

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.J.O.H.,

Petitioner,

- against -

PAUL ARTETA; *et al.*,

Respondents.

No. 25 Civ. 5278 (ALC)

**RESPONDENTS' SUR-REPLY IN FURTHER OPPOSITION TO
PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

On July 17, 2025, the Court issued an order directing the government to file a sur-reply to Petitioner's motion for a preliminary injunction "[i]n light of the BIA Order and Petitioner's arguments in response to this development." ECF No. 28. The government respectfully submits this sur-reply in further support of its opposition to Petitioner's motion for a preliminary injunction. For the reasons set forth in the government's opposition brief, as well as the reasons contained herein, the Court should deny Petitioner's motion for a preliminary injunction.

Petitioner brought this action to challenge his detention on grounds that it is unlawful for him to remain detained on account of ICE's "unilateral" invocation of the automatic stay provision, which automatically stayed the immigration judge's May 30 bond order while ICE appealed that bond order. But circumstances have materially changed because Petitioner is no longer detained on account of ICE's use of the automatic stay provision. On July 14, ICE filed with the BIA an emergency motion for a discretionary stay of the immigration judge's bond order, which the BIA granted that same day. That is the very process that Petitioner himself argued is the proper process in his petition and opening motion. He now complains that that very process was improperly used here and that it presents its own due process issues. But this action and in particular the preliminary injunction motion were predicated entirely on the automatic stay provision, which is no longer operating to maintain the status quo—rather, the BIA's discretionary stay grant authorizes Petitioner's continued detention pending the BIA's ruling in the bond appeal.

Petitioner asserts that the seeking and granting of a discretionary stay here was procedurally improper and violated due process. But Petitioner is wrong on both scores. There was nothing procedurally improper with ICE seeking the stay, nor with the BIA granting it. Nor did the granting of the stay deprive Petitioner of due process.

ARGUMENT

Petitioner filed this case on the premise that ICE's invocation of an automatic stay of the immigration judge's bond order renders his detention unlawful because it is unaccompanied by adequate procedural protections, *i.e.*, due process, given that Petitioner has no opportunity to be heard by a neutral adjudicator to oppose or seek to lift ICE's automatic stay. But Petitioner no longer remains unable to post bond on account of ICE's automatic stay of the immigration judge's bond order. Rather, he remains detained because the BIA exercised its independent authority and granted a discretionary stay motion filed by ICE, staying the immigration judge's bond order pending resolution of ICE's appeal.¹ Petitioner now faults the use of the discretionary stay process, but his arguments are without merit.

A. The seeking of and obtaining a discretionary stay was not procedurally improper

Petitioner argues that the discretionary stay's issuance was "procedurally improper" because, according to him, ICE can seek a discretionary stay only if the BIA does not decide the bond appeal before the automatic stay expires, and, the BIA "may issue a decision on the discretionary stay motion only" if it cannot resolve the bond appeal before the automatic stay

¹ Courts in similar circumstances have found such challenges to be moot. *See, e.g., Altayar v. Lynch*, No. 16-cv-2479 (JZB), 2016 WL 7383340, at *1 (D. Ariz. Nov. 23, 2016), *report and recommendation adopted*, No. 16-cv-2479 (GMS), 2016 WL 7373353 (D. Ariz. Dec. 20, 2016) (petition challenging detention under automatic stay provision rendered moot after BIA granted ICE a discretionary stay pending custody appeal); *Murillo-Flores v. Mukasey*, No. 08-cv-943 (JAT), 2009 WL 310143, at *4 (D. Ariz. Feb. 6, 2009) ("Because Petitioner is no longer detained under the automatic stay, this Court may no longer grant any relief as to [the automatic stay and procedural due process claims], and they must be dismissed as moot."); *Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1031 (E.D. Wis. 2007) (finding challenges related to automatic stay provision moot because "DHS's automatic stay was replaced by a discretionary stay entered by the BIA, and even that stay is of no effect at this point since the BIA vacated the IJ's bond order and remanded the case for further proceedings"); *El-Dessouki v. Cangemi*, No. 06-cv-3536 (DSD), 2006 WL 2727191, at *2 (D. Minn. Sept. 22, 2006) (because the BIA issued a discretionary stay, habeas challenge to detention pursuant to the automatic stay provision is moot).

expires. Reply at 6-7. Not so. This argument borders on frivolity, as it not only finds no support in the plain text of the regulations, but is in fact directly contradicted by the plain text of the regulations, only part of which Petitioner quoted to the Court.

To begin, the regulations unquestionably provide ICE with the authority to file a motion for a discretionary stay *at any time*: “DHS may submit a motion for a discretionary stay *at any time after the filing of its notice of appeal of the custody decision, and at a reasonable time before the expiration of the period of the automatic stay*, and may incorporate by reference the arguments presented in the brief in support of the need for continued detention of the alien during the pendency of the removal proceedings.” 8 C.F.R. § 1003.6(c)(5) (emphasis added).² That is precisely what occurred here. Yet in his reply brief, Petitioner cites to this regulation and quotes some language from the regulation, but inexplicably omits the material language quoted above. Moreover, 8 C.F.R. § 1003.19(i)(1) provides that “DHS is entitled to seek a discretionary stay . . . from the [BIA] in connection with such an appeal *at any time*.” 8 C.F.R. § 1003.19(i)(1) (emphasis added).

Next, Petitioner fails to cite to any support for his assertion that the BIA can grant a discretionary stay only if it is unable to resolve the custody appeal before the automatic stay expires. This is because there is no such restriction. Just as DHS may seek a discretionary stay at any time, the BIA may rule on such a motion at any time. *See* 8 C.F.R. § 1003.19(i)(1). The regulations also contemplate that the BIA would rule on a discretionary stay motion even while an automatic stay is in place. For example, one provision provides that, if the BIA “denies a motion

² In promulgating the final rule, the Attorney General explained: “The rule makes clear that DHS may submit a motion for discretionary stay at any time after the filing of its notice of appeal of the custody decision, even well in advance of the 90-day deadline [(i.e., expiration of the automatic stay)] . . .” Final Rule, *Review of Custody Determinations*, 71 Fed. Reg. 57873, 57874 (Oct. 2, 2006).

for discretionary stay, *or fails to act on such a motion before the automatic stay period expires*, the alien's release shall be automatically stayed for five business days." 8 C.F.R. § 1003.6(d) (emphasis added). If the BIA was prohibited from ruling on a stay motion before the expiration of the automatic stay period, the italicized language would have no meaning. Read together, the pertinent regulations expressly contemplate that ICE may invoke the automatic stay provision, and at any time, also file a motion for a discretionary stay with the BIA, which the BIA can adjudicate at any time. Instead, Petitioner constructs a straw man interpretation of the regulation to manufacture an alleged problem that does not exist.

In short, Petitioner's assertion that it was procedurally improper under the regulations for ICE to file motion for a discretionary stay, and for the BIA to grant it, is meritless.

B. The BIA's issuance of a discretionary stay here does not violate due process

Petitioner's reply brief advances no legal argument in support of his assertion that "the issuance of a discretionary stay in this instance is violative of due process." Reply at 7. He asserts only that "[i]t was granted less than two hours after filing, with no opportunity for Petitioner to oppose." *Id.* The reply makes no effort to explain how the BIA's issuance of a discretionary stay deprives him of due process.³ The lack of legal argument aside, Petitioner's assertion is unavailing.

³ In his habeas petition, Petitioner repeatedly referenced the discretionary stay as an alternative mechanism that would satisfy due process and avoid the concerns raised by invocation of an automatic stay. *See, e.g.*, Pet. ¶ 53 (identifying the discretionary stay as an additional procedural safeguard that would satisfy due process, noting "there is a clear alternative to the automatic stay set forth in § 1003.19(i)(1) which also provides a process by which DHS can request an emergency stay of an immigration judge's custody determination from the BIA"); *id.* ("Requesting a stay from an appellate court is the appropriate procedure because . . . such a decision should not be in the hands of the prosecutorial agency."); *id.* ¶ 54 ([DHS's] interest is easily protected by DHS's ability to seek an emergency stay from the BIA pursuant to § 1003.19(i)(1) of an immigration judge's bond decision"); *id.* ¶ 64 ("The government's interest here is easily protected through an existing regulation that allows DHS to make an emergency request that the BIA stay an immigration judge's custody determination."). ICE has proceeded with the process Petitioner identified as sufficient. *See Junior R. v. Sessions*, No. 18-cv-12054

An immigration judge's bond order can be stayed automatically by DHS or by an adjudication by the BIA in the exercise of its discretion. *See* 8 C.F.R. § 1003.19(i)(1) & (2). A discretionary stay requires an adjudication by an independent arbiter, the BIA. "DHS is entitled to seek a discretionary stay (whether or not on an emergency basis) from the [BIA] in connection with [a custody] appeal at any time." *Id.* The discretionary stay regulation does not prohibit the alien from responding to a discretionary stay request, but the nature of the discretionary stay request requires the BIA to act quickly. The decision is not, however, automatic or unilateral, because it must be made by the BIA, who is free to grant or deny the stay.

The finite period of detention allows the BIA an opportunity to review the immigration judge's bond decision in a narrowly tailored procedure that serves the government's interest in preventing flight of aliens likely to be ordered removable and in protecting the community. *See, e.g., Bezmen v. Ashcroft*, 245 F. Supp. 2d 446, 451 (D. Conn. 2003) (describing 8 C.F.R. § 1003.19(i)(1) as a "narrowly tailored, less restrictive means" of protecting the government's interest in seeking stays of custody decisions "without unduly infringing upon [petitioner's] liberty interest."); *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004) ("the emergency stay provision found in 8 C.F.R. § 1003.19(i)(1) presents an appropriate and less restrictive means whereby the government's interest in seeking a stay of the custody redetermination may be protected without unduly infringing upon Petitioner's liberty interest."). The alien may respond to the stay request, although the expedited nature of the proceeding may make it difficult to file a lengthy response.

(JMV), 2019 WL 4597569, at *3 (D.N.J. Sept. 23, 2019) ("Rather than suggest impropriety, these cases suggest that the Government's actions in this matter comported with the courts' preferred procedure and suggest that the Government's acquisition of a stay from the BIA adequately addressed any harm from the automatic stay.").

And even if the BIA enters a stay (whether or not the alien responds to the stay request), the alien may also move to dissolve the stay or seek reopening or reconsideration.

Petitioner argues, without support, that he was denied due process because he did not have an opportunity to respond to ICE's emergency motion for a discretionary stay. But even assuming that he could not have filed a response promptly after ICE filed its motion through the BIA's electronic filing system, Petitioner is not without recourse—he can still move to dissolve the stay by filing a motion for reconsideration or to reopen. The availability of such relief provides Petitioner with a constitutionally sufficient opportunity to be heard. *See, e.g., A. v. Garland*, No. 23-cv-1696 (PJS/TNL), 2023 WL 8469655, at *2 (D. Minn. Dec. 7, 2023) (finding that where BIA granted ICE's motion for a discretionary stay of immigration judge's bond decision before the petitioner could file an opposition, any due process violation was "likely 'cured'" when the petitioner was able to make his arguments to the BIA in a motion for reconsideration); *Organista v. Sessions*, No. 18-cv-285 (GMS), 2018 WL 776241, at *3 (D. Ariz. Feb. 8, 2018) (finding that petitioner who did not receive opportunity to contest discretionary stay of release failed to show likelihood of success on claim that he had not received sufficient opportunity to be heard, given availability of reconsideration motion as post-deprivation remedy).

In *Organista*, the court considered a challenge to a discretionary stay that ICE obtained from the BIA of an immigration judge's custody order. 2018 WL 776241, at *2. In that case, the petitioner argued that he did not receive notice and an opportunity to be heard before the discretionary stay was entered. *Id.* The court conducted the three-part analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine "whether a pre-deprivation hearing is required and what specific procedures must be employed at that hearing given the particularities of the deprivation." *Id.* (internal citation omitted). The court in *Organista* found that although the

petitioner had a liberty interest in being heard on the stay request, the government had legitimate interests in obtaining a stay in exigent circumstances where an alien may present a danger or flight risk. 2018 WL 776241 at *2. Based on the totality of circumstances, the court found that the petitioner had failed to show that he was likely to establish a due process violation, and denied the motion for a preliminary injunction. Specifically, the court noted that there was evidence in the record that the petitioner received notice of the stay request before the BIA had entered the stay, and had the opportunity—albeit brief—to respond to ICE’s discretionary stay request. *Id.* at *3. Moreover, the court noted that the petitioner had the post-deprivation opportunity to file a motion to reopen or to reconsider with the BIA, and had failed to do so. *Id.* The court specifically recognized that this post-deprivation remedy of filing a motion to reopen or to reconsider was likely to satisfy due process concerns. *Id.*

Here, there is no dispute that Petitioner’s counsel received immediate notice of ICE’s filing of its discretionary stay motion with the BIA, as an electronic service notification was automatically sent at the time of filing through the EOIR Courts and Appeals System (ECAS). *See* ECF No. 25-1 at 6 (Proof of Service). There is no evidence that Petitioner’s counsel notified the BIA that it wished to file an opposition before the motion was adjudicated, nor is there any evidence that Petitioner has taken any action to seek to lift the stay with the BIA since it was entered. Indeed, the court in *Organista* suggested that, under similar circumstances, such a motion to reconsider or to vacate the stay is the type of post-deprivation process that could satisfy due process. As of this filing, the government is unaware of any motion or effort by Petitioner to seek to lift the BIA’s stay. He thus has not demonstrated that the procedures here, wherein ICE requested a discretionary stay, the BIA granted it, and Petitioner has not sought to reopen or reconsider that decision, violate due process.

CONCLUSION

For the foregoing reasons, and those contained in the government's opposition brief, the Court should deny Petitioner's motion for a preliminary injunction.

Dated: New York, New York
July 18, 2025

Respectfully submitted,

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Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 2,599 words.