United States District Court
Western District of Texas
San Antonio Division

AMM,
Petitioner,

v.

Kristi Noem, Secretary of United States Department of Homeland Security et. al.,
Respondents.

No. 5:25-cv-01210-FB

Response in Opposition to Petitioner's Motion for Temporary Restraining Order and/or Preliminary Injunctive Relief

Petitioner, through counsel, filed a habeas petition with this Court on or about September 26, 2025, concurrently with a Motion for Temporary Restraining Order. ECF Nos. 1, 5. The Court ordered service on Respondents and a response to both the habeas petition and the TRO motion by noon today, October 6, 2025. ECF Nos. 6–7. Federal Respondents timely submit their response as outlined below:

In her Motion for Temporary Restraining Order (TRO) and/or Preliminary Injunction, Petitioner requests, *inter alia*, that the Court order her immediate release from custody, or in the alternative, a bond hearing before an Immigration Judge. ECF No. 5 at 2. Petitioner challenges the lawfulness of her post-order detention but concedes that she (1) entered the United States under the Visa Waiver Program (VWP); (2) overstayed her allowed VWP; (3) has a pending asylum application, and (4) has been detained in post-removal-order ICE custody since September 2025 subject to her final order of removal. *Id.* at 1, 3-7; *see Also* Exhibit A (VWP Documents).

While the parties disagree on the Petitioner's statutory right to a bond hearing in this case, this Court need not resolve that issue to dispose of this TRO motion or the underlying habeas petition. Regardless of the correct detention authority, Petitioner is not entitled to release from

post-removal-order custody at this time, and the Court lacks jurisdiction to review ICE's discretionary decision to execute an Administratively Final Order of Removal.

Moreover, Petitioner's detention is not in violation of the Constitution as applied to her, because she is being given sufficient procedural due process provided to her by statute: the ability to apply for asylum. Petitioner's detention during this process is also not in violation of substantive due process, because it is neither unreasonably prolonged nor indefinite. As such, Petitioner is not likely to succeed on the merits of these claims, and this TRO should be denied.

I. Relevant Background

Petitioner is a national of Argentina and a citizen of Italy. ECF No. 1 at ¶ 13; *see also* Exhibit A at 7 (VWP Documents). She is currently detained in ICE custody pending her removal. *See* Exhibit A at 6 (VWP Documents). Petitioner concedes that she entered under the VWP. *See* ECF No. 1 at ¶ 14; *see also* 8 U.S.C. § 1187.

On or about September 16, 2025, Respondents notified Petitioner that she would be processed for removal under section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1187, for having overstayed the terms of her 2023 VWP entry. *See* Exhibit A at 6-8. The notice further warned that Petitioner is "prohibited from entering, attempting to enter, or being in the United States" for ten years from the date of her departure under this VWP removal. *Id* at 3.

II. Legal Standards

The case falls squarely within *McCarthy v. Mukasey*, 555 F.3d 459, 460 (5th Cir. 2009), which held that a UK citizen who overstayed the VWP was not entitled to any due process rights beyond an asylum hearing. Under *McCarthy*, this Court should not only deny this motion for preliminary injunction, but also the habeas petition in its entirety.

A preliminary injunction is an "extraordinary and drastic remedy." *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). As such, it is "not to be granted routinely, but only when the movant, by a clear showing, carries [the] burden of persuasion." *Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). "The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Canal Auth.*, 489 F.2d at 572. A preliminary injunction should be granted only if the movant has "clearly" carried the burden of persuasion on all four of these prerequisites. *Id.* at 573.

III. Argument

As a threshold issue, Petitioner is unlikely to prevail in her habeas petition, because this Court lacks jurisdiction to review her claims for relief. Specifically, this Court lacks jurisdiction to enjoin the execution of a final order of removal. 8 U.S.C. § 1252(g); *see also Garland v. Aleman Gonzalez*, 596 U.S. 543, 550–51 (2022); *see also Westley v. Harper*, No. 25–229, 2025 WL 592788 at *4–6 (E.D. La. Feb. 24, 2025) (denying preliminary injunction and dismissing case for lack of jurisdiction where district court lacked jurisdiction to stay removal); *El Gamal, et al, v. Noem, et al,* No. 25–CV–664–OLG, ECF No. 29 at 2 (W.D. Tex. July 2, 2025). Moreover, there is no jurisdiction to direct Respondents to commence removal proceedings against her under 8 U.S.C. § 1229a via the issuance of a Notice to Appear (NTA). 8 U.S.C. § 1252(g).

Even if she could overcome these jurisdictional hurdles, which she cannot, Petitioner is unlikely to succeed on the merits of her habeas petition, because she cannot show that her detention

is contrary to law or that she is entitled to any benefit that would prevent the harm that she faces. Petitioner has been in detention for less than sixty days with a final order of removal under INA § 217. Her detention is lawful by statute and not unconstitutionally prolonged.

Moreover, Petitioner is not entitled to the substantive due process rights that Petitioner purports she would lose should this Court deny this motion for preliminary injunction. *See* ECF No. 5 at 7-15 (arguing for immediate release and bond hearing). As a VWP entrant and overstay, Petitioner waived her right to (1) obtain judicial review of a removal order; (2) pursue relief from removal beyond a fear claim; and (3) receive any due process protections beyond what the statute provides him. *See id.; see also, e.g., Kim v. Napolitano*, No. EP–11–CV–261–KC, 2011 WL 13491886 (W.D. Tex. Nov. 14, 2011); *Kim v. Obama*, No. EP–12–CV–173–PRM, 2012 WL 10862140 (W.D. Tex. July10, 2012).[1] In other words, Petitioner has not shown that Petitioner is entitled to release, a bond hearing, the issuance of an NTA, judicial review of her order of removal, the right to remain in the United States without lawful status, or the right to lawfully return to the United States within ten years of the execution of this removal order. *See id.*

Similarly, Petitioner cannot show a procedural due process violation here. While an agency is required to follow its own procedural regulations, the Fifth Circuit finds no procedural due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). The record shows that ICE timely served Petitioner with written notice of the allegations and the charges against her due to her VWP overstay. *See* Exhibit

[1] Respondents provide the Court with these citations for the limited purpose of the *Kim* courts' (I and II) overview of the VWP. The facts of *Kim* are distinguishable from this case in that Kim claimed fear after being served with his notice of intent, which placed him into asylum-only proceedings before an Immigration Judge. By contrast, Petitioner did not claim fear or otherwise challenge his INA § 217 removal order when served with notice. As such, her removal order is final.

A (Visa Waiver Removal Documents). Although Petitioner refused to sign or otherwise respond to the allegations against her, ICE nonetheless notified her of her right to contest the allegations and charges against her. *Id.*

Even if Petitioner were successful in showing some form of procedural due process violation in this case, the remedy for such a violation is substitute process. *Mohammad v. Lynch*, No. EP-16-CV-28-PRM, 2016 WL 8674354, at *6 n.6 (W.D. Tex. May 24, 2016) (finding no merit to petitioner's procedural due process claim where the evidence demonstrated that the review had already occurred, thereby redressing any delay). Even in the criminal context, failure to comply with statutory or regulatory time limits does not mandate release of a person who should otherwise be detained. *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990). For these reasons, Petitioner is unlikely to prevail on the procedural due process claim, or it would not result in her release from custody or a stay of her removal order.

Finally, with respect to the balancing of the equities and public interest, it cannot be disputed that (1) Petitioner has a final order of removal that entitles the government to detain her unless and until Petitioner shows good cause that her removal is unlikely; and (2) both the government and the public at large have a strong interest in the enforcement of the immigration laws and the removal of aliens with final removal orders. Through her participation in the VWP, Petitioner waived her right to contest removability and purposefully overstayed the terms of the VWP.

IV. Conclusion

This TRO motion should be denied, and the Court should deny the Petition in its entirety.

Respectfully submitted,

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