

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ANDRES ALONSO
CERVANTES-MARTINEZ,
Petitioner,

V.

WARDEN FOR THE PORT ISABEL
DETENTION CENTER, et. al.,
et al.,

Respondents.

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CIVIL ACTION NO. 1:25-CV-236

**RESPONDENTS' COMBINED MOTION TO DISMISS
AND RESPONSE IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION**

Respondents, by and through the United States Attorney for the Southern District of Texas, Nicholas G. Ganjei, respectfully submits for consideration its response in opposition to Petitioner's motion for preliminary injunction, and its motion to dismiss this case for want of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Fed. R. Civ. Proc., Rules 65, and 12(b)(1) and (6)

Petitioner's Amended Petition has failed to state a claim upon which this court can exercise jurisdiction or otherwise grant relief, and he has not met the requirements for preliminary injunctive relief. In support of this argument and Motion, Respondents submit the following:

INTRODUCTION

Petitioner seeks a preliminary injunction based on claims that, as a matter of law, fail to state a cause of action. Because Petitioner cannot demonstrate a likelihood of success on the merits (an essential element for preliminary injunctive relief), his motion for preliminary injunction

should be denied. Moreover, since the Petition itself is legally deficient based on the arguments herein, Petitioner's Amended Petition for habeas relief should be dismissed in its entirety under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

FACTUAL OVERVIEW

Petitioner, a native and citizen of Peru, entered the United States illegally on or about May 2, 2022. *ECF 5-1, p. 9* Soon thereafter, Petitioner was apprehended by Border Patrol and was determined to be inadmissible to the United States and placed into expedited removal proceedings under 8 U.S.C. §1182 (7)(A)(i)(I) and 8 U.S.C. §1225(b)(1). *Id.* Petitioner then expressed that he feared persecution and torture should he be forced to return to Peru. Consequently, expedited removal action ceased pending a credible fear interview of the Petitioner by an Asylum Officer.

On May 31, 2022, a Credible Fear Interview (CFI) was conducted an Asylum Officer in Pearsall, Texas. *ECF 5-1, p. 14* At the conclusion of the CFI, the Asylum Officer found that while the Petitioner was credible, Petitioner had *not* established “[c]redible fear of persecution.” The Asylum Officer also found that “. . . there [was] not a significant possibility that the applicant could establish eligibility for withholding of removal or deferral of removal under the Convention against Torture¹.” *ECF 5-1, p. 17-18*

Petitioner requested that the Asylum Officer's decision regarding the CFI be reviewed by an Immigration Judge (“IJ”). *ECF 5-1, pp. 4-31* While that review was pending, Petitioner was paroled from ICE custody at which time he traveled to live with his sponsor in Chicago, Illinois. *ECF 5, p.3* A setting was scheduled in Chicago for an IJ to review the Asylum Officer's negative finding of credible fear on June 13, 2022, and again on July 28, 2022; both times, Petitioner failed

¹ CAT

to appear².

On August 15, 2025, DHS attorneys filed a motion with the immigration court for a decision regarding its review of the Asylum Officer's negative credible fear finding. *ECF 5-4* In the Motion, DHS attorneys noted Petitioner's unexplained failure to appear and asked the immigration judge to review the digital audio recording from the hearing and issue an order pursuant to 8 CFR § 1240.12³. *Id.* On October 2, 2025, the IJ issued an Order holding that "[t]he DHS credible fear determination is AFFIRMED, and the case is returned to DHS for removal of the Applicant." *ECF 5-8* Per the IJ's Order, Petitioner's immigration case was returned to DHS at which time, on October 23, 2025, an order for expedited removal was entered. *Govt's Exh. 1*⁴

On October 19, 2025, Petitioner filed the instant action seeking Habeas relief and subsequent motion for injunctive relief arguing that he should be released from detention because there was no enforceable final order of removal in place arguing that DHS. DHS responds that this position is not correct. There is an enforceable Order for Expedited Removal in place; therefore, DHS is allowed to detain the Petitioner pending his removal to Peru.

STANDARD OF REVIEW

In a petition for a writ of habeas corpus, the petitioner is challenging the legality of the restraint or imprisonment. *See* 28 U.S.C. § 2241. The burden is on the petitioner to show the

² See *ECF 5-1*, p. 3; *ECF 5-2*; and *ECF 5-3* -- Petitioner alleges that his failure to appear were not his fault. Petitioner claims that he did not receive the notice(s) and was ill with Covid-19 during one of the scheduled settings. Respondent takes issue with Petitioner's claim that he did not receive notice of the hearing(s); however, as explained further in this response, Respondents believe this issue is one that outside the jurisdictional preview of this Court. In addition, Petitioner's claims that he attempted to reach out to ICE regarding the IJ settings ring hollow given that the exhibit he provides to support this contention, does not appear to be directed to anyone other than Petitioner's attorneys. See *ECF 5-5* and *5-6*

³ 8 CFR 1240.12(a) states "The decision of the immigration judge may be oral or written. The decision of the immigration judge shall include a finding as to inadmissibility or deportability. **The formal enumeration of findings is not required.** The decision shall also contain reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge." (emphasis added)

⁴ *Govt's Exh. 1* is filed contemporaneously, but separately, as a SEALED exhibit. A copy of *Govt's Exh. 1* will be emailed to opposing counsel via secured means.

confinement is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). Here, Petitioner is challenging his detention pending his removal claiming that no final order of removal exists allowing for his detention.

Judicial review of immigration matters, including review of detention issues, is limited. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“the power over aliens is of a political character and therefore subject only to narrow judicial review”). The Supreme Court has thus “underscore[d] the limited scope of inquiry into immigration legislation,” and “has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” *Fiallo*, 430 U.S. at 792 (internal quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The plenary power of Congress and the Executive Branch over immigration necessarily encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their

deportation.”); *Demore v. Kim*, 538 U.S. 510, 531 (2003) (“Detention during removal proceedings is a constitutionally permissible part of that process.”)

A. Motions to Dismiss for Want of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief Can Be Granted

The burden of establishing subject matter jurisdiction in federal court is on the party seeking to invoke it. *Hartford Ins. Group v. Lou-Con Inc.*, 293 F.3d 908, 910 (5th Cir.2002). Accordingly, Plaintiff must prove that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.1980). A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case. *Krim v. PCOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir.2005) (citations omitted). In considering a challenge to subject matter jurisdiction, the district court is “free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case.” *Id.*

Likewise, Rule 12(b)(6) allows dismissal if a plaintiff fails “to state a claim upon which relief may be granted.” *Fed. R. Civ. P. 12(b)(6)*. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Fed. R. Civ. P. 8(a)(2)*. To withstand a Rule 12(b)(6) motion, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

B. Preliminary Injunction—Rule 65

To obtain a preliminary injunction, Petitioner must demonstrate: (1) a likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) that the balance of equities favors the movant/Petitioner; and (4) the injunction is in the public interest. See *Winter v. Natural Res.*

Def. Council, Inc., 555 U.S. 7, 20 (2008); *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 582 (5th Cir. 2013) Should Petitioner fail in supporting any one of these elements his claim for relief fails. *Clark v. Prichard*, 812 F.3d 991, 993 (5th Cir. 1987) (explaining that “[t]he party seeking such relief must satisfy a cumulative burden of proving each of the four elements”)

ARGUMENT

Petitioner argues that he should be released from detention because he is not subject to an enforceable final order of removal. This is not correct. When the IJ issued his October 2, 2025, Order affirming the Asylum Officer’s negative credible fear finding, his case was sent back to DHS officials to complete the expedited removal process evidence at Government’s Exhibit 1.

Petitioner’s detention pursuant to the 8 C.F.R. § 235.3(b)(2) is reinforced by Congress’s command to detain Petitioner throughout his removal proceedings pursuant to 8 U.S.C. § 1225(b)(2). Moreover, this detention pending removal does not violate Due Process. Because Petitioner cannot show his detention violates the law, the Petition must be dismissed. *See* 28 U.S.C. § 2241.

A. The Petition should be dismissed (and the Motion for Preliminary Injunction should be Denied) because he is subject to a Final Order of Removal.

The Court should dismiss the Petition for lack subject matter jurisdiction because judicial review of pending removal proceedings is unavailable under INA § 235(b), 8 U.S.C. § 1225(b)(2), which subjects Petitioner to mandatory detention. The INA authorizes civil detention of aliens during removal proceedings and “[d]etention is necessarily part of this deportation procedure.” *Carlson v. Landon*, 342 U.S. 524, 538 (1952); *see also* 8 U.S.C. § 1225(b), 1226(a), and 1231(a). Section 1225 authorizes the detention of applicants for admission. 8 U.S.C. §

1225(b)(1) and (2); *see also Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018). The Supreme Court has recognized that 1225(b)(2) “applies to all applicants for admission not covered by § 1225(b)(1). Under § 1225(b)(2), an alien “who is an applicant for admission” shall be detained for a removal proceeding “if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A); *see also Fla. v. United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023). While § 1225 does not provide for aliens to be released on bond, DHS has the sole discretion to temporarily release any applicant for admission on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022). Under the plain language of INA § 235, 8 U.S.C. § 1225, Petitioner—who is present in the United States without being admitted—is subject to detention under § 1225(b)(2). *Jennings v. Rodriguez*, 583 U.S. at 297 (“Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants of admission until certain proceedings have concluded.”). As such, since the Petitioner cannot show a likelihood of success on the merits of his claim, his Motion for Preliminary Injunction should be denied.

(1) An Enforceable Order of Removal Exists.

When this Court held its October 22, 2025, hearing on Petitioner’s motion for a TRO, Petitioner pointed out that the “Order of Removal” form had not been completed by DHS officials. ECF 5-1, p. 9 The reason for this is because, as regulations require, DHS officials ceased completing the expedited removal paperwork when Petitioner claimed he had a credible fear of being returned to his home country thus triggering the CFI process set out at 8 C.F.R. § 208.30(b) and 8 C.F.R. § 1208.31. Petitioner was provided a CFI by an Asylum Officer⁵; his request for

⁵ ECF 5-1, pp. 14-28

review of the decision by an IJ⁶ was acknowledged and scheduled on not just one occasion, but two⁷ – both times Petitioner failed to appear or make any serious attempt to rectify and/or reschedule over the next three years⁸. Rather, he remained silent and chose not to actively pursue this remedy. In 2025, Respondent acted and moved for the IJ to issue a decision regarding Petitioner's credible fear determination⁹. ECF 5-4

Now, Petitioner claims that the Order of Removal in this case is not an enforceable order because the IJ's October 2, 2025, Order did not equate to being a final and enforceable "Order of Removal" because (1) the "Order of Removal" form from 2022 was unexecuted and (2) the process related to the IJ review of the Asylum Officer's CFI conclusions failed to provide due process.

Regarding Petitioner's first claim that the "Order of Removal" form was unsigned, Respondents show that – as contemplated by the regulations and law -- after the issuance of the IJ's October 2, 2025, Order affirming the Asylum Officer's negative credible fear finding, Petitioner's case was sent back to DHS officials for finalizing Petitioner's expedited removal from the country. See Govt's Exh. 1. The Order of Removal is now completed and signed, and officials are prepared to move forward with expedited removal.

B. This Court Lacks Jurisdiction to Modify or Otherwise Set Aside the IJ's Decision Affirming the Asylum Officer's Negative Credible Fear Finding

Petitioner also attempts to attack the IJ's October 2, 2025, Decision itself by suggesting that issues involving the purported lack of notice and purported failures on the part of the IJ render it unenforceable. This Court, however, does not have jurisdiction to intercede or set aside the IJ's

⁶ ECF 5-1, p. 1

⁷ ECF 5-1, p.3; ECF 5-2; and ECF 5-3

⁸ Petitioner suggests that ECF 8-1 is proof that Petitioner made efforts to contact DHS officials. No where on this exhibit does it reflect that any communication was made, or attempted to be made, to DHS officials.

⁹ Petitioner does not state whether he was opposed or unopposed to this motion when it was filed.

October 2, 2025, Order. Looking at the relevant regulations pertaining to expedited removal as it pertains to persons seeking relief under the asylum statutes can be found at 8 C.F.R. § 1208.30. Some illegal aliens, such as the Petitioner here, can be subject to expedited removal without being placed into “removal proceedings.” However, as this regulation sets out, there are circumstances where aliens may be afforded an opportunity to present a credible fear claim warranting review and consideration by an Asylum Officer and/or an IJ; if a decision is made confirming that the alien does have a credible fear of persecution or torture, he will not be subject to expedited removal and he or she can seek relief through the immigration court and immigration relief procedures.

That is not the case here. Here, Petitioner received a negative credible fear finding from the Asylum Officer, and he appealed that finding seeking review from the IJ. Under the regulations, if the Immigration Judge does not find credible fear of persecution or torture, the alien is returned to DHS for removal. Neither party may appeal an Immigration Judge’s ruling in a credible fear review. However, after providing notice to the Immigration Judge, DHS may reconsider its determination that an alien does not have a credible fear of persecution. See 8 C.F.R. § 1208.30(g)(2)(iv)(A)¹⁰.

To the extent the Petitioner seeks judicial review of Petitioner’s removal, such claims should be dismissed. In the present action under 28 U.S.C. § 2241, there is no jurisdictional basis for this Court to review Petitioner’s challenges to his removal proceeding. The “sole function” of habeas relief is to “grant relief from unlawful imprisonment or custody and it cannot be used properly for any other purpose,” which means that it “is not available to review

¹⁰ “If the immigration judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution or torture, the case shall be returned to DHS for removal of the alien. The immigration judge’s decision is final and may not be appealed. USCIS may nevertheless reconsider a negative credible fear finding as provided at 8 CFR 208.30(g)(1)(i).”

questions unrelated to the cause of detention.” *Pierre v. United States*, 525 F.2d 933, 935–36 (5th Cir. 1976).

PRAYER

Respondents pray that this Court DENY Petitioner’s Motion for Preliminary Injunction and Respondents also pray that this Court DISMISS Petitioner’s claims, in toto, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sends notice of electronic filing to Plaintiff’s counsel of record.

By: *s/Nancy L. Masso*
NANCY L. MASSO
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