UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LARYSA KOSTAK	)	**CIVIL ACTION NO: 3:25-cv-01093**
	)	
VERSUS	)	**JUDGE EDWARDS**
	)	
DONALD J. TRUMP, *ET AL.*	)	**MAGISTRATE JUDGE MCCLUSKY**

RESPONSE TO PETITIONER'S MOTION FOR RELEASE PENDING ADJUDICATION OF PETITIONER'S HABEAS CORPUS PETITION AND, AS APPLICABLE, HER MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOW INTO COURT, through undersigned counsel, come Respondents, who respectfully move this Court to deny Petitioner's Motion for Release Pending Adjudication (Doc. 9) on the grounds articulated below:

I. INTRODUCTION

Petitioner is a Ukrainian national who entered the United States at an unknown location on an unknown date. She entered without inspection from an immigration officer but claims to have been residing in the United States since the year 2005. Although Petitioner entered the United States in 2005, she did not apply for asylum until 2018. Petitioner submitted her application for asylum to the U.S. Citizen and Immigration Services (USCIS) in January 2018. However, since she had been in the country for more than one year at the time her application for asylum was submitted, USCIS could not adjudicate the application. Therefore, USCIS referred Petitioner's application for asylum to an immigration judge for review. Although she had unlawfully remained in the United States since 2005, Petitioner's initial encounter with Immigrations and Customs Enforcement (ICE) agents occurred in June 2025 when she was detained and taken into custody after appearing for an immigration court hearing. No custody determination had been made prior

to June 2025 with respect to Petitioner because ICE was unaware of her presence in the United States. Petitioner has never had § 1226 detention status. After being denied bond, Petitioner filed a Petition for Writ of Habeas Corpus, (Doc. 1), a Motion for Temporary Restraining Order (TRO) and Preliminary Injunction (Doc. 3), and most recently a Motion for Release Pending Adjudication of the Habeas Petition and TRO ("Motion for Release") (Doc. 9).

Respondents assert that all three of Petitioner's pending pleadings seek the same relief, i.e., release from detention. Therefore, the Motion for Release, which is the subject of this memorandum response, is superfluous. The motion should be denied since TRO proceedings had already been initiated at the time it was filed. There is no legal basis for the Motion for Release in light of the pending Motion for TRO that was filed in connection with the habeas pleading seeking Petitioner's immediate release from ICE custody. Also, cases cited in support of the Motion for Release are neither factually nor legally aligned with the instant matter. Petitioner's inability to cite to more "on-point" legal authority signals that a Motion for Release would be defeated in cases where the petitioner was lawfully detained in connection with a charge of entering without inspection (EWI).

Moreover, the Motion for Release should be denied because Petitioner is being lawfully detained as an applicant for entry pursuant to Section 235 of the Immigration and Nationality Act (8 U.S.C. §1225). Therefore, Petitioner cannot show that her detention violates either her substantive or procedural due process rights. Accordingly, she cannot establish a likelihood of success on the merits of her Petition for Writ of Habeas Corpus. Further, Petitioner's allegation that she was detained pursuant to a "ruse" by ICE agents misses the mark since the record confirms that Petitioner was detained at immigration proceedings that were scheduled by an immigration judge.

In addition, Respondents maintain that Petitioner has not proven eligibility for release pending adjudication under the test established by Fifth Circuit Court of Appeals jurisprudence. Petitioner has not shown that she is subject to extraordinary circumstances such as a health condition which would warrant immediate release under the Fifth Circuit analysis. Therefore, the applicable law supports Petitioner's continued detention through the conclusion of her immigration court proceedings.

II. STATEMENT OF FACTS

1. Petitioner is a native of the Former Soviet Union and a citizen of Ukraine who entered the United States without being inspected by an immigration officer at an unknown location on an unknown date. (*See* Declaration of Department of Homeland Security Assistant Field Director Charles Ward, attached hereto as Government Exhibit A.)
2. On January 18, 2018, Petitioner filed an application for asylum with U.S. Citizenship and Immigration Services (USCIS). *See* Ex. A, ¶4. USCIS referred the application to an immigration judge for adjudication, thereby initiating removal proceedings.
3. On May 15, 2019, USCIS served Petitioner with Form I-862, Notice to Appear, charging her with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) as an alien present in the United States with being admitted or paroled, or who arrived in the United States at any time of place other than as designated by the Attorney General. (*See* Ex. A, ¶5; *See* also Notice to Appear, attached hereto as Government Exhibit A-1).
4. On September 12, 2019, Petitioner appeared before an Immigration Judge for an initial master calendar hearing. After pleadings were resolved and removability established, her

case was continued to November 1, 2022, for a hearing on the merits of her asylum application. *See* Ex. A, ¶6.

5. On March 6, 2023, the immigration court issued a Notice of Intent to Take Case Off the Court's Calendar. *See* Ex. A, ¶7. This Notice was issued two years prior to Plaintiff's most recent immigration court hearing and was intended to remove the matter for the court's active docket. The Notice did not constitute a resolution of the Petitioner's case, or an adjudication of any claims raised. The case remained pending and could be placed back on the docket at any time by the court, the Department of Homeland Security, or by the Petitioner.
6. On March 18, 2025, the immigration court issued a Notice of In-Person Hearing to take place on June 26, 2025. *See* Ex. A, ¶8.
7. On June 26, 2025, Petitioner appeared before the immigration court for a master calendar hearing. The case was continued until December 11, 2026, for a hearing on the merits of her asylum application. *See* Ex. A, ¶9.
8. Following her appearance at the June 26, 2025 immigration court proceedings, Petitioner was taken into ICE custody. *See* Ex. A, ¶10.
9. On July 8, 2025, Petitioner filed a request for a bond and custody redetermination in the immigration court. At the custody redetermination hearing on July 22, 2025, the Immigration Judge determined that Petitioner was subject to mandatory detention and denied the request for a change in custody status. Petitioner reserved appeal of the decision, and the appeal is due by August 21, 2025. *See* Ex. A, ¶11.
10. As of August 5, 2025, Petitioner has not filed an appeal with the Board of Immigration Appeals. *See* Ex. A, ¶12.

11. Petitioner is not subject to a final order of removal. An upcoming October 2025 hearing date is currently scheduled in Petitioner's immigration proceedings.

III. ARGUMENT

A. Petitioner Cannot Demonstrate a High Probability of Success on Her Constitutional Claims.

1. Petitioner's detention under Section 235 of the Immigration and Nationality Act (8 U.S.C. § 1225) is lawful and does not violate her Due Process rights.

The Court should reject Petitioner's argument that 8 U.S.C § 1226 governs her detention instead of 8 U.S.C. § 1225. The Immigration and Nationality Act (INA)[1] § 235 is the applicable detention authority for all applicants for admission—both arriving aliens and PWAPs ("Present Without Admission or Parole") alike—regardless of whether the alien was initially processed for expedited removal proceedings under INA § 235 or placed directly into removal proceedings under INA § 240. *See* INA § 235(b)(1)(B)(ii) (providing for detention of any alien who is found to have established a credible fear of persecution in expedited removal proceedings for further consideration of their asylum application), (iii)(IV) ("Any alien subject to the procedures under [INA § 235(b)(1)(B)] shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); *see also* 8 C.F.R. § 235.3(b)(2)(iii) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal."), (b)(4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an [I]mmigration [J]udge, the alien shall be detained."), (c) (providing that "any arriving alien . . . placed in removal proceedings pursuant to section 240 of the [INA] shall be detained in accordance with section 235(b) of the [INA]" unless paroled pursuant to INA § 212(d)(5)).

INA § 235 defines an "applicant for admission" as an "alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port

[1] INA is codified within Title 8 of the United States Code (U.S.C). Although Petitioner's pleadings cite the U.S.C. to reference INA provision, Respondents make direct citations to the INA herein.

of arrival . . . .) . . . ." INA § 235(a)(1). Accordingly, by its very definition, the term "applicant for admission" includes two categories of aliens: (1) arriving aliens and (2) aliens PWAP ("Present Without Admission or Parole"). The broad category of applicants for admission includes, *inter alia*, any alien present in the United States who has not been admitted." INA § 235(a)(1). Applicants for admission "fall into one of two categories, those covered by [INA § 235(b)(1)] and those covered by [INA § 235(b)(2)]." *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018). Section 235(b)(1) of the INA applies to aliens subject to expedited removal. *See* INA § 235(b)(1)(B)(ii), (iii)(IV). On the other hand, INA § 235(b)(2) "is broader" and "serves as a catchall provision that applies to all applicants for admission not covered by [INA § 235(b)(1)]." *Jennings*, 583 U.S. at 287; *see* INA § 235(b)(2)(A), (B). Under INA § 235(b)(2)(A), an alien "who is an applicant for admission" shall be detained for removal proceedings under INA § 240 "if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted." INA § 235(b)(2)(A). Regardless, "[b]oth [INA § 235(b)(1) and (b)(2)] mandate detention" "throughout the completion of applicable proceedings." *Jennings*, 583 U.S. at 301–03.

Applicants for admission in INA § 240 removal proceedings according to the plain language of INA § 235(b)(2)(A), "*shall* be detained." INA § 235(b)(2)(A) (emphasis added). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances' when a contrary legislative intent is clearly expressed." *Ardestani v. INS*, 502 U.S. 129, 135–36 (1991) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). As the United States Supreme Court has explained, nothing in INA § 235(b)(2)(A) "says anything whatsoever about bond hearings." *Jennings*, 583 U.S. at 297. Such aliens may only be released from detention if the Department of Homeland Security (DHS) invokes its discretionary parole authority under INA § 212(d)(5). *See Jennings*, 583 U.S. at 288; *see generally* INA § 212(d)(5).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), significantly amended the

immigration laws. After the enactment of IIRIRA, the Department of Justice (DOJ) originally took the position—consistent with pre-IIRIRA law—that "despite being applicants for admission, aliens who are present without being admitted or paroled . . . will be eligible for bond and bond redetermination." Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997). Until recently, DHS and DOJ have interpreted INA § 236(a) to be the applicable detention authority for aliens PWAP placed directly into INA § 240 removal proceedings. *See generally* INA § 236(a). However, legal developments have made clear that INA § 235 is the applicable immigration detention authority for *all* applicants for admission. As discussed above, the Supreme Court held that INA § 235(b) applies to all applicants for admission, noting that the language of INA § 235(b)(2) is "quite clear" and "unequivocal[ly] mandate[s]" detention. *Jennings*, 583 U.S. at 303, 283. Therefore, the Motion for Release should be denied since it is not persuasive with respect to Petitioner's argument that her detention represents a constitutional rights violation.

2. Petitioner's arrest subsequent to a hearing scheduled by an immigration judge was lawful and did not violate Petitioner's Fourth Amendment rights.

Petitioner asserts that her arrest and detention resulted from an illegal ruse. However, requiring Petitioner appear for the June 2025 hearing in-person rather than by video conferencing does not qualify as a ruse because Plaintiff was summoned to court by the immigration judge. The decision to have Petitioner appear in-person was carried out by the court, and not by ICE officials. However, even if the Court were to construe Plaintiff's allegations regarding a ruse to be true even though this characterization of events is entirely denied, Respondents aver that use of a ruse still would not illegitimize Petitioner's arrest. In *U.S. v. Allibhai*, 933 F.2d 244 (5th Cir. 1991), the Fifth Circuit examines the permissible use of ruse by law enforcement. The court held that the Government did not engage in outrageous conduct in violation of the defendant's due process rights when agents carried out undercover sting operations.

3. The Court should deny the Motion for Release because Petitioner has failed to exhaust her administrative remedies before the BIA.

As of the dates upon which Petitioner filed her Petition for Writ of Habeas Corpus, Motion for TRO, and Motion for Release, Petitioner had not appealed her underlying bond denial to the Board of Immigration Appeals (BIA). When an alien fails to exhaust appellate review at the BIA, courts should "ordinarily" dismiss the habeas petition without prejudice or stay proceedings until he exhausts his appeals. *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011).

The Motion for Release should be denied since it is purported to bypass the immigration court's administrative process when appellate review at the BIA may eliminate the need for judicial intervention.

B. The Petitioner's Proposed Legal Authority for Release Pending Adjudication is Distinguishable from Petitioner's Case.

1. Plaintiff cannot satisfy the Fifth Circuit test for demonstrating extraordinary circumstances warranting release pending adjudication of her Petition for Writ of Habeas Corpus.

The case law cited in Petitioner's Motion for Release is wholly inapposite to the facts and legal issues that bear on these proceedings. For example, *Calley v. Callaway*, 496 F.2d 701(5th Cir. 1974) and *Nelson v. Davis* 739 Fed. Appx 254 (5th Cir. 2018) involved habeas proceedings brought by prisoners, not by immigrant detainees. Nonetheless, in these cases, the Fifth Circuit held that the test for determining if release pending adjudication of the action were appropriate is whether the petitioner raises substantial constitutional claims with a high probability of success, and whether there are extraordinary circumstances. Respondents have already established that Petitioner in the instant case fails to satisfy the first prong of the test. With regard to the extraordinary circumstances element, the Fifth Circuit articulated that extraordinary circumstances exist, for example, where there has been a "serious deterioration of the petitioner's health while

incarcerated"; where a short sentence for a relatively minor crime is "so near completion that extraordinary action is essential to make collateral review truly effective"; and possibly where there has been an "extraordinary delay in processing a habeas corpus petition." *Nelson v. Davis,* 739 Fed. Appx at 255 (*Citing Calley v. Callaway*, 496 F.2d at 702 n.1). Neither *Nelson* nor *Callaway* culminated in the prisoner's release. (The Nelson case specifically did not find extraordinary or exceptional circumstances warranting release). Respondents aver that this Honorable Court should also deny the Petitioner release in the instant case since she fails to allege health issues, or any other extraordinary circumstances as defined by the Fifth Circuit test.

Similarly, *Singh v. Gillis,* No. 5:20-CV-96, 2020 WL 4745745, (S.D. Miss. June 4, 2020) is also distinguishable because the petitioner in *Singh* sought immediate release from custody due to his vulnerability to contacting COVID-19. The *Singh* Court held that it need not reach the first prong of the *Calley* test because Petitioner had not prevailed on the second prong, i.e. the petitioner had not shown extraordinary circumstances that called for the petitioner's release.

Petitioner cites *Mahdawi v. Trump*, et al, No. 2:25-CV-389, 2025 WL 1243135 (D. Vt. Apr. 30, 2025) and *Ozturk v. Trump, et al.,* No. 2:25-CV-374, 2025 WL 1420540 (D. Vt. May 16, 2025) for the proposition that immediate release is appropriate when a habeas petitioner is not a flight risk or danger to the community. However, *Mahdawi* was a case wherein the detainee alleged that he was arrested and detained by ICE in retaliation for exercising his First Amendment rights. The District of Vermont found that the public interest factor weighed in favor of release because his continued detention would have a chilling effect on protected speech, which is squarely against the public interest. Likewise, in *Ozturk* the petitioner claimed that she was detained in violation of her First Amendment Free Speech rights in retaliation for co-authoring an op-ed. The *Ozturk* Court found that the petitioner had shown extraordinary circumstances supporting release upon

noting that the petitioner did suffer from health problems and that Government had flown Petitioner to Louisiana to be detained despite a court order enjoining the transfer.

In contrast to *Mahdawi* and *Ozturk*, the instant case does not implicate Petitioner's right to freedom of speech and does not require the Court to balance Petitioner's lawful detention against the public interest. Therefore, Petitioner's reliance on these decisions is misplaced.

IV. CONCLUSION

Based upon the facts and analysis presented above, Respondents respectfully request that the Court deny Petitioner's Motion for Release Pending Adjudication of Petitioner's Habeas Corpus Petition and, as Applicable, Her Motion for a Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

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