UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Myles O'Connor, Petitioner, v. Warden, Broward Transitional Center, et al. Respondents.	)	Case No. 25-61338-CIV-DAMIAN **REPLY MEMORANDUM IN SUPPORT OF HABEAS CORPUS PETITION**

None of the evidence in the government's Response to Order to Show Cause (ECF No. 14) undermines any of the central facts alleged in the petition for habeas corpus.

Mr. O'Connor wishes to clarify that his adjustment of status interview is scheduled for Monday, July 14, 2025 at 8:30 AM in Holtsville, New York. Ex. 7 – I-485 Interview Notice. Counsel apologizes for incorrectly stating the date in the petition.

The government makes no real defense of the precedent that is causing Mr. O'Connor to be denied a bond hearing, *Matter of A-W-*, 25 I&N Dec. 45 (BIA 2009). Rather, the government points out that some district courts have followed *Matter of A-W-*, some have not, but the government remains bound by it as a precedent of the Board of Immigration Appeals. *See* Response to Order to Show Cause, ECF No. 14, at 5. The government only cites one case in support of *Matter of A-W-*, and the sum total of that decision's reasoning is as follows:

> As an initial matter, the Court denies Kim's request for a bond redetermination. Because he self-admittedly entered the United States under the VWP, Mot. 3, he has waived all statutory rights to contest his deportation, except on the basis of asylum. 8 U.S.C. § 1187(b)(2). Unlike other aliens held under § 1226(a), VWP entrants are not entitled to a bond redetermination proceeding before an Immigration Judge. *Matter of [A-W-]*, 25 I & N Dec. 45 (BIA 2009). Therefore, based on Kim's own admission that he entered the United States pursuant to the VWP, he is ineligible for a bond redetermination.

Kim v. Obama, No. EP-12-CV-173-PRM, 2012 WL 10862140, at *2 (W.D. Tex. July 10, 2012). *Kim* fails to identify any authority to detain noncitizens in the Visa Waiver Program statute, 8 U.S.C. § 1187. *Kim* fails to explain why waiving any challenge to deportation means waiving any challenge to detention. The Immigration and Nationality Act lays out the authority for removal proceedings and bond proceedings in separate statutes, 8 U.S.C. §§ 1229a and 1226 respectively. Removal and bond are separate proceedings before an immigration judge (*see Matter of R-A-V-P-*, 27 I&N Dec. 803, 804 (BIA 2020)), so there is nothing incongruous about denying a removal hearing while still providing a bond hearing.

Indeed, in recent years the government has declined to defend *Matter of A-W-* and instead stipulated to provide bond hearings in at least two cases, including one in this district. *Semelik v. Field Office Director*, No. 24-cv-24924, ECF 11 Order on Stipulation of Dismissal (S.D. Fla. Dec. 31, 2024); *Krause v. Joyce*, No. 25-cv-2379, ECF 14 Stipulation and Order (S.D.N.Y. March 27, 2025) (both attached as Ex. 8 – Stipulations to Grant Bond Hearings).

"Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line." *W. Virginia v. EPA*, 597 U.S. 697, 723 (2022) (cleaned up, citation omitted). If Congress had intended the government to detain Visa Waiver Program overstays without a bond hearing under 8 U.S.C. § 1187, then Congress would have used language in that statute explicitly authorizing detention. Congress clearly knows how to authorize detention, because the immigration detention statutes speak clearly. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained…."); 8 U.S.C. § 1226(a) ("[A]n alien may be arrested and detained…."); 8 U.S.C. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien."). There is no such language in 8 U.S.C. § 1187. None was identified by *Matter*

of A-W-, and none was identified in *Kim*, the sole decision cited by the government in support of *Matter of A-W-*.

As far as the government's point that it remains bound by *Matter of A-W-* as precedent, that is due to a procedural quirk in judicial review of decisions of the Board of Immigration Appeals. *See* Response to Order to Show Cause, ECF No. 14, at 5-6. If the Board issues a final deportation order in removal proceedings, the affected party may petition for review to the appropriate circuit court of appeals, which could correct any errors in the Board's decision and set precedent within that circuit. 8 U.S.C. § 1252(a)(1). However, if the Board issues a decision denying bond, there is no right to petition for review to a circuit court. The only remedy is a petition for habeas corpus filed in a federal district court, which lacks the ability to set precedent. Thus, *Matter of A-W-* lingers, technically binding DHS as precedent long after serious doubts have emerged about its reasoning.

Since Congress did not create any special detention authority for Visa Waiver Program travelers, their detention must be governed by the default detention statute, 8 U.S.C. § 1226(a), which permits detention "pending a decision on whether the alien is to be removed from the United States." Since Mr. O'Connor's asylum proceeding is ongoing, and he is still applying for lawful permanent residence, a decision is still pending on whether he is to be removed from the United States. He must be provided the procedural protections available under 8 U.S.C. § 1226(a), namely a bond hearing.

Lastly, petitioner is attaching additional evidence documenting his ties to the community and his good character. Ex. 9 – Evidence of Ties to the Community. Since he has resided in the U.S. for 16 years and established deep ties to the community, he should not be detained without a bond hearing.

Respectfully submitted,

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8. Stipulations to Grant Bond Hearings

9. Evidence of Ties to the Community