

the time set for the hearing, Defendant waived his right to a hearing and stipulated to his pretrial detention. (October 13, 2004 Order.) Defendant, through counsel, has filed three motions to continue the trial in this matter, which have been granted. (Docket Nos. 27 - 29, 30, 33, 34, 40, 44.) Defendant is presently scheduled to begin trial on Superseding Indictment 04-543 on September 12, 2005. (Docket No. 44.) No other continuances have been requested. Defendant has changed counsel twice during the pendency of this proceeding and is currently represented by Robert E. H. Miller, Esq., his third attorney. Defendant's second attorney, Catherine T. Henry, Esq., filed a Motion for Release Pending Trial on Defendant's behalf on March 22, 2005. (Docket No. 39.) Defendant's previous Motion for Release Pending Trial was denied following a Hearing held on March 29, 2005 because the Court found that "there is no condition or combination of conditions which would reasonably assure the appearance of this defendant as required." (3/29/05 N.T. at 20.)

After Defendant's Motion for Release Pending Trial was denied, and while he was still represented by Ms. Henry, Defendant attempted to change his plea to guilty, in the anticipation that changing his plea would expedite his release from detention. (Defendant's letters dated 4/5/05 and 4/7/05, 4/13/05 N.T. at 8-14.) A Change of Plea Hearing was held on April 13, 2005. Defendant was placed under oath as the Hearing began. (4/13/05

N.T. at 4.) During the Hearing, Defendant denied that the copy of the visa application offered by the Government was a copy of the visa application which he completed. (Id. at 35.) Defendant also denied that he made a false statement on his application for a visa. (Id. at 38-39.) As Defendant denied, under oath, that he made false statements on his visa application, the Court was unable to accept Defendant's guilty plea to Superseding Indictment 04-543. (Id. at 40.) Defendant subsequently retained his present counsel. Mr. Miller filed the instant Motion on Defendant's behalf on May 27, 2005. The Government filed a response to the Motion on May 31, 2005 and a Hearing was held on June 8, 2005.

II. LEGAL STANDARD

This Court has jurisdiction to review a detention order of a Magistrate Judge pursuant to 18 U.S.C. § 3145(b). Section 3145(b) requires the Court to make a de novo determination of the findings of fact underlying the detention order. United States v. Smith, No. Crim. A. 04-680, 2004 WL 2590500, at *1 (E.D. Pa. Oct. 29, 2004) (citing United States v. Delker, 757 F.2d 1390, 1394 (3d Cir. 1985)). Section 3142(e) of the Bail Reform Act, 18 U.S.C. § 3142(e), provides that: "If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the

person prior to trial." 18 U.S.C. § 3142(e). The Bail Reform Act requires the Court to consider four factors in determining whether there are "conditions of release that will reasonably assure the appearance of [the Defendant] as required and the safety of any other person and the community." 18 U.S.C. § 3142(g). The relevant factors are: 1) the nature and circumstances of the offenses charged in the Superseding Indictment; 2) the weight of the evidence against the Defendant; 3) the Defendant's history and characteristics, including his "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct history relating to drugs or alcohol abuse, criminal history and record concerning appearance at court proceedings" and whether he was on probation, parole or pretrial release at the time the instant offense occurred; and 4) the nature and seriousness of the danger that would be posed to any person or to the community if Defendant were released pending trial. Id. The Government's burden of establishing "risk of flight justifying pretrial detention is the preponderance of the evidence standard. The Government's burden in demonstrating danger to the community justifying pretrial detention is the clear and convincing standard." Smith, 2004 WL 2590500, at *1 (citing United States v. Himler, 797 F.2d. 156, 160, 161 (3d Cir. 1986)).

III. DISCUSSION

Having considered the submissions of Defendant and the Government, and the June 8, 2005 Hearing, the Court makes the following findings of fact and reaches the following conclusions of law pursuant to 18 U.S.C. § 3142(i).

A. The Offense and the Evidence in this Case

1. Defendant is presently detained pending trial on Superseding Indictment 04-543, which charges him with one count of making a false statement with respect to a material fact, under oath, on a visa application, and knowingly presenting an application for a non-immigrant visa containing a false statement, in violation of 18 U.S.C. §§ 1546(a) and 3238 (Count I), and one count of knowingly using, attempting to use, and possessing a visa which Defendant knew was procured by means of a false statement, in violation of 18 U.S.C. § 1546(a). Superseding Indictment 04-543 charges that Defendant's visa application states that Defendant

had never been arrested, charged or convicted of any offense or crime, and was not a member of a terrorist organization, when in fact as the [D]efendant then and there well knew, he had been arrested for an offense or crime, charged and convicted of an offense or crime, and had been a member of Hamas, a terrorist organization on the United States Department of State's List of Designated Foreign Terrorist Organizations.

(Superseding Indictment Count I.) There is probable cause to believe that Defendant has violated 18 U.S.C. §§ 1546(a) and 3238 as set forth in Superseding Indictment 04-543.

2. The evidence against Defendant, which has been submitted to this Court in connection with Defendant's Motions for Pretrial Release, appears to be very strong. This evidence consists of the subject visa application and a certified copy of the records of Defendant's arrest, prosecution and sentence, which were obtained by the Government from the Military Appeals Court of Israel.¹ The records obtained from Israel show that Defendant was arrested in 1999 for membership in an illegal association (Hamas), throwing stones, and offenses committed against the public order. He was convicted and sentenced by Israeli authorities to 15 months imprisonment, with all but 100 days suspended, and fined.
3. Defendant faces a maximum penalty of 10 years imprisonment, supervised release, a fine, and a special assessment for each of Counts I and II pursuant to 18 U.S.C. §§ 1546(a), if he is convicted of the crimes charged in the Superseding Indictment.
4. Defendant faces deportation proceedings because of a detainer lodged against him by the United States Immigration and Customs Enforcement ("ICE") as a result of his prosecution

¹The Government has provided the Court with an English translation of these documents.

pursuant to Superseding Indictment 04-543.

B. Characteristics of the Defendant and Risk of Flight

5. Defendant grew up on the West Bank and entered this country on a student visa which was issued on or about July 25, 2000.
6. After arriving in this country, Defendant married Rrahema Gurra, who Defendant states is a United States citizen. Defendant and his wife have two small children who are United States citizens. Defendant claims to own a home in the City of Philadelphia.
7. Defendant was arrested on an administrative warrant for being out of status on his student visa in January 2004 and detained in the York County Prison. He was later released on bail by an immigration judge on his out-of-status warrant.
8. Defendant was interviewed by special agents of the FBI both at the York County Prison and at home after he was released on bail. The FBI agents learned from Defendant during those interviews that he had been arrested in Israel.
9. Defendant faces the possibility that he will be deported from this country if he is convicted.
10. Defendant's in-laws are willing to put up their home, which is located in Philadelphia, Pennsylvania and worth approximately \$75,000, to secure Defendant's bail, if necessary.
11. Defendant claims that he suffers from fibromyalgia and stomach problems which have not been appropriately treated during his

detention.

12. There is no evidence that Defendant was on probation, parole or pretrial release for any other offense in the United States at the time of the current offense.
13. There is evidence on the record of this Motion that Defendant was, at one time, a member of Hamas, which the Government has designated a Foreign Terrorist Organization.
14. The Court recognizes that Defendant did not flee while the FBI was investigating the instant case and concludes that Defendant has strong ties to the community and the support of his wife and in-laws. However, Defendant's ties to the community and the support of his family do not outweigh Defendant's strong incentive to flee to avoid conviction in this case, possible additional imprisonment following conviction and the probability that he would be deported following his release from incarceration.
15. The Government contends that Defendant could be deported pursuant to the ICE detainer prior to trial in this case if he is released on bail by this Court and returned to the custody of the ICE.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that there is a serious risk that Defendant would flee if he were released on bail by this Court and subsequently released on bail by an

immigration judge. The Court further concludes that there is a possibility that Defendant could be deported prior to trial if he were released on bail and returned to the custody of the ICE. Consequently, the Court finds that there is no condition or combination of conditions which will reasonably assure the appearance of Defendant as required.² Defendant's "Forthwith Motion for Release Pending Trial" is, therefore, denied.

An appropriate order follows.

²As the Court has found that there is no condition or combination of conditions that will assure Defendant's appearance, the Court need not determine whether any condition or combination of conditions would assure the safety of any other person and the community.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. :
 :
ATEF HASAN ISMAIL IDAIS :

CRIMINAL No. 04-CR-543

AND NOW, this 27th day of June, 2005, upon consideration of Defendant's "Forthwith Motion for Release Pending Trial" (Docket No. 56), the Government's response thereto, and the Hearing held on June 8, 2005, **IT IS HEREBY ORDERED**, for the reasons set forth in the attached Memorandum, as follows:

1. Said Motion is **DENIED** on the ground that, pursuant to 18 U.S.C. § 3142(e) and (f), the Government has proven by a preponderance of the evidence that no condition or combination of conditions will reasonably assure the appearance of the Defendant.
2. Defendant is committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal; that Defendant be afforded reasonable opportunity for private consultation with counsel; and that, on order of the Court of the United States or on the request of an attorney for the United States, the person in charge of the corrections facility in which the Defendant is confined shall deliver the Defendant to a

United States Marshal for the purpose of an appearance in
connection with court proceedings.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.