UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 25-CV-61338-DAMIAN

MYLES O'CONNOR,

Petitioner,

v.

WARDEN, BROWARD TRANSITIONAL CENTER, *et al.*,

Respondent.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

Respondents, Warden, Broward Transitional Center *et al.*, by and through the undersigned Assistant United States Attorney, files this Response to the Court's Order to Show Cause [DE 8]. As set forth below, the Court should deny the Emergency Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 [DE 1].

I. INTRODUCTION AND BACKGROUND

Petitioner, Myles O'Connor, is a native of the United Kingdom and citizen of Ireland. *See* Exh. A, Form I-213, Record of Deportable/Inadmissible Alien dated May 1, 2025; see also Exh. B, Declaration of Officer Miguel Cotto, ¶ 6. On or about January 23, 2009, Petitioner entered the United States at or near JFK International Airport, New York, and was admitted to the United States on the Visa Waiver Program (VWP). *See* Exh. C, Form 71-058, VWP Notice of Intent to Issue Final Administrative Removal Order; see also Exh. B, Cotto Decl. ¶ 7. Thereafter, Petitioner departed the United States and was again admitted under the VWP on March 13, 2009. *See* Exh. D; Cotto Decl. ¶ 8. Under the VWP, Petitioner was required to depart the United States within ninety days of being admitted. *See* Exh. D; *see also* Cotto Decl. ¶ 9. Petitioner failed to depart the United States as required. *See* Exh. D; Cotto Decl. ¶ 10.

On November 25, 2024, Petitioner's United States citizen son filed a Petition for Alien Relative, Form I-130, on his behalf with the U.S. Citizenship and Immigration Service (USCIS). *See* Exh. E, Form I-130 Receipt Notice from USCIS; Cotto Declaration ¶ 11. On the same date, Petitioner filed an Application for Adjustment of Status, Form I-485, with USCIS based on the Form I-130 petition from his son. *See* Exh. F, Form I-485 Receipt Notice; *see also* Cotto Decl. ¶ 12. The applications remain pending before USCIS. *Id.* ¶ 13.

On or about April 30, 2025, Petitioner was encountered by U.S. Customs and Border Protection ("CBP") at the Key West International Airport in Key West, Florida. *See* Exh. A; *see also* Decl. ¶ 14. CBP determined that Petitioner lacked proper immigration documents to allow him to remain in the United States. *See* Exh. A; Decl. ¶ 15. On May 1, CPB issued a Notice of Intent to Issue a Final Administrative Removal Order, wherein Petitioner indicated but refused to sign, a wish to request asylum, withholding or deferral of removal. *See* Exh. C, Form 71-058, VWP Notice of Intent to Issue Final Administrative Removal Order; Decl. ¶ 16. On the same date, CBP also issued Petitioner the VWP Final Administrative Removal Order. *See* Exh. G, ICE Form 71-060, VWP Final Administrative Order dated May 1, 2025; *see also* Cotto Decl. ¶ 17. On May 2, 2025, Petitioner was taken into the custody by U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO). *See* Exh. H, Form I-200, Warrant of Arrest of Alien, and Exh. I, Detention History; Cotto Decl. ¶ 18. Petitioner was initially detained by ICE at the Krome North Service Processing Center in Miami, Florida, but was transferred to the Broward Transitional Center (BTC) located in Pompano Beach, Florida on May 15, 2025. *See* Exh. I, Detention History; Cotto Decl. ¶ 19.

On May 27, 2025, ICE ERO re-issued Petitioner a VWP Notice of Intent to Issue a Final Administrative Removal Order, as well as a VWP Final Administrative Removal Order which was

served on July 8, 2025. *See* Exh. D, Form 71-058, VWP Notice of Intent to Issue Final Administrative Removal Order; *see also* Exh. J, Form 71-060, VWP Final Administrative Order; *see also* Cotto Decl. ¶ 20. On May 27, 2025, based on Petitioner's indication on the Form 71-058, asylum-only proceedings commenced with the Executive Office of Immigration Review (EOIR). *See* Exh. X, Form I-863, Notice of Referral to Immigration Judge; Cotto Decl. ¶ 21.

On June 12, 2025, Petitioner appeared with counsel at a master hearing before the EOIR at BTC. *See* Exh. X, Notice of Hearing for June 12, 2025; Cotto Decl. ¶ 22. At that hearing, the immigration judge issued a hearing notice for a master hearing on June 24, 2025, and advised Petitioner, through his counsel, to file his application for asylum by the next hearing date. *See* Exh. M, Notice of Hearing for June 24, 2025; Cotto Decl. ¶ 23. On June 24, 2025, the immigration judge advised Petitioner, through his counsel, that his asylum application was defective and ordered him to file additional evidence. *See* Cotto Decl. ¶ 24. Petitioner's next master hearing is scheduled for July 15, 2025 at BTC. *See* Exh. N, Notice of Hearing for July 15, 2025; *see also* Cotto Decl. ¶ 25. Petitioner has not yet filed an amended asylum application. *Id.* ¶ 26. To date, Petitioner remains in ICE custody at BTC. *See* Exh. I, EARM Detention History; Decl. ¶ 27. Petitioner represents that he has an interview in New York on July 14, 2025, on his application that he must attend or the application will be deemed abandoned. *Id.* ¶ 25.

Petitioner asserts three related claims for relief: (1) Request for bond hearing under 8 U.S.C. § 1226; (2) Violation of the Fifth Amendment's Due Process Clause; and (3) Writ of habeas corpus *ad testificandum* to allow him to appear for an interview on his application for adjustment of status, which is scheduled to take place in New York on July 14, 2025. [DE 1]. Petitioner seeks a declaration that his detention without a bond hearing violates 8 U.S.C. § 1226 and the Due Process Clause; a bond hearing on or before July 10, 2025; and a writ of habeas corpus permitting

Petitioner to attend his adjustment of status interview.

II. ARGUMENT

Title 28 U.S.C. § 2241 grants federal courts the authority to issue writs of habeas corpus whenever an individual is "[i]n custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Section 2241 is the proper vehicle through which to challenge the constitutionality of a non-citizen's detention without bail. *Demore v. Kim*, 538 U.S. 510, 516-17 (2003).

A. The Visa Waiver Program and *Matter of A-W-*, 25 I&N Dec. 45, 47 (BIA 2009).

Under 8 U.S.C. § 1187, a qualifying visitor may enter the United States without obtaining a visa, so long as a variety of statutory and regulatory requirements are met. Once admitted under the VWP, a visitor may remain in the United States for 90 days. § 1187(a)(1). A VWP visitor is subject to numerous restrictions, including waiver of any right to contest the government's admissibility determinations and removal actions, except that the individual may contest removal actions on the basis of asylum. § 1187(b). A VWP applicant must, prior to admission, present U.S. officers with a completed, signed Form I–94W expressly waiving, the "right . . . to contest, other than on the basis of an application for asylum, any action for removal of the alien." § 1187(b)(2); *Bradley v. Att'y Gen. of U.S.*, 603 F.3d 235, 238-39 (3d Cir. 2010). Additionally, a VWP entrant's removal "shall be determined by the district director who has jurisdiction over the place where the alien is found, and shall be effected without referral of the alien to an immigration judge for a determination of deportability." 8 C.F.R. § 217.4(b). *See also Bradley* 603 F.3d at 238-39.

Under § 1187(c)(2)(E), the Department of Homeland Security ("DHS") has authority to detain aliens subject to the VWP. *See Matter of A-W-*, 25 I&N Dec. 45, 47 (BIA 2009). In *A-W-*, the Board of Immigration Appeals ("BIA") explained that "Immigration Judges have only been

granted authority to redetermine the conditions of custody of aliens who have been issued and served with a Notice to Appear in relation to removal proceedings pursuant to 8 C.F.R. Part 1240" governing removal proceedings *Id.* at 46-47. Immigration judges only have the authority to consider matters delegated to them by the Attorney General and the Immigration and Nationality Act, and the BIA stated that because the Attorney General no longer has authority over bond proceedings relating to noncitizens who have been admitted through the VWP, the Attorney General cannot delegate such authority to an immigration judge. *Id.* at 48; 8 C.F.R. § 1003.10(b).

Some courts have recognized the authority under § 1187 to detain individuals who entered through the VWP and stayed more than 90 days, while other courts have rejected *A-W-* and concluded that § 1187 does not provide for detention of these individuals without a bond hearing. For example, in *Kim v. Obama*, No. 12-cv-173, 2012 WL 10862140, at *2 (W.D. Tex. July 10, 2012), the court explained that "VWP entrants are not entitled to a bond redetermination proceeding before an Immigration Judge." In contrast, in *Gjergj G. v. Edwards*, No. 19-cv-5059, 2019 WL 1254561 (D.N.J. Mar. 18, 2019), the court held that § 1187(c)(2)(E) "contains no language which expressly authorizes the detention of VWP aliens sufficient to support the BIA's conclusion that the statute provides authority for the detention of VWP aliens independent of the general authority to detain aliens pending removal pursuant to 8 U.S.C. § 1226. *Id.* (ordering a bond hearing and quoting *Szentkiralyi v. Ahrendt*, No. 17-cv-1889, 2017 WL 3477739, at *2 (D.N.J. Aug. 14, 2017)) (internal quotations omitted); *see also Kleinauskaite v. Doll*, No. 17-cv-2176, 2018 WL 6112482, at *6-10 (M.D. Pa. Oct. 9, 2018) (analyzing *A-W-* and various cases). However, these cases are from other district courts and not binding on this Court.

Respondents are bound by decisions of the BIA under 8 C.F.R. § 1003.1(g)(1) ("Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of

the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States.). Accordingly, Respondents maintain that under *A-W-*, Petitioner is subject to § 1187(c)(2)(E).

B. 8 U.S.C. § 1226(a) and Due Process

Petitioner argues he is being detained under 8 U.S.C. § 1226(a), which provides:

> (a) Arrest, detention, and release. On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--
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> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on--
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but
>
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

8 U.S.C. § 1226(a). Section 1226 "authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings." *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). Non-criminal aliens in removal proceedings are typically entitled to a bond hearing. *France v. Ripa*, No 24-cv-24333, 2025 WL 973532, at *3 (S.D. Fla. Apr. 1, 2025); *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 574 (2022) (assuming without deciding that § 1226(a) might be read to require a bond hearing). However, as Petitioner is not in removal proceedings under a Notice to Appeal, section 1226 does not currently apply.

The Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. am. V. The Fifth Amendment applies to aliens

facing deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). Detaining a VWP violator without a bond hearing does not necessarily amount to a due process violation. *See Hodge v. Barr*, No. 19-cv-6630, 2020 WL 210063, at *4 (W.D.N.Y. Jan. 14, 2020). In *Hodge*, the petitioner had violated the VWP, and ICE detained him under § 1187 without a hearing. *Id.* The court noted that it was "an unsettled question" whether § 1187 or § 1226 authorized this type of detention, but proceeded to analyze whether the detention violated the petitioner's due process rights and concluded it had not. *Id.* The court reasoned that the detention had lasted less than 12 months and that if the petitioner's asylum application was denied, there did not appear to be any barriers to his deportation. *Id.* Thus, the Court held that "[t]he totality of the circumstances leads the Court to conclude that his detention without a bond hearing has not crossed the line into a due process rights violation at this time." *Id.* Here, Petitioner is in a similar situation to the petitioner in *Hodge*, as he is subject to the VWP provisions, has been detained approximately two months, and is in asylum-only proceedings. Thus, his continued detention does not amount to a Fifth Amendment violation.

C. Petitioner's Adjustment of Status Interview

ICE is in contact with USCIS to arrange a remote interview on Petitioner's Application for Adjustment of Status so that he can attend the hearing while detained. USCIS has a timeslot saved for Petitioner to complete his USCIS interview remotely on July 14, 2025. ICE officials are coordinating with USCIS for Petitioner to attend the interview remotely from the Broward Transitional Center.

III. CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court dismiss Petitioner's Petition and deny all relief sought in the Petition.

Respectfully submitted,

HAYDEN O'BYRNE
UNITED STATES ATTORNEY

Date: July 7, 2025

By: */s/ Darcie A. Thompson*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of July, 2025, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Darcie A. Thompson
Assistant U.S. Attorney