

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 0:25-cv-61492-MD

JUAN DAVID PESTANA BUENDIA,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY, *et al.*

Respondents.

REPLY TO RESPONSE TO ORDER TO SHOW CAUSE ON HABEAS CORPUS
PETITION

Reply re Habeas Corpus Petition
Pestana Buendia v. DHS, et al.

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I. INTRODUCTION

Petitioner, Juan David Pestana Buendia's habeas claim arises from Respondents' failure to adhere to the law with respect to a non-criminal detainee awaiting a decision on removal. *See* 8 U.S.C. § 1226(a). Mr. Pestana Buendia entered the United States in June 2021, timely sought asylum, and remained in the United States pending a decision on his asylum claim. Remarkably, Respondents concede that "non-criminal aliens in removal proceedings are typically entitled to a bond hearing." ECF No. 14 at 8. And yet, Respondents have detained Mr. Pestana Buendia since May 9, 2025, without the bond hearing they admit he's entitled to.

Respondents' sole justification for their actions is to suggest that Mr. Pestana Buendia's waiver under the Visa Waiver Program (VWP) permits them to detain him without any due process. Contrary to Respondents' assertions, a waiver under the VWP is not an absolute waiver of all rights, nor does it waive the right to seek habeas review of detention that is unlawful. In short, Respondents' conduct amounts to a grave deprivation of Mr. Pestana Buendia's liberty interests without due process. To remedy this deprivation, the Court should issue an order immediately releasing Mr. Pestana Buendia from detention.

II. RELEVANT INTERVENING FACTS

Five days after Mr. Pestana Buendia filed this habeas action, Respondents issued a Final Administrative Order of Removal against him, ECF No. 14-7 at 2, even though an immigration judge already had jurisdiction over Mr. Pestana Buendia's asylum-only proceedings.¹ On July 29, 2025, U.S. Citizenship and Immigration Service (USCIS) approved Mr. Pestana Buendia's Form I-130, Relative Petition, based on his marriage to his U.S. citizen wife. ECF No. 14-4. Mr. Pestana Buendia's immigration court hearing on August 13, 2025, was continued to September 3, 2025. ECF No. 14 at 5. On August 21, 2025, USCIS denied Mr. Pestana Buendia's Form I-485, adjustment of status application based primarily on the assertion that Respondents' final order of removal was an adverse factor weighing heavily against adjustment. ECF No. 14-5. Mr. Pestana Buendia has 33 days or until September 23, 2025, to file a motion to reopen or reconsider with

¹ Under 8 C.F.R. § 208.2(c)(1)(iv), immigration courts have sole jurisdiction over asylum applications filed by VWP entrants. Because Respondents referred Mr. Pestana Buendia for asylum-only proceedings, a denial of asylum operates as a final order of removal. *See Nreka v. United States AG*, 408 F.3d 1361, 1367 (11th Cir. 2005) (referral to asylum-only proceedings in conjunction with denial of asylum for a VWP entrant operates a final order of removal.)

USCIS on the denial of his adjustment of status application. 8 C.F.R. § 103.5. Respondents continue to detain Mr. Pestana Buendia at Broward Transitional Center.

III. ARGUMENT

“Noncitizens detained under §1226(a) receive bond hearings after the Government initially detains them.” *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579–80 (2022). Respondents urge this Court to analyze Mr. Pestana Buendia’s detention under the VWP statute—a statute that does not authorize Respondents to detain anyone. *See* 8 U.S.C. § 1187. In doing so, Respondents attempt to carve Mr. Pestana Buendia’s detention out of 8 U.S.C. § 1226(a) and circumvent the statutory requirement to provide him a bond hearing at the outset of detention. *See* 8 U.S.C. § 1226(a)(2), 8 C.F.R. § 236.1(d)(1), 8 C.F.R. § 1003.19.

Respondents’ position is flawed. Congress expressly permitted VWP entrants to seek asylum. 8 U.S.C. § 1187(b)(2). Although Mr. Pestana Buendia entered under the VWP and remained past 90 days, he timely applied for asylum consistent with regulations governing that process. *See* 8 C.F.R. § 208.4(a)(2) (requiring an asylum application to be filed within one year of entry); *see also* ECF No. 14 at 3 (stating that on October 25, 2021, “Petitioner applied for asylum”). Moreover, Mr. Pestana Buendia has due process rights by virtue of having established ties to the United States in the years he has waited for a decision on his asylum claim. *See Sengchanh v. Lanier*, 89 F. Supp. 2d 1356, 1359 (N.D. Ga. 2000) (“deportable aliens enjoy greater constitutional procedural due process rights than do aliens who are first seeking entry to this country.”) Respondents cannot now claim that Mr. Pestana Buendia—who entered the United States over four years ago—has no due process rights merely because he entered under the VWP.

Respondents rely on *Matter of A-W-*, 25 I&N Dec. 45, 47 (BIA 2009) to argue that Mr. Pestana Buendia is subject to detention under the VWP statute. However, the overwhelming majority of courts to analyze VWP detention have rejected *Matter of A-W-*, instead holding that 8 U.S.C. § 1226(a) governs detention of VWP overstays. *See, e.g., Neziri v. Johnson*, 187 F. Supp. 3d 211, 213 (D. Mass. 2016). Under Section 1226(a), Mr. Pestana Buendia should have received a bond hearing at the outset of detention. Accordingly, the Court should reject Respondents’ arguments and release Mr. Pestana Buendia.

A. Entry Under the Visa Waiver Program Does Not Waive Due Process

Mr. Pestana Buendia’s habeas claim solely challenges the fact of his detention without a bond hearing—not any aspect of his underlying proceedings or Respondents’ decision to seek

removal. Respondents would lead this Court to believe that in waiving certain rights under the VWP, Mr. Pestana Buendia waived his right to a bond hearing or to seek habeas relief from unlawful detention. *See* ECF No. 14 at 8–9. Respondents are incorrect. A waiver of rights under the VWP is specific:

(1) to review or appeal under this chapter of **an immigration officer's determination as to the admissibility of the alien at the port of entry** into the United States, or

(2) to contest, other than on the basis of an application for asylum, **any action for removal of the alien.**

8 U.S.C. § 1187(b) (emphasis added).

The statute's text waiving contest of "any action for removal of the alien" does not pertain to statutory or constitutional challenges to detention, like the challenge before this Court. The Supreme Court analyzed similar language in jurisdiction-stripping provision 8 U.S.C. § 1252(b)(9) and refused to construe such text as precluding habeas review of unlawful detention. *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018) (statutory text, "any action taken or proceeding brought to remove an alien" did not bar habeas claim). The Court reasoned that an expansive reading of "any action" would deprive meaningful review of detention. *Id.* The Supreme Court's interpretation and reasoning support a narrow reading of 8 U.S.C. § 1187(b)(2); otherwise, the VWP waiver would foreclose meaningful review of detention where explicit jurisdiction-stripping provisions do not. Accordingly, the Court should reject any suggestion that an entry under the VWP waives due process.

B. Petitioner's Detention is Squarely Governed by Section 1226(a)

The only detention statute that applies to Mr. Pestana Buendia as a VWP entrant is 8 U.S.C. § 1226(a). Against the weight of case law and constitutional principles, Respondents contend that Mr. Pestana Buendia is subject to detention under the VWP statute. Respondents are incorrect because the VWP statute does not authorize ICE to exercise detention authority. *See* 8 U.S.C. § 1187; *Szentkiralyi v. Ahrendt*, No. 17-1889 (SDW), 2017 U.S. Dist. LEXIS 128399, at *6–7 (D.N.J. Aug. 14, 2017) (analyzing Section 1187(c)(2)(E) and noting it "contains no language which expressly authorizes the detention of VWP aliens.") Consistent with the statutory scheme for immigration detention and case law regarding VWP detention, Mr. Pestana Buendia cannot be said to be detained under any statute other than 8 U.S.C. § 1226(a).

Most courts considering VWP detention have determined that Section 1226(a), rather than the VWP statute, applies. *See Neziri*, 187 F. Supp. 3d at 213 (rejecting BIA's holding that IJs lack jurisdiction over custody determinations in asylum-only proceedings and concluding that VWP is governed by Section 1226), *Sutaj v. Rodriguez*, No. 16-5092 (JMV), 2017 U.S. Dist. LEXIS 1896, at *13 (D.N.J. Jan. 5, 2017) (same, adopting the reasoning of *Neziri*), *Szentkiralyi*, 2017 U.S. Dist. LEXIS 128399, at *11 (same, rejecting government's argument that VWP statute provides detention authority), *Emila N. v. Ahrendt*, No. 19-5060 (SDW), 2019 U.S. Dist. LEXIS 39356, at *7 (D.N.J. Mar. 12, 2019) (same), *Gjergj G. v. Edwards*, Civil Action No. 19-5059 (SDW), 2019 U.S. Dist. LEXIS 44335, at *7 (D.N.J. Mar. 18, 2019) (same); *Romance v. Warden York Cty. Prison*, No. 3:20-cv-00760, 2020 U.S. Dist. LEXIS 189023, at *9-10 (M.D. Pa. July 28, 2020) (same); *but see Kim v. Napolitano*, No. EP-11-CV-261-KC, 2011 U.S. Dist. LEXIS 158259, at *6 (W.D. Tex. Nov. 14, 2011) (pre-*Jennings* decision construing VWP waiver as waiving due process rights).

After finding Section 1226(a) governs detention, some courts have explained that even assuming VWP detention were governed by Section 1187, the statute should be read to avoid a constitutional problem. *See e.g., Neziri*, 187 F. Supp. 3d at 213–14. With the principle of constitutional avoidance in mind, some courts have granted habeas to VWP detainees under a prolonged detention analysis, but in each case the petitioner had already been detained for significant time. *See id.* at 212 (27 months); *Sutaj*, 2017 U.S. Dist. LEXIS 1896, at *1 (16 months); *Malets v. Horton*, No. 4:20-cv-01041-MHH-SGC, 2021 U.S. Dist. LEXIS 176503, at *13 (N.D. Ala. Jan. 11, 2021) (approximately 30 months). However, if this Court finds, consistent with the weight of case law, that Mr. Pestana Buendia's detention is governed by Section 1226(a), then there is no need to engage in a prolonged detention analysis because Section 1226(a) requires initial bond hearings. *See Arteaga-Martinez*, 596 U.S. at 579–80 (bond hearing under Section 1226(a) required at outset of detention), *Emila N.*, 2019 U.S. Dist. LEXIS 39356, at *7 (holding VWP detainee was subject to Section 1226(a) and granting habeas without prolonged detention analysis). Stated differently, if Section 1226(a) governs Mr. Pestana Buendia's detention, he should not be deprived of his freedom for several more months before receiving a bond hearing that was owed to him at the outset of detention.

Like the majority of courts to address VWP detention, this Court is not bound by BIA decisions and should not give deference to *Matter of A-W-*. The BIA concluded that VWP detention is authorized by Section 1187 based on its reasoning that statutory transfer of authority from the Attorney General to the Department of Homeland (DHS) prevented IJs from reviewing bonds for VWP entrants. *Szentkiralyi* 2017 U.S. Dist. LEXIS 128399, at *11. However, that transfer of authority “did not deprive [DHS] of the authority to delegate bond authority to IJs just as the Attorney General had done.” *Id.* Significantly, Congress was explicit in authorizing the discretionary detention of noncitizens pending a removal decision. 8 U.S.C. § 1226(a). By contrast, Section 1187 does not mention detention of VWP entrants. *Id.* § 1187. As such, “the detention of an alien in asylum proceedings must instead arise from one of the other statutory provisions expressly covering aliens subject to detention during their removal proceedings.” *Emila N.*, 2019 U.S. Dist. LEXIS 39356, at *6.

The mere fact that Mr. Pestana Buendia’s proceedings were commenced with a Notice of Referral to Immigration Judge, as opposed to a Notice to Appear, does not change the conclusion that his detention is governed by Section 1226(a). *See Romance*, 2020 U.S. Dist. LEXIS 189023, at *9. Mr. Pestana Buendia is waiting for a decision on whether he can be removed from the United States, and Section 1226(a) is the only provision that expressly authorizes detention pending such a decision. *Id.* Similarly, the fact that asylum-only proceedings limit the substantive relief available to Mr. Pestana Buendia has no bearing on whether he is entitled to a bond hearing. As the court noted in *Sutaj*, a bond hearing is procedural and “does not frustrate the intent of the VWP program to limit the types of substantive relief available.” 2017 U.S. Dist. LEXIS 1896, at *13.

Construing Mr. Pestana Buendia’s entry under the VWP as permitting indefinite detention without a bond hearing would create a serious constitutional problem. *Neziri*, 187 F. Supp. 3d at 214 (citing *Zadvydas*, 533 U.S. 678, 689 (2001)); *Mitka v. ICE Field Office Dir.*, No. C19-193 MJP, 2019 U.S. Dist. LEXIS 196045, at *4 (W.D. Wash. Nov. 12, 2019). Mr. Pestana Buendia has lived in the United States since June 2021 and he is married to a U.S. citizen. Regardless of the posture of his underlying proceedings he is entitled to due process. *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 107 (2020) (“aliens with established connections in the country have due process rights”). Section 1226(a) governs Mr. Pestana Buendia’s detention and, in conjunction with implementing regulations, authorizes a bond hearing at the outset of detention—not when detention has become unreasonably prolonged. Accordingly, the Court should find that

Respondents' failure to adhere to Section 1226(a) renders Mr. Pestana Buendia's detention unlawful.

C. Petitioner's Detention Without an Initial Bond Hearing is Unlawful

"[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Zadvydas*, 533 U.S. at 523. Under Section 1226(a) and corresponding regulations, Mr. Pestana Buendia should have received a bond hearing months ago. *See Jennings*, 583 U.S. at 306 (noting "[f]ederal regulations provide that aliens detained under §1226(a) receive bond hearings at the outset of detention."); *see also* 8 C.F.R. § 236.1(d)(1), 8 C.F.R. § 1003.19. Respondents' do not deny that bond hearings are available under Section 1226(a). Instead, they assert that Mr. Pestana Buendia—a non-criminal asylum seeker—is not entitled to due process. ECF No. 14 at 7, 9.

In support of their position, Respondents rely on a single district court decision that did not analyze *Matter of A-W-* or VWP detention. *See generally Hodge v. Barr* No. 6:19-cv-06630-MAT, 2020 U.S. Dist. LEXIS 6191, at *8 (W.D.N.Y. Jan. 14, 2020)). The court in *Hodge* found no due process violation based on the petitioner's length of detention. *Id.* at 9. Respondents do not explain why *Hodge* is more persuasive than the numerous cases that engaged in a fulsome analysis of VWP detention. Either way, this Court should decline to follow *Hodge* because the idea that VWP entrants have no due process rights "leads to the illogical conclusion that an alien detained pursuant to 8 U.S.C. § 1226(c) [authorizing mandatory detention for applicable crimes] has greater rights than a VWP applicant." *Malets*, 2021 U.S. Dist. LEXIS 176503, at *13.

Mr. Pestana Buendia's right to a bond hearing materialized on May 9, 2025 when Respondents first detained him. *See* 8 U.S.C. § 1226(a), 8 C.F.R. § 236.1(d)(1), 8 C.F.R. § 1003.19. It has been over 114 days and Respondents continue to detain Mr. Pestana Buendia in violation of the law. And even if Mr. Pestana Buendia were not entitled to a bond hearing at the outset of detention, Respondents' arguments fail to consider that if Mr. Pestana Buendia's asylum claim is denied, he could appeal to the BIA. 8 C.F.R. § 1003.1(b)(9). The appeal process could take many months. Thus, Respondents would subject Mr. Pestana Buendia to months- or years-long detention without ever affording him a bond hearing. This is plainly unconstitutional.

Respondents are required to follow the law and their own regulations. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Respondents' repeated disregard of statutes and regulations implicating Mr. Pestana Buendia's proceedings and detention cannot be overlooked. From arresting Mr. Pestana Buendia without a warrant as he left his home, to detaining him without an initial individualized

hearing, Respondents' violations have caused Mr. Pestana Buendia significant harm. To remedy this harm, the Court should release Mr. Pestana Buendia.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Mr. Pestana Buendia's habeas petition and order his immediate release from detention.

Date: September 1, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Martin D. Rosenow, certify that on Monday, September 1, 2025, the foregoing document was filed electronically, and all parties and their counsel of record were served through the CM/ECF system.

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