and convincing evidence. Because the sentencing Court based its restitution order on factual findings made by a lower standard of proof, it was an error for the IJ to conclude that the order, standing alone, constituted clear, unequivocal and convincing proof of the loss necessary to transform the Appellant's conviction into an aggravated felony under the INA act.

The U.S. Supreme Court unanimously held that the $10,000 threshold set out in 1101(a)(43)(M)(i) referred to the particular circumstances in which, the alien committed the fraud crime on the particular occasion, rather than to an element of the fraud crime. The language of the definition referred to conduct, involved in an offense of conviction, rather than to element of the offense, and the statutory amount of loss would otherwise have little, if any, meaningful application in view of the minimal fraud statutes with a monetary loss threshold as an element.

The relevant statute 18 U.S.C. § 1341 did not require a finding of loss. Indeed, the jury made no such finding during the Appellant's trial. However, at sentencing, the Appellant objected the stipulated loss amount which exceeded $2,5 million, especially because as such, have increased the Appellant's imprisonment term without taken first to the jury to make the decision beyond a reasonable doubt. The Appellant was sentenced as a first-time offense to a term of 108 months imprisonment and requested to pay $2,582,935.60 million in restitution.

Subparagraph (M)(i)'s threshold refers to the particular circumstances, in which an offender committed a fraud or deceit crime on a particular occasion rather than to an element of the fraud or deceit crime. Subparagraph (M)(i)'s language is consistent with a circumstances-specific approach. The words "in which" (modifying "offense") can refer to the conduct involved *"in"* the commission of the offense of conviction, rather than to the elements *of* the offense. Congress is unlikely to have intended subparagraph (M)(i) to apply in such a limited and haphazard manner.

The question before BIA is whether the italicized language refers to an element of the fraud or deceit "offense" as set forth in the particular fraud or deceit statute defining the offense of which the Appellant was previously convicted. If so, then in order to determine whether a prior conviction form the kind of offense described, the IJ must look to the criminal fraud or deceit statute to see whether it contains a monetary threshold of $10,000 or more. See, *TAYLOR vs. UNITED STATES, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)(so interpreting the Armed Career Criminal Act)*. The appellant asserts, however, that the italicized language does not refer to an element of the fraud or deceit crime. Rather, it refers to the particular circumstances, in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion.

Appellant Rogerio Chaves Scotton, an alien, immigrated to the United States in November 13, 1989. In 2012, he was indicted for alleged offense of mail fraud, 18 U.S. C. § 1341. A jury found

the Appellant guilty after a five-week trial, and after submitting an note to the Court stating that they have not understood the charges lodged against the Appellant. And because the statute do not require a finding of any particular amount of the alleged offense cause to the victim or victims, the jury made no finding about the amount of loss. At sentencing, the appellant did not admit to any loss amount and further object such. The Court then imposed a sentence of 108 months of imprisonment and order the Appellant to pay $2,582, 935.60 in restitution.

In November 13, 2019, January 17, 2020, and March 12, 2020, the Department of Homeland Security, claimed that the Appellant was convicted of an aggravated felony, and sought to remove him from the United States under said final administrative removal order issued on the days mentioned above, which was served on the Appellant on November 15, 2019, January 29, 2020 and March 13, 2020.

During the Bond Hearing on April 3, 2020, the Immigration Judge made his own decision that Appellant's conviction classify as an aggravated felony, stating that the records in front of him, clear shows that the victims' loss exceeded $10,000; and that Appellant's conviction consequently falls within the immigration statute's aggravated felony definition. See, 8 U.S.C. §§ 1101(a)943)(M)(i). The IJ have not specify which record of the Appellant's conviction he had used to make his findings. The government bears the burden of proving removability by clear and convincing evidence. See, *Id. § 1229a(c)(3)(A)*, and by extension, must carry the devoir of persuasion as to an Appellant's conviction for an aggravated felony. Thus, if § 1101(a)(43)(M)(i)'s $10,000 threshold referred an element that must be proven in every instance to sustain a conviction, the appellant's fraud conviction would not have been aggravated felony conviction. But if the $10,000 threshold referred to facts underlying the convictions, then the fraud conviction would have been aggravated-felony conviction.

The Supreme Court has also clarified that "the loss [amount] **must be tied** to the **specific counts** covered by the **conviction**". See, *NIJHAWAN vs. HOLDER, id. At 42, 129 S. Ct. at 2303 (quotation makers omitted)*.

Therefore, the Appellant respectfully request the honorable Court to reverse the IJ order denying bond and release him without any further delay.

B) WHETHER THE APPELLANT IS ENTITLED TO ADJUSTMENT OF STATUS CONCURRENTLY WITH A WAIVER UNDER 212(h)

At the conclusion of the bond hearing, the IJ stated that the appellant is not entitled to adjustment of status concurrently with a waiver of inadmissibility under 212(h) because he is an aggravated felon.

The Appellant also challenge such finding made by the IJ as a matter of law.

The Appellant contends that an I-130 petition was filed on his behalf by his U.S. citizen mother on July 18, 2018. And said application was granted on July 31, 2019. (See, hereto exhibit 1).

The Appellant asserts that his removal would bring "EXTREME HARSHIP" to himself, to his ill U.S. citizen mother, Marina Colon, who is declared legally blind, and to his U.S. citizen stepfather, Carlos Colon. The Appellant asserts that he does have strong family ties in the United States and have lived here for over three decades.

The Appellant is not an aggravated felon. He did not pose and danger to any person or any danger to the community. He should be allowed to request the exercise of discretion under § 212(h) of the Act.

The Appellant I-130 was approved as he is now applying for relief from removal, therefore, he has filed a concurrent adjustment of status application at the Atlanta Immigration court.

Under section 212(h) of the Act; 8 C.F.R. section 1245, 1(F)(2013), "provides that an adjustment of status application is the sole method of requesting the exercise of discretion under § 212(h) of the Act". As it relates to the inadmissibility of an Alien in the United States. *MATTER OF SUNCHEZ, § 212(H). Under 601(d)(4) of the Immigration Act*.

The attorney General of the United States has consented that a "waiver" under § 212(h) is provided for certain exclusion grounds.

When an alien like the Appellant Rogerio Chaves Scotton is applying or re-applying for a visa and for admission to the United States and is applying for adjustment of his status, concurrently with a waiver for relief from removal is must do under § 212(h).

The appellant contends that he can prove "EXTREME HARDSHIP" to his U.S. mother at any time. The Appellant U.S. mother is 76 years old. She is declared legally blind and has several illnesses and is on several medication. She has endured surgery for colostomy, for colon perforation and two incisional hernias repair surgery tines which was consequence of errors during the colostomy surgery.

The Appellant's mother recently has two stents proceeding done which the last on October 2019. She has history of hemorrhagic retinal stroke. She has been declared legally blind with now only the ability to see shadows. She has history of hypothyroidism and malignant hypertension.

In the *MATTER OD Y-N-P, 26 I&N, Dec. 10, 16 (BIA 2012)* was held that an inadmissible alien in removal proceeding can only file a section 212(h) waiver application to adjust his status under section 245 of the Act 8 U.S.C. § 1255 (2006) or one of the other regulatory provisions. *MATTER OF BUSTAMANTE, 25 I&N, Dec, 564, 567 (BIA 2011)*, which states that the "purpose of section 212(h) is to overcome a ground of inadmissibility that would otherwise preclude an alien like the Appellant Rogerio Chaves Scotton from obtaining admission or adjustment of his status".

The Appellant's U.S. mother has started the process of applying for a family-sponsored immigration visa petition, I-130 which was approved on July 31, 2019. See, *C.F.R. § 20419(e)(1)*.

The Appellant contends that he has submitted substantial evidence under his application for adjustment of status concurrently with a waiver, filed with the Atlanta Immigration Court, in which he can clear demonstrate under section 224(a) of the act that his deportation would in fact, result in "EXTREME HARSHIP" to his U.S. citizen mother and stepfather. Therefore, the *MATTER OF ANDERSON, SUPRA*, should apply to his case. When assessing extreme hardship, the DHS or Immigration Court should also apply *SANTANA FIGUERRA vs. INS, 644 F.2d 1354, 1357 (9th Cir. 1981)*; *BRIDGES vs. WIXON, 326 U.S. 135, 147 (1945)(quoting NG FUNG HO vs. WHITE, 259 U.S. 276, 284 (1922)*.

In this case, the Appellant has requested the Immigration Court for adjustment of status by way of his U.S. citizen mother Marina Colon who has filed on his behalf. He also seeks a waiver, regarding inadmissibility based on his conviction and the "extreme hardship" his removal would bring to himself, his mother and his stepfather. His mother needs daily care which is currently dare by his stepfather who has hard-a-time to do it because of his own health condition. She is unable to travel to Brazil and have not been able to visit the Appellant during his time in prison as well as during the current time, under ICE custody because of her current health condition.

The Appellant has requested the Immigration Court to consider the "emotional" and "psychological" impact that his removal would bring to his ill mother Marina Colon.

The Appellant's mother has started the process of applying for a family-sponsored immigration visa petition, I-130 which was approved. And which is why the Court should apply that [LIFE] Act to the Appellant's case. The Legal Immigration Family Equity [LIFE] act stated that certain

family-based immigration can entered or remain in the United States while their immigration petition is pending.

The Respondent will reside at 7797 Golf Circle Drive, Apt# 204, Margate, Florida 33063 with his U.S. mother and his U.S. stepfather if the Court grant his bond pending resolution of his adjustment of status or removal process.

Accordingly, BIA should GRANT the Appellant appeal, REVERSE the denial of the IJ for bond and adjustment of status, and REMAND to the IJ for reconsideration of the Appellant's Scotton bond. For all of the reason and case facts submitted with this motion, the Appellant Rogerio Chaves Scotton now respectfully requests BIA Court to grant him a bond of $1,500.00 or less and release him without any further delay. Alternative, the Appellant request the honorable Court to place him on a home confinement pending resolution of his petition for adjustment of status or removal.

Wherefore, in the interest of justice and fairness, the Appellant prays for the reasons stated above, that the Honorable Immigration Court grant him this appeal.

The Appellant submits this motion in good faith and the interest of justice.

Respectfully Submitted,

_____

ROGERIO CHAVES SCOTTON
ICDC# 70926
IRWIN COUNTY DETENTION CENTER
132 COTTON DRIVE
OCILLA, GA 31774

PROOF OF SERVICE

I Rogerio Chaves Scotton, do certify that on this April 26, 2020, I have served the attached brief in support of his application, form I26 (which is under the Appellant's constitutional rights) on the Board of immigration Appeals, in the above proceeding. I have served such brief via, United States Postal service (USPS) priority mail through, Irwin County Detention Center legal mail.

I have also served a copy of said brief and application on:

ASSISTANCE CHIEF OF COUNSEL OF THE U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) OF THE DEPARTMENT OF HOMELAND SECURITY (DHS) by first class mail, AT"
180 TED TURNER DRIVE, SUITE 337
ATLANTA, GA 30303

Respectfully Submitted,

_____
ROGERIO CHAVES SCOTTON
ICDC# 70926
IRWIN COUNTY DETENTION CENTER
132 COTTON DRIVE
OCILLA, GA 31774