

United States District Court  
Western District of Texas  
San Antonio Division

Margaret O'Connor  
Petitioner,

v.

Director, U.S. Citizenship and Immigration  
Services, *et al.*  
Respondents.

No. 5:25-CV-00947-FB-ESC

**Federal<sup>1</sup> Respondents Response to  
Petitioner's Writ of Habeas Corpus Petition**

Federal Respondents timely submit this response per this Court's Order dated September 12, 2025, ordering a response within 30 days of service. *See* ECF No. 7; 15. In her petition, Petitioner first demanded first an immediate bond hearing, arguing her detention is contrary to statute and the Due Process Clause, and second, an order requiring Respondents to facilitate Petitioner's appearance at an interview with United States Citizenship and Immigration Services (USCIS) on her adjustment of status application.<sup>2</sup> *See* ECF No. 1. Finally, Petitioner's claim for a writ of habeas corpus *ad testificandum* is moot as Petitioner received an interview as ordered by the court. *Compare* ECF No. 6 with Exh. D (denial notice referencing Petitioner's interview).

At the outset, Petitioner, who was admitted to the United States under the Visa Waiver Program ("VWP"), is not entitled to release, because she has an order removal to the United Kingdom. *See* INA § 217, 8 U.S.C. § 1187. Under § 1187(a)(1), an individual seeking admission under the VWP applies for admission as a nonimmigrant and is provided with a waiver of the visa

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<sup>1</sup> The Department of Justice does not represent the warden.

<sup>2</sup> Petitioner also claims entitlement to attorney fees under the Equal Access to Justice Act ("EAJA"), but the Fifth Circuit no longer recognizes EAJA fees in the habeas context. ECF No. 1 at 16; *see also Barco v. Witte*, 65 F.4th 782 (5th Cir. 2023).

requirement, subject to certain conditions. 8 U.S.C. § 1182(a)(7)(B)(i)(II); *see McCarthy v. Mukasey*, 555 F.3d 450, 459–60 (5th Cir. 2009). The VWP allows qualifying aliens of designated countries to enter the United States temporarily for up to 90 days without first obtaining a visa. 8 USC § 1187. To benefit from the VWP, however, the alien must waive the right to contest any action for removal, other than on the basis of an application asylum. 8 USC § 1187(b)(2). Removal of such an alien “shall be effected without referral ... to an immigration judge for a determination of deportability.” 8 C.F.R. § 217.4(b).

Whether to pause removal for that purpose is within the sole discretion of the Department of Homeland Security (DHS). While the district court has jurisdiction under § 2241 to review a custody challenge, the court lacks jurisdiction to review any issues directly related to a VWP removal order. *See Vargas v. U.S. Dep’t of Homeland Sec.*, No. 1:17–CV–356, 2017 WL 962420 at \*2–3 (W.D. La. Nov. 10, 2017).

#### **I. Facts and Procedural History**

Petitioner is a national of England and a citizen of Ireland. ECF No. 1 at ¶ 16. She is currently in ICE custody pending her removal under the VWP. *See* ECF No. 1 at ¶ 10. Petitioner concedes that she entered under the VWP. *See* ECF No. 1 at ¶ 19; *see also* 8 U.S.C. § 1187.

On or about November 25, 2024, Petitioner initiated the process to adjust her immigration status to that of a Legal Permanent Resident. ECF No. 1 at ¶ 20. On or about April 30, 2025, while traveling from the Key West, Florida, airport back to New York, Petitioner was detained by U.S. Customs and Border Protection. ECF No. 1 at ¶ 21. Respondents notified Petitioner, because she overstayed the terms of her 2022 VWP entry, she would be referred for removal under section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1187. *See* Exhibit A. On August 8, 2025, Petitioner was served with a form I-863, Notice of Referral to Immigration Judge for asylum only

proceedings. *See* Exhibit B (Notice of Referral). On August 26, 2025, Petitioner filed a Motion for Temporary Restraining Order with this Court, requesting an order requiring ICE to facilitate Petitioner's ability to participate in her interview with USCIS remotely. ECF No. 4. On August 27, 2025, the Court granted Petitioner's motion and ordered ICE to facilitate Petitioner's appearance remotely with USCIS by August 28, 2025. ECF No. 6. On August 28, 2025, Petitioner appeared remotely for her interview with USCIS. On September 2, 2025, USCIS issued a notice to Petitioner informing her that her application for adjustment of status had been denied. *See* Exhibit C (USCIS Denial Notice).

On October 1, 2025, the immigration judge granted Petitioner a continuance to file an application for relief in her asylum-only proceedings. *See* Exhibit D (Order of the Immigration Judge). Petitioner was ordered to file any applications for relief from removal by October 7, 2025. *Id.* Petitioner failed to properly file *any* completed applications. *Id.* Thus the immigration judge found all applications abandoned and ordered Petitioner removed to the United Kingdom. *Id.* On October 10, 2025, Petitioner's husband's application for relief was also denied.<sup>3</sup>

## II. Relevant Law

### A. Detention Is Lawful Under 8 U.S.C. §§ 1187 and 1231(a)(6).

Petitioner is subject to a final order under the VWP. 8 U.S.C. § 1187. The general authority to detain aliens after the entry of a final order of removal is set forth in 8 U.S.C. § 1231(a). That statute affords ICE a 90-day mandatory detention period within which to remove the alien from the United States following the entry of the final order. 8 U.S.C. § 1231(a)(2). The 90-day removal period begins on the latest of three dates: the date (1) the order becomes "administratively final,"

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<sup>3</sup> Due to confidentiality concerns, the Respondents have not filed that order as an exhibit with this Court. Should the Petitioner object to this fact, and the Court request to see it, Respondents can confer with opposing counsel and seek to file said order under seal.

(2) a court issues a final order in a stay of removal, or (3) the alien is released from non-immigration custody. 8 U.S.C. § 1231(a)(1)(B).

Not all removals can be accomplished in 90 days, and certain aliens may be detained beyond the 90-day removal period. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Under § 1231, the removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep't of Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien presents a flight risk or other risk to the community. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). An alien may be held in confinement until there is “no significant likelihood of removal in a reasonably foreseeable future.” *Zadvydas*, at 533 U.S. at 680.

**B. Petitioner Has a Final Order of Administrative Removal Lawfully Issued Under 8 U.S.C. § 1187.**

Petitioner is not entitled to release, because she is subject to a final removal order under the VWP, and an immigration judge has denied the only relief available to her in asylum-only proceedings. *See* INA § 217, 8 U.S.C. § 1187; *see also* Exhibit D (Order of the Immigration Judge). Under § 1187(a)(1), an individual seeking admission to the United States under VWP applies for admission as a nonimmigrant and is provided with a waiver of the visa requirement, subject to certain conditions. 8 U.S.C. § 1182(a)(7)(B)(i)(II); *see McCarthy v. Mukasey*, 555 F.3d 450, 459–60 (5th Cir. 2009). The VWP allows qualifying aliens of designated countries to enter the United States temporarily for up to 90 days. 8 U.S.C. § 1187. To benefit from the VWP, however, the alien must waive the right to contest any action for removal, unless he is requesting asylum. 8 U.S.C. § 1187(b)(2). Removal of such an alien “shall be effected without referral ... to an immigration judge...” 8 C.F.R. § 217.4(b).

This necessarily means that an alien who remains in the United States longer than the time allotted to her under the VWP may not contest a removal action. While the district court has habeas

jurisdiction under § 2241 to review a custody challenge, the court lacks jurisdiction to review any issues directly related to a VWP removal order. *See Vargas*, 2017 WL 962420 at \*2–3.

The authority to detain aliens subject to an administrative removal order under 8 U.S.C. § 1187 is found within the statute itself. *See* 8 U.S.C. § 1187(c)(2)(E). Petitioner argues in error that ICE is holding her pursuant to 8 U.S.C. § 1226. *See* ECF No. 1 at 7. The record shows, however, that DHS notified Petitioner of the intent to issue a final administrative order of removal under the VWP. Ex. A (VWP Documents). On May 1, 2025, U.S. Border Patrol served Petitioner with a final order under the VWP. *Id.* The order notifies Petitioner that the decision is final and not subject to administrative appeal. *Id.* DHS subsequently referred Petitioner for a determination by an immigration judge under 8 C.F.R. § 208.2(c), also known as “asylum-only proceedings.” *Id.* The records further show that Petitioner declined, however, to properly file any application for relief, not once but twice, during her asylum -only proceedings. *See* Exhibit D (Order of the Immigration Judge). As such, the immigration judge deemed her applications for relief abandoned and reaffirmed her final order of removal to the UK. *Id.*; *see* also 8 U.S.C. § 1187(c)(2)(E). Petitioner may seek review of this decision by the Board of Immigration Appeals and potentially the circuit court of appeals, but such review does not disturb the finality of her final order under the VWP. *See, e.g., Johnson v. Guzman-Chavez*, 594 U.S. 523, 528–29, 540–41 (2021). Like in withholding-only cases, Petitioner will have 30 days to decide whether to seek an administrative appeal before ICE will execute her final order, unless her attorney files a written waiver of appeal with the immigration court. *See id.*; *see also Matter of A-W-*, 25 I&N Dec. 45 (BIA 2009) (no bond during asylum-only proceedings).

### **III. Argument**

#### **A. Petitioner’s Request for ICE to Facilitate Her Presence Before USCIS is**

**Moot.**

On August 27, 2025, the Court granted Petitioner's motion and ordered ICE to facilitate Petitioner's appearance remotely with USCIS by August 28, 2025. ECF No. 6. On August 28, 2025, Petitioner appeared remotely for her interview with USCIS. *See* Exhibit B (USCIS Denial Notice). On September 2, 2025, USCIS issued a notice to Petitioner informing her the application for adjustment of status had been denied. *Id.* This avenue of relief is now foreclosed, and this issue before the Court is moot.

**B. Petitioner's Detention Comports with Due Process.**

It is uncontested that Petitioner has been in DHS custody since May 1, 2025, after service of a final administrative order of removal under the VWP. Ex. A (VWP Documents). The VWP statute plainly states that a participating VWP country must, within three weeks of issuance of a final order, accept the repatriation of any citizen, former citizen, or national of that country against whom that final order is issued. 8 U.S.C. § 1187(c)(2)(E). The statute cautions, however, that there is no duty owed by the United States or any right owed to the alien with respect to removal or release under this provision. *Id.* The statute further notes that the statute creates no cause of action or claim against a United States official "to compel the release, removal, or consideration for release or removal of any alien." *Id.* In other words, the statute mandates Petitioner's detention until his removal is executed.

Courts typically review due process claims regarding immigration detention under *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The *Zadvydas* court reviewed the constitutionality of final order detention as authorized by 8 U.S.C. § 1231. Under § 1231, the first 90 days following the entry of the removal order subjects the alien to mandatory detention. 8 U.S.C. § 1231(a). The removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep't of*

*Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien presents a flight risk or other risk to the community, or if he fails to comply with removal efforts. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). An alien may be held in confinement until there is “no significant likelihood of removal in a reasonably foreseeable future.” *Zadvydas*, at 533 U.S. at 680.

The 90-day removal period may also be extended where ICE determines the alien is unlikely to comply with the removal order. *See Guzman-Chavez*, 594 U.S. at 528–29, 544; *see also* 8 C.F.R. § 1231(a)(6); 8 C.F.R. § 241.4. Continued detention under this provision is the “post-removal-period.” *Guzman-Chavez*, 594 U.S. at 529. The statute does not specify a time limit on this post-removal period, but the Supreme Court has read an implicit limitation into the statute and held that the alien may be detained only for a period reasonably necessary to remove the alien from the United States. *Id.*; 8 C.F.R. § 241.13. Six months is the presumptively reasonable timeframe in the post-removal context. *Zadvydas*, 533 U.S. at 701. Although the Court recognized this presumptive period, *Zadvydas* “creates no specific limits on detention . . . as ‘an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.’” *Andrade v. Gonzales*, 459 F.3d 538, 543 (5th Cir. 2006) (quoting *Zadvydas*, 533 U.S. at 701).

To state a claim for relief under *Zadvydas*, Petitioner would have to show that: (1) she is in DHS custody; (2) she has a final order of removal; (3) she has been detained in *post-removal-order* detention for six months or longer; and (4) there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 700. Petitioner has been detained with a final order of removal under the VWP since May 1, 2025. As such, any claim under *Zadvydas* would

not be ripe until six months have lapsed in post-order custody.<sup>4</sup> While Petitioner may still seek administrative review of the immigration judge's decision in her asylum-only proceedings, her final order of removal is no less final during that administrative review. Like aliens who are detained during withholding-only proceedings following reinstatement of removal, there is no statutory right to a bond hearing because the alien is already subject to a final order of removal. *See Guzman Chavez*, 594 U.S. at 540–1. Moreover, Petitioner has not shown good cause to believe that Petitioner's removal to the United Kingdom is unlikely. This habeas should be denied.

**C. 8 U.S.C. § 1252(g) Strips the Court of Jurisdiction to Provide the Relief Sought.**

Section 1252(g) precludes review of Petitioner's claims because she directly challenges ICE's decision to execute an administratively final order of removal under VWP. "Judicial review in the removal context is heavily circumscribed by 8 U.S.C. § 1252." *Duron v. Johnson*, 894 F.3d 644, 646 (5th Cir. 2018). Except as provided in § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

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<sup>4</sup> Petitioner has been detained in ICE custody for less than six months, meaning that any claim filed under *Zadvydas* to challenge the constitutionality of her post-order detention is premature. In *Zadvydas*, the U.S. Supreme Court held that § 1231(a)(6) "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States" but "does not permit indefinite detention." 533 U.S. at 689. "[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute." *Id.* at 699. The Court designated six months as a presumptively reasonable period of post-order detention but made clear that the presumption "does not mean that every alien not removed must be released after six months." *Id.* at 701. Once the alien establishes that he has been in post-order custody for more than six months at the time the habeas petition is filed, the alien must provide a "good reason" to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *See Andrade*, 459 F.3d at 543–44; *Gonzalez v. Gills*, No. 20–60547, 2022 WL 1056099 at \*1 (5th Cir. Apr. 8, 2022). Unless the alien establishes the requisite "good reason," the burden will not shift to the government to prove otherwise. *Id.*

Section 1252(g) specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review “any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] *execute removal orders* against any alien under this chapter.” 8 U.S.C. § 1252(g) (emphasis added); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

This jurisdictional bar has been applied in the Western District of Texas and in the Fifth Circuit multiple times. *See* ECF No. 28 at 5 n.18.; *see also Leger v. Young*, 464 F. App’x 352, 353, 2012 WL 874560 at \*1 (5th Cir. 2012) (citing *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 943 (5th Cir. 1999); *Idokogi v. Ashcroft*, 66 F. App’x. 526, 2003 WL 21018263 (5th Cir. 2003) (per curiam); *Fabulje v. Immigration and Naturalization Agency*, 244 F.3d 133 (5th Cir. 2000); *Olya v. Garite*, EP-25-CV-00083-DCG, 2025 WL 890180 at \*1 (W.D. Tex. Mar. 19, 2025) (citing *Moreira v. Mukasey*, 509 F.3d 709, 712 (5th Cir. 2007)). These cases support the government’s position that this Court lacks jurisdiction to provide the relief Petitioner seeks.

Given the plethora of decisions finding consistently that § 1252(g) strips courts of jurisdiction to enjoin the government’s execution of a final order of removal, this Court should find the same. Section 1252(g) deprives this Court of providing Petitioner the relief she seeks, even if that relief is sought only for a limited time pending a final ruling on the Petition for Writ of Habeas Corpus.

**D. To the Extent Petitioner Challenges the Constitutionality of Her Removal Order, such a Claim Must Be Filed with the Circuit Courts of Appeals.**

Even if Petitioner raises a colorable claim here regarding the constitutionality of Petitioner’s VWP removal order and her resulting decision, that claim must be brought in the circuit court in a petition for review. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(D). The habeas petition in this case fails to allege any facial or as-applied challenge to the constitutionality of Petitioner’s

final order of removal under the VWP. *See* ECF No. 1 at 8–113. Indeed, Petitioner did not challenge any aspect of her removal process under the VWP. Even if Petitioner had properly stated a constitutional challenge to the VWP, this Court lacks jurisdiction to review it, as it must be properly funneled to the Fifth Circuit. *See* 8 U.S.C. § 1252(b)(9); *Reno v. AAADC*, 525 U.S. at 483; *see also El Gamal v. Noem*, --- F.Supp.3d---, 2025 WL 1857593 at \*5 (W.D. Tex. July 2, 2025) (collecting cases and finding that any challenge to ICE’s initial decision to detain the alien during removal proceedings is protected from judicial review in district court, because the alien must appeal any order of removal to the BIA and ultimately petition for judicial review of any relevant constitutional claims by the court of appeals); *Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at \*2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

Here, Petitioner challenges in district court the government’s decision to detain her for the purpose of executing her removal order under the statutes governing the VWP. These actions, however, were taken specifically for the purpose of removing her from the United States, and therefore, they must be challenged only in the court of appeals. *See* 8 U.S.C. § 1252(b)(9); *see also, e.g., Jennings*, 583 U.S. at 294–95.

Indeed, ICE gave Petitioner an opportunity to contest the VWP removal order. *See* Exhibits A (VWP Documents), B (Notice of Referral). Petitioner, represented by counsel, failed to take advantage of the process and did not file a complete application to the Immigration Judge. *See* Exhibit D (Immigration Judge Order). Nonetheless, Petitioner may appeal the adverse to decision to the BIA and ultimately to the Fifth Circuit. *See, e.g., Patel v. Barr*, No. CV–20–00229–PHX–DLR (DMF), 2022 WL 12688142 at \*14–15 (D. Ariz. Sept. 9, 2020) (analyzing *Thuraissigiam’s* impact on the habeas claim of a VWP entrant).

Indeed, the fact that Petitioner is challenging initial detention here is enough to trigger § 1252(b)(9) because “detention is an ‘action taken . . . to remove’ an alien.” *See Jennings*, 583 U.S. 318, 319 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). In other words, to the extent that Petitioner challenges the legality of the final order of removal under the VWP and resulting detention, those claims are properly raised only through the appropriate federal court of appeals. *See* 8 U.S.C. § 1252(b)(9). Petitioner is lawfully detained with a final order of removal issued under the VWP, and this Court lacks jurisdiction to stay her removal order. *See* INA § 217, 8 U.S.C. § 1187.

#### **IV. Conclusion**

Petitioner initially sought two claims of relief before this court, one of which was provided and is now moot. ICE facilitated Petitioner at her interview before USCIS. USCIS denied her application to adjust status. That avenue of relief is now moot.

Petitioner’s second request is for a bond hearing. However, Petitioner seeks process outside of what Congress affords her as a VWP applicant. Additionally, when she was before the immigration judge, she failed to file any completed applications for relief. Accordingly, Petitioner remains subject to final order of removal with additional process available to her through administrative review and judicial review in the court of appeals, should she choose to pursue those avenues. As such the Court should deny this petition.

Respectfully submitted,

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