IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOSE MADRID LEIVA, Petitioner, v. JACOB WELSH, Warden, Chase County Jail; CHRISTOPHER CHAMBERLAIN, Acting Assistant Director, ICE Kansas City Field Office; KRISTI NOEM, Secretary of Homeland Security, Respondents.	)	Case No. 25-cv-3075-TC

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Respondents Jacob Welsh, Chase County Sheriff and Warden of Chase County Jail,[1] Christopher Chamberlain, Acting Assistant Field Office Director, Kansas City Field Office, Immigration and Customs Enforcement (ICE),[2] and Kristi Noem, Secretary of Homeland Security, by and through Acting United States Attorney for the District of Kansas Duston J. Slinkard and Assistant United States Attorneys Audrey D. Koehler and Christopher Allman, move to dismiss Petitioner's Amended Petition under Federal Rule of Civil Procedure 12(b)(1).

STATEMENT OF THE FACTS

Petitioner is a citizen of Guatemala. Madrid Leiva Decl., Doc. 18, ¶ 1. Petitioner brings habeas and Administrative Procedure Act (APA) claims under 28 U.S.C. § 2241 and 5 U.S.C.

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

[2] Previously named as Respondent was Erik Teschner, ICE Kansas City Field Office Assistant Director. Pursuant to Federal Rule of Civil Procedure 25(d), Mr. Chamberlain is substituted into the case.

§ 702. Am. Pet., Doc. 17, ¶¶ 10–11. Petitioner seeks declaratory relief and to be released from custody. *Id.* at p. 29.

Petitioner was removed from the United States to Guatemala on March 7, 2013. *Id.* ¶ 58. Petitioner alleges that he returned to the United States on March 6, 2019. *Id.* ¶ 59. On November 25, 2022, the U.S. Citizenship and Immigration Services (USCIS) received Petitioner's Petition for U nonimmigrant status. *See* Notice of Action, Doc. 17-1, p. 1. On February 18, 2025, Petitioner was notified that evidence demonstrated that Petitioner's petition for U nonimmigrant status was bona fide and that he "may be placed in deferred action." *Id.* The notice directed Petitioner that his "period of deferred action will begin on the date your employment authorization begins." *Id.* Although Petitioner alleges that he has applied for employment authorization, he does not allege that he has received employment authorization. Am. Pet. ¶ 22. 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 section 241(a)(5) of the Immigration and Nationality Act (8 U.S.C. § 1231(a)(5)) and 8 C.F.R. § 241.8. Form I-871, Doc. 17-5.

ARGUMENT

To obtain habeas corpus relief, a petitioner must demonstrate that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3). The REAL ID Act, however, "imposes substantial limitations on judicial review, including habeas review, of final orders of removal." *Thoung v. United States*, 913 F.3d 999, 1001 (10th Cir. 2019). As such, "'petitions for review' filed with the courts of appeal are the 'sole and exclusive means for judicial review from an order of removal.'" *Id.* (quoting 8 U.S.C. § 1252(a)(5)). This limitation includes review of reinstated orders of removal. *See Luna-Garcia v. Holder*, 777 F.3d 1182, 1184 (10th Cir. 2015) ("[A] reinstated removal order is a final order of removal for purposes of judicial

review under § 1252(a)(1)."). Thus, Petitioner must demonstrate that he is entitled to relief based on grounds "that are *unrelated to a final order of removal*." *See Ogole v. Garland*, No. 24-3198-JWL, 2025 WL 548452, at *1 (D. Kan. Feb. 19, 2025) (emphasis added) (citing *Demore v. Kim*, 538 U.S. 510, 517–18 (2003)).

Here, Petitioner's claims are directly related to his final order of removal as he alleges (1) the issuance of his Bona Fide Determination (BFD) renders him not removable; and (2) ICE's reinstatement of his removal violated its regulations. Am. Pet. ¶¶ 82, 92, 102. Although framed otherwise, Petitioner essentially asks the Court to determine that his final order of removal should not have been reinstated and to prohibit ICE from proceeding with his removal—relief that is explicitly reserved to the appropriate circuit court of appeals on a petition for review. As such, the Court should dismiss Petitioner's claims in their entirety for lack of subject matter jurisdiction.

I. Petitioner's claim that he is not removable because of the issuance of his Bona Fide Determination is barred by 8 U.S.C. § 1252(g).

First, this Court lacks jurisdiction to address Petitioner's claim that the issuance of his BFD renders him not removable. The Immigration and Nationality Act (INA) strips federal courts of jurisdiction "to hear any cause or claim . . . arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). Recognizing this prohibition, the Tenth Circuit has held that "8 U.S.C. § 1252(g) operates in the deferred-action context to remove a court's 'jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to . . . execute removal orders.'" *McCloskey v. Keisler*, 248 F. App'x 915, 917–18 (10th Cir. 2007) (unpublished) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–87 (1999)); *see also Veloz-Luvevano v. Lynch*, 799 F.3d 1308, 1315 (10th Cir.

2015) ("But neither an [immigration judge] nor the [Board of Immigration Appeals] has the authority to review the government's prosecutorial discretion decisions. And we too lack jurisdiction over them under 8 U.S.C. § 1252(g)."); *Jaquez-Estrada v. Barr*, 825 F. App'x 538, 542 (10th Cir. 2020) (unpublished) ("Further, [Deferred Action for Childhood Arrivals] is a matter of prosecutorial discretion, and we lack jurisdiction to review the decision whether to extend it.") (citing 8 U.S.C. § 1252(g); *Veloz-Luvevano*, 799 F.3d at 1315); *Raudacastillo v. Lynch*, 616 F. App'x 385, 388 (10th Cir. 2015) (unpublished) ("But the DHS has sole authority to exercise prosecutorial discretion in immigration cases and we lack jurisdiction over those decisions.").

Although Petitioner argues that he "does not seek review of a removal order" and "only" challenges "the lawfulness of his detention," Petitioner's claim of unlawful detention clearly rests on his belief that he "is not removable from the United States." *Compare* Am. Pet. ¶¶ 14, 19 *with* ¶¶ 5, 68, 92, 99. As such, Petitioner's claim falls squarely within section 1252(g)'s prohibition on review of claims arising from the decision to execute removal orders. *See* 8 U.S.C. § 1252(g); *see also Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1275 (10th Cir. 2018) ("Although Gonzalez-Alarcon seeks release from detention, his claim is based on the alleged invalidity of his order of removal."); *Rodriguez-Sosa v. Whitaker*, No. CV 18-3261, 2018 WL 6727068, at *2 (D. Minn. Dec. 21, 2018) ("Petitioner attempts to sidestep the jurisdictional issue by claiming that she is not requesting review of her removal decision but instead is challenging an agency policy under the Administrative Procedures Act ('APA') and the constitutionality of her detention under the Fifth Amendment.").[3]

[3] To the extent Petitioner truly challenges only his continued detention and not his removal from the United States, Respondents represent that they are ready and willing to remove Petitioner from the United States expeditiously but counsel for Petitioner specifically requested that Petitioner not be removed from the United States pending resolution of his APA claim.

Similarly, a petitioner in the Western District of Washington recently "challenge[d] ICE's decision to detain him and execute his final order of removal despite USCIS's grant of deferred action pending the adjudication of his U-visa application." *Velasco Gomez v. Scott*, No. 25-cv-0522-JLR-BAT, 2025 WL 1726465, at *4 (W.D. Wash. June 20, 2025). There, the court held that it lacked jurisdiction because the petitioner's claim facially fell within the section 1252(g) jurisdictional bar. *Id.* at *5. Unlike the petitioner in *Velasco Gomez*, however, Petitioner has not been granted deferred action. Although Petitioner alleges that the BFD alone grants him deferred action, "factual allegations that contradict . . . a properly considered document are not well-pleaded facts that the court must accept as true." *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1385 (10th Cir. 1997).

Here, Petitioner has referenced USCIS's Policy Manual throughout the Amended Petition and the Policy Manual makes clear that, in the BFD context, deferred action is not granted until an employment authorization is issued:

> 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.

Bona Fide Determination Process, USCIS Policy Manual, *available at* https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5 (last visited July 21, 2025);[4] *see also* Am. Pet. ¶¶ 7, 34, 36–38, 42, 46. Moreover, Petitioner's BFD notice clearly stated that

[4] "[T]he district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007).

Petitioner's "period of deferred action will begin on the date your employment authorization begins." Notice of Action, Doc. 17-1, p. 1. Although Petitioner alleges that he has applied for employment authorization, he does not allege that he has received employment authorization. Am. Pet. ¶ 22.

Petitioner's cited authority also does not support his suggestion that the BFD notice alone grants deferred action. *See generally Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430 (6th Cir. 2022); *Texas v. United States*, 126 F.4th 392 (5th Cir. 2025). In fact, in *Barrios Garcia*, the Sixth Circuit recognized that "USCIS must decide whether a principal petitioner's U-visa application is 'bona fide' *before* the agency undertakes discretionary decisions about national security, public safety, and other relevant factors *and before* USCIS makes more discretionary decisions to issue a BFD EAD and grant deferred-action status." *Barrios Garcia*, 25 F.4th at 444–45 (emphasis added).

In sum, Petitioner has not been granted deferred action. But, even if he had been granted deferred action, 8 U.S.C. § 1252(g) strips the federal courts of jurisdiction to hear claims arising from the decision by the Attorney General to execute removal orders. The Court therefore lacks jurisdiction over Petitioner's APA and habeas claims relating to ICE's decision to proceed with removal despite the existence of the BFD.

II. Petitioner's challenge to the service of the reinstatement order is barred by 8 U.S.C. § 1252(a)(5).

This Court also lacks jurisdiction to address Petitioner's claim of purported procedural irregularities with his removal. Such claims must be raised in a petition for review to the relevant circuit court—not in a habeas or APA claim. The INA provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including [28 U.S.C. § 2241], or any other habeas corpus provision, . . . a petition for review

> filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e).

8 U.S.C. § 1252(a)(5).

Here, Petitioner alleges that he was not served with a copy of the reinstated order of removal nor advised of his appeal rights. Am. Pet. ¶¶ 53, 65. He also alleges that the order was not served on his attorney, which he argues is required by regulation. *Id.* The Tenth Circuit Court of Appeals, and other circuits, however, have addressed these types of claims on petitions for review. *See, e.g.*, *Cadenas-Campuzano v. Garland*, No. 21-9524, 2021 WL 5561434 (10th Cir. Nov. 29, 2021) (unpublished) (addressing a petitioner's claim that he was not served with his reinstatement order on a petition for review); *Petlechkov v. U.S. Att'y Gen.*, No. 20-14861, 2024 WL 1463413, at *4 (11th Cir. Apr. 4, 2024) (unpublished) (concluding that the petitioner was not substantially prejudiced by alleged failure to be served or given the opportunity to respond to a charge of removability), *cert. denied sub nom. Petlechkov v. Garland*, 145 S. Ct. 1094 (2025); *Edward v. U.S. Att'y Gen.*, 165 F. App'x 136, 138 (3d Cir. 2006) (unpublished) (concluding on a petition for review that the petitioner was not prejudiced by alleged delayed service).

Petitioner's claim of inadequate service therefore must be addressed in a petition for review to the circuit court and the Court lacks jurisdiction over Petitioner's habeas and APA claims arising out of this alleged inadequate service. 8 U.S.C. § 1252(a)(5).

To the extent Petitioner asserts that he may circumvent subsection (a)(5)'s mandate by framing his claim as a challenge to "Respondents' unlawful policy of not properly serving the reinstatement paperwork as required by law," his claim also fails. Am. Pet. ¶ 43. First, Petitioner does not allege any other facts relating to his claim that Respondents have a "policy of not properly serving the reinstatement paperwork." *See generally* Am. Pet. This bare assertion "amount[s] to

nothing more than a 'formulaic recitation'" of *one* of the elements of an APA claim and fails to state a claim upon which relief may be granted. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (discussing plausibility standard); *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (discussing final agency action under the APA).

Moreover, as addressed above, Petitioner asserts that Respondents' alleged failure to serve him with the reinstated removal order deprived him of due process. That claim is now properly before the Eighth Circuit and—regardless of Petitioner's framing—this Court lacks jurisdiction over it. *See Madrid-Leiva v. Bondi*, No. 25-2023, Pet. for Review, p. 1 (8th Cir. May 22, 2025); *see also* 8 U.S.C. § 1252(a)(5); 5 U.S.C. § 704 (providing that only "[a]gency action made reviewable by statute" and "final agency action *for which there is no other adequate remedy in a court* are subject to judicial review" under the APA) (emphasis added).

CONCLUSION

This Court lacks subject matter jurisdiction over the entirety of Petitioner's claims and should therefore dismiss the Amended Petition under Rule 12(b)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 21, 2025, the foregoing was electronically filed with the Court using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ *Audrey D. Koehler*
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