UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 25-CV-61492-DAMIAN

JUAN DAVID PESTANA BUENDIA,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; KRISTI NOEM, in her official capacity, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; TODD M. LYONS, in his official capacity, ACTING DIRECTOR, OF IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; GARRETT RIPA, in his official capacity, ASSISTANT FIELD OFFICER IN CHARGE, ICE MIAMI FIELD OFFICE; and WARDEN, BROWARD TRANSITIONAL CENTER, *et al.*,

Respondent.
_____/

RESPONSE TO ORDER TO SHOW CAUSE

Respondents, U.S. Department of Homeland Security, Kristi Noem in her official capacity as Secretary of U.S. Department of Homeland Security, Todd M. Lyons, in his official capacity as the Acting Director of ICE, Garrett Ripa in his official capacity as Assistant Field Officer in Charge of the ICE Miami Field Office, and Warden, Broward Transitional Center ("Respondents"), by and through the undersigned Assistant United States Attorney, file this Response to the Court's Order to Show Cause [D.E. 9]. As set forth below, the Court should deny the Emergency Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 [D.E. 1].

I. INTRODUCTION

Petitioner entered the United States utilizing the Visa Waiver Program (VWP) which enables most citizens or nationals of participating countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. Travelers must have a valid Electronic System for Travel Authorization ("ESTA") approval prior to travel and meet all requirements. *See* U.S. Dep't of State website.[1] One key requirement of participation in the VWP is a waiver of the right to contest removal from the United States for any violation of the terms of the program. Despite being granted approval to use this program, Petitioner failed to leave the United States after the 90-day period expired. Petitioner was detained in June 2025 and is subject to removal from the United States as explained below, and this Petition should be denied.

II. FACTUAL BACKGROUND

Petitioner is a dual national of Venezuela and Portugal.[2] *See* Exh. 1, Form I-213, Record of Deportable/Inadmissible Alien dated May 9, 2025; *see also* Exh. 2, Declaration of Officer Shane Baksh ("Baksh Declaration") ¶ 6. Petitioner entered the United States using his Portuguese passport on or about June 29, 2021, and was admitted to the United States on the Visa Waiver Program (VWP) pursuant to Section 217 of the Immigration and Nationality Act, as amended. *See* Exh. 3, Form 71-058, VWP Notice of Intent to Issue Final Administrative Removal Order; *see also* Exh. 2, Baksh Declaration ¶ 7–8. When completing the ESTA (which replaced the traditional

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[1] https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html (last visited Aug. 29, 2025).

[2] U.S. Customs and Border Patrol, https://esta.cbp.dhs.gov/esta (last visited Aug. 29, 2025) (under "Visa Waiver Program Countries" Portugal is listed, which Venezuela is not.

I-94W)[3] for admission into the VWP program, Petitioner agreed to waive rights to review of appeal any removal action arising from an application under the VWP.[4]

Under the VWP, Petitioner was required to depart the United States within ninety days of being admitted (i.e. September 26, 2021); however, he failed to depart the United States as required. *See* Exh. 3, ICE Form 71-058, VWP Notice of Intent to Issue Final Administrative Removal Order; *see also* Exh. 2, Baksh Declaration ¶ 9.

On October 25, 2021, after his VWP had already expired, Petitioner applied for asylum before U.S. Citizenship and Immigration Service ("USCIS"). *See* D.E. 1-3 ¶ 3. On August 14, 2024, USCIS administratively closed the asylum application for lack of jurisdiction and issued a Form I-863, Notice of Referral to the Immigration Judge. *See* D.E. 1-4, Form I-863, Notice of Referral to Immigration Judge.[5]

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[3] *Id.* (select topic "If I have a travel authorization through ESTA, do I need to fill out an I-94W?" and the body of the answer is: "The implementation of the ESTA program allowed DHS to eliminate the requirement for Visa Waiver Program travelers arriving by air, land or sea to complete an I-94W prior to being admitted to the United States." (last visited Aug. 29, 2025).

[4] *Id.* (select "Are there disadvantages to using the Visa Waiver Program?" and body of answer is:

> Before using the Visa Waiver Program, be aware of the following conditions that apply and carefully consider your options:
>
> - If you are admitted to the United States under the Visa Waiver Program, you may not change or extend your non-immigrant status.
> - If your admission is denied, you have no right to appeal a determination as to admissibility.
> - *If you are found to have violated the terms of your admission, you also have no right to review or appeal, other than on the basis of an application for asylum, any removal action arising from an application for admission under the Visa Waiver Program.*

(emphasis added).

[5] *See* 8 CFR § 208.2 (covering USCIS's jurisdiction over certain requests, and under subsection (c)(1)(iv) how only immigration court has jurisdiction over asylum applicants who are VWP violators).

At some point during his time in the United States, Petitioner married a United States citizen. *See* D.E. 1, ¶ 17. On April 25, 2025, Petitioner's spouse filed a Form I-130 Petition for Alien Relative with USCIS on his behalf. *See* D.E. 1-5, USCIS Receipt Notices. On the same day, Petitioner also applied for adjustment of status (Form I-485) with USCIS. *Id.* On July 29, 2025, USCIS approved the Form I-130. *See* Exh. 4, Form I-130 Petition for Alien Relative, Approval Notice. On August 20, 2025, USCIS denied Form I-485. *See* Exh. 5, Form I-485, Application to Register Permanent Residence or Adjust Status, Denial Notice.

On or about May 9, 2025, Petitioner was encountered by U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO). *See* Exh. 1, Form I-213 dated May 9, 2025; *see also* Exh. 2, Baksh Declaration ¶ 11. ICE determined that Petitioner had violated the terms of his visa waiver program under INA § 217, for remaining longer than authorized in violation of INA § 237(a)(1)(B). *See* Exh. 1, Form I-213 dated May 9, 2025; *see also* Exh. 2, Baksh Declaration ¶ 12. On the same date, ICE issued a Notice of Intent to Issue a Final Administrative Removal Order, wherein Petitioner acknowledged receipt of the Notice of Intent, and admitted the allegations contained therein. *See* Exh. 3, ICE Form 71-058, VWP Notice of Intent to Issue Final Administrative Removal Order; *see also* Exh. 2, Baksh Declaration ¶ 13. Petitioner also indicated that he wished to request asylum, withholding of removal, or deferral of removal to Portugal. *See* Exh. 3, ICE Form 71-058, VWP Notice of Intent to Issue Final Administrative Removal Order; *see also* Exh. 2, Baksh Declaration ¶ 14. On the same date, Petitioner was taken into ICE ERO custody. *See* Exh. 2, Baksh Declaration ¶ 11. Petitioner was initially detained by ICE ERO at the Krome North Service Processing Center in Miami, Florida, but was later transferred to the Broward Transitional Center (BTC) located in Pompano Beach, Florida on May 25, 2025. *See* Exh. 6, Detention History; *see also* Exh. 2, Baksh Declaration ¶ 15. On July 30, 2025, ICE served

Petitioner the VWP Final Administrative Removal Order, which he refused to sign. *See* Exh. 7, ICE Form 71-060, VWP Final Administrative Order; *see also* Exh. 2, Baksh Declaration ¶ 16. Petitioner's next merits hearing was scheduled for August 13, 2025, at BTC. *See* Exh. 2, Baksh Declaration ¶17. However, Petitioner's attorney requested a continuance for personal reasons unrelated to the Petitioner's case, and his next merits hearing is scheduled for September 3, 2025. *See* Exh. 2, Baksh Declaration ¶17–18.

Petitioner asserts three related claims for relief based on his belief he is entitled to a bond hearing under 8 U.S.C. § 1226: (1) Violation of the Fifth Amendment's Due Process Clause; (2) Violation of the Administrative Procedure Act; and (3) Violation of the Fourth Amendment. [D.E. 1]. Petitioner seeks immediate release from detention, a declaration that his detention without a bond hearing violates various statutes.

III. ARGUMENT

Petitioner is not entitled to the relief sought. 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). In short, Petitioner's entry under the VWP was in exchange for a waiver of certain rights, and Petitioner then violated the terms of the VWP when he stayed beyond the 90 days. The Court should analyze Petitioner's situation under § 1187, not § 1226. Plaintiff's merits hearing on his pending asylum claim is scheduled for September 3, 2025.

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). Petitioner agreed to these terms when he applied for an ESTA (which replaced the Form I-94W) to participate in VWP. 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 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. Petitioner is not entitled to 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--
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> > (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, so § 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 three months, and has his merits hearing on the asylum request on September 3, 2025. Thus, his continued detention does not amount to a Fifth Amendment violation.

IV. CONCLUSION

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

Dated: August 29, 2025

Respectfully submitted,

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