

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOSE MADRID LEIVA,

Petitioner,

v.

Case No. 25-3075-TC

JACOB WELSH, Warden, Chase County Jail;

ERIK TESCHNER, Assistant Director,

ICE Kansas City Field Office;

KRISTI NOEM, Secretary of Homeland Security,

Respondents.

RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE (DOC. 2)

Christopher Allman, Assistant United States Attorney for the District of Kansas, Respondents Jacob Welsh, Chase County Sheriff and Warden of Chase County Jail,¹ Erik Teschner, Assistant Director, Kansas City Field Office, Immigration and Customs Enforcement, and Kristi Noem, Secretary of Homeland Security files this response to Judge Lungstrum's Order to Show Cause (Doc. 2) entered on April 24, 2025, requiring an expedited response that 1) briefly states the basis for petitioner's detention and their position concerning his removability in light of the USCIS Bona Fide Determination, and 2) show cause why the Court should not enjoin the transfer of petitioner outside this judicial district pending resolution of this case.

¹ Pursuant to ICE's intergovernmental service agreement (IGSA) with the Chase County Jail, the United States represents that respondent solely in regard to this current immigration habeas matter involving a person currently detained at that jail.

1) Brief Summary of the basis for petitioner's detention and Respondents' position concerning his removability in light of the USCIS Bona Fide Determination

Attached as Exhibit A is a declaration from Eric K. Swanson, Deportation Officer, that provides a summary of the basis for petitioner's detention and the United States' position concerning his removability in light of the USCIS Bona Fide Determination. This is an excerpt from that declaration:

5. Petitioner is a native and citizen of Guatemala.
6. On October 27, 2009, Petitioner was issued a Notice to Appear ("NTA," Form I-862), thereby placing him in removal proceedings before an Immigration Judge. The NTA alleged that Petitioner is subject to removal from the United States based on Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.
7. The Immigration Judge subsequently sustained the charge, and on August 8, 2011, ordered Petitioner removed to Guatemala.
8. Petitioner appealed the Immigration Judge's August 8, 2011 removal order to the Board of Immigration Appeals ("BIA"). The BIA dismissed Petitioner's appeal on February 8, 2013, thereby rendering the removal order to be final. *See* INA § 101(a)(47)(B)(i), 8 U.S.C. § 1101(a)(47)(B)(i); 8 C.F.R. § 1241.1(a).
9. On March 7, 2013, Petitioner was removed to Guatemala.
10. On April 22, 2025, Petitioner came into ICE custody and is currently detained at the Chase County, Kansas jail.

11. On April 22, 2025, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued, and Petitioner was processed for reinstatement of removal pursuant to INA 241(a)(5), 8 U.S.C. § 1231(a)(5), and 8 C.F.R. § 241.8.

12). I have been informed by U.S. Citizenship and Immigration Services (“USCIS”) that Petitioner does not have deferred action as of the date of this declaration.

Exhibit A.

The Bona Fide Determination notice by its own terms states that the period of deferred action will start when the employment authorization is granted, and petitioner does not allege the employment authorization has been granted, and as of today, USCIS does not have a record of employment authorization being granted.

This position is confirmed in the public USCIS Policy Manual, Vol. 3, Part C, Ch. 5, which states in pertinent part:

“During the BFD process, USCIS first determines whether a pending petition is bona fide. Second, USCIS, in its discretion, determines whether the petitioner poses a risk to national security or public safety, and otherwise merits a favorable exercise of discretion. ***If USCIS grants the alien a Bona Fide Determination Employment Authorization Document (BFD EAD) as a result of the BFD process, USCIS then also exercises its discretion to grant that alien deferred action for the period of the BFD EAD.***” (Emphasis added)

The policy manual is available here: <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>.

2) Why the Court should not enjoin the transfer of petitioner outside this judicial district pending resolution of this case.

Judge Crabtree recently summarized the legal standards for a temporary restraining order:

A party seeking a TRO must show: (1) that it is substantially likely to succeed on the merits; (2) that it will suffer irreparable injury if the court denies the requested relief; (3) that its threatened injury without the restraining order

outweighs the opposing party's injury under the restraining order; and (4) that the requested relief is not adverse to the public interest. *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019).

Preliminary relief—whether in the form of a TRO or a preliminary injunction—“is an extraordinary remedy, the exception rather than the rule.” *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019) (quotation cleaned up) (preliminary injunction); *see also Heavy Petrol. Partners, LLC v. Atkins*, No. 09-1077-EFM-KMH, 2010 WL 11565423, at *2 (D. Kan. May 25, 2010) (“A temporary restraining order is an extraordinary remedy that is an exception rather than the rule, and courts do not grant it as a matter of right.”). The decision whether to issue “a temporary restraining order or other preliminary injunctive relief is within the sound discretion of the district court.” *Sac & Fox Nation of Mo. v. LaFaver*, 905 F. Supp. 904, 906 (D. Kan. 1995).

A plaintiff must make a “clear and unequivocal showing” on all four requirements for preliminary relief. *Colorado v. U.S. Env't Prot. Agency*, 989 F.3d 874, 883 (10th Cir. 2021) (quotation cleaned up). And, in our Circuit, when “the failure to satisfy one factor is dispositive, a court need not consider the other factors” for preliminary relief. *See id.* at 890 (declining to consider the remaining factors where plaintiffs failed to show irreparable harm).

Steede v. Levy, No. 25-2136-DDC-TJJ, 2025 WL 1029422, at *3 (D. Kan. Apr. 7, 2025).

Federal Rule of Civil Procedure 65(c) provides as follows regarding posting a bond by the moving party:

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

A trial court has “wide discretion” under Rule 65(c) in determining whether to require security.

See Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782 (10th Cir. 1964) (per

curiam). “Nevertheless, a district court may ‘waive the requirement of an injunction bond’ when

‘the court is satisfied that there's no danger that the opposing party will incur any damages from

the injunction.’” *Chen v. Noem*, No. 1:25-CV-00733-TWP-MG, 2025 WL 1163653, at *12 (S.D.

Ind. Apr. 21, 2025) (quoting *Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453, 458

(7th Cir. 2010) ("There is no reason to require a bond in such a case.")).

Analysis

At the current time, petitioner is being held in the Chase county jail and Immigration and Customs Enforcement ("ICE") has no current plan to move petitioner from that location. In light of the pendency of this habeas case, ICE Enforcement and Removal Operations ("ERO") has noted the petitioner's case so that if there is a future plan to move petitioner from the Chase county jail, he will not be moved without providing agency counsel for ICE and the AUSA assigned to this case advance notice—and counsel for the United States would promptly inform this court and petitioner's counsel. Consequently, an injunction is unnecessary at this time and ICE opposes entering an order preventing petitioner from being transferred outside of the judicial district as an infringement on the Executive Branch's authority.

The United States notes that Judge Lungstrum has taken the position that even if a habeas petitioner is removed from Kansas after commencing a habeas case, that he retains jurisdiction over the person and matter. *See Lee v. English*, No. 19-3029-JWL, 2019 WL 3891147, at *4 (D. Kan. Aug. 19, 2019) (Judge Lungstrum notes that the petitioner's transfer "does not defeat initial jurisdiction;" specifically, subject matter jurisdiction to deny the petition.) (*citing see Pinson v. Berkebile*, 604 F. App'x 649, 652–52 (10th Cir. 2015); *Griffin v. Ebbert*, 751 F.3d 288, 290–91 (10th Cir. 2014) ("Jurisdiction attached on that initial filing for habeas corpus relief, and it was not destroyed by the transfer of petitioner and accompanying custodial change") (citations omitted); *Santillanes v. U.S. Parole Comm'n*, 754 F.2d 887, 888 (10th Cir. 1985) (citations omitted) ("It is well established that jurisdiction attaches on the initial filing for habeas corpus

relief, and it is not destroyed by a transfer of the petitioner and the accompanying custodial change.”).

Respectfully submitted,

DUSTON J. SLINKARD
Acting United States Attorney
District of Kansas

/s/ Christopher Allman
CHRISTOPHER ALLMAN
Ks. S.Ct. No. 14225
Assistant United States Attorney
500 State Avenue, Suite 360
Kansas City, Kansas 66101
PH: (913) 551-6730
FX: (913) 551-6541
Email: chris.allman@usdoj.gov
Attorneys for Respondents

Exhibit A

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ERIK TESCHNER; *Assistant Field Office*
Director, Kansas City Field Office;
and KRISTI NOEM, *Secretary of Homeland Security,*

Respondents.

**DECLARATION OF DEPORTATION OFFICER
ERIC K. SWANSON**

Pursuant to the provisions of 28 U.S.C. § 1746, I, Eric K. Swanson, Deportation Officer (“DO”) for Enforcement and Removal Operations (“ERO”), Immigration and Customs Enforcement (“ICE”), of the Department of Homeland Security (“DHS”), hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I am competent in all respects to testify as to the matters contained in this declaration, and I make this declaration in my official capacity. The statements contained in this declaration are based upon my personal knowledge of the immigration case regarding Jose Madrid Leiva (“Petitioner”), my review of available electronic databases and records kept by DHS in the ordinary course of business, and/or information provided to me by other DHS employees in the course of my official duties.

2. I make this declaration in support of the Respondents' initial response to the Petition for Writ of Habeas Corpus filed by Petitioner, and to place before the Court information relevant to this matter.

3. I have been a Deportation Officer with ERO Kansas City, Missouri, since August 2023. Previously, I was a Border Patrol Agent with U.S. Customs and Border Protection from 2009 to 2021, and a Supervisory Border Patrol Agent from 2021 to 2023.

4. As a Deportation Officer, my duties include: (1) arresting aliens who are removable from the United States, (2) processing aliens who will be removed from the United States or placed into removal proceedings before an Immigration Judge, (3) monitoring aliens' cases until removal, (4) responding to aliens' requests while in ICE custody, and (5) requesting travel documents and coordinating travel for aliens ordered removed from the United States. My duties may, at times, include other responsibilities related to the apprehension, arrest, and removal of aliens, as needed.

5. Petitioner is a native and citizen of Guatemala.

6. On October 27, 2009, Petitioner was issued a Notice to Appear ("NTA," Form I-862), thereby placing him in removal proceedings before an Immigration Judge. The NTA alleged that Petitioner is subject to removal from the United States based on Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

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9. On March 7, 2013, Petitioner was removed to Guatemala.

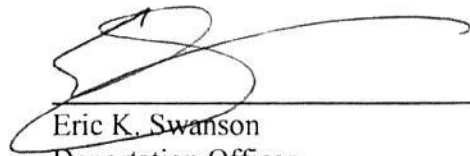
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12. I have been informed by U.S. Citizenship and Immigration Services ("USCIS") that Petitioner does not have deferred action as of the date of this declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4/20/25
(date)


Eric K. Swanson
Deportation Officer