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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

FRANKLIN OCHOA MOLINA,

Petitioner,

v.

LUIS SOTO, *et al.*,

Respondents.

Hon. Evelyn Padin, U.S.D.J.

Civil Action No. 25-16880 (EP)

**ANSWER TO VERIFIED PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241**

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PRELIMINARY STATEMENT

Petitioner is an alien who entered the United States with his mother when he was a minor in 2017, under the Visa Waiver Program (“VWP”) codified at 8 U.S.C. § 1187. The VWP, in essence, allows aliens from certain countries to visit the United States for up to 90 days without a visa, provided they comply with statutory requirements. Petitioner, however, overstayed and, on October 8, 2025, U.S. Immigration and Customs Enforcement (“ICE”) detained him without bond in accordance with § 1187 to execute his removal from the United States.

Petitioner brings this habeas action under 28 U.S.C. § 2241 arguing that his detention is governed by § 1226(a), not § 1187, and he is thus entitled to a bond hearing or immediate release. ECF 1 (Petition), ¶ 27. He claims that his detention without a bond hearing violates § 1226(a) and the Due Process Clause. Petition ¶¶ 26-28, 32-33. He further claims that Respondents have violated the Administrative Procedure Act (“APA”) by “detaining and seeking to deport [him] on the basis of an alleged waiver of rights that [he], as a minor, could not have knowingly and voluntarily executed.” *Id.*, ¶¶ 36-37. Although unclear, Petitioner appears to refer to a “waiver of rights” under the VWP, in which an alien who enters the country under the Program waives any right “to contest . . . any action for removal of the alien.” 8 U.S.C. § 1187(b); *see also Shkempi v. Att’y Gen. United States*, 41 F.4th 237, 239 (3d Cir. 2022) (“The linchpin of the program is the waiver, which assures that a VWP visitor who comes here . . . will leave on time and will not raise a host of legal and factual claims to impede his removal if he overstays.”) (brackets omitted).

Respondents respectfully submit that Petitioner is lawfully detained under § 1187 pending his removal from the United States. Under § 1187 VWP, certain aliens may enter the United States for up to 90 days without a visa providing the aliens waive their rights to challenge any action for their removal “other than on the basis of an application for asylum.” 8 U.S.C. § 1187(b)(2). Petitioner does not allege that he has filed an application for asylum, *see Petition*, and ICE intends to remove him for overstaying under § 1187.¹ Removal of a VWP alien “shall be effected without referral of the alien to an immigration judge” unless the alien applies for asylum. 8 C.F.R. § 217.4(b).

Respondents, however, are mindful that this Court has determined that a VWP alien who has overstayed the 90-day period is detained under § 1226(a), not § 1187. *See, e.g., Gjergi G. v. Edwards*, No. 19-5059 (SDW), 2019 WL 1254561 (D.N.J. Mar. 18, 2019); *Emila N. v. Ahrendt*, No. 19-5060 (SDW), 2019 WL 1123227 (D.N.J. Mar. 12, 2019) (same). Respondents nonetheless assert that § 1187 governs Petitioner’s detention because the Board of Immigration Appeals (“BIA”), the highest administrative body interpreting immigration law in the Immigration Courts, has held in *Matter of A.W.*, 25 I. & N. Dec. 45, 47 (BIA 2009), that an alien who has

¹ Petitioner asserts that he “is in the process of applying for permanent residency based on his U.S. citizen wife’s petition, which remains pending.” *Petition*, ¶ 3. However, Petitioner is now foreclosed from contesting his removal based upon his marriage to a U.S. citizen. *See Bradley v. Attorney General United States*, 603 F.3d 235, 242 (3d Cir. 2010) (“We agree and hold that, although Bradley was once statutorily eligible under 8 U.S.C. § 1255(c)(4) for the adjustment he now seeks, he may not, after the expiration of his 90–day stay, adjust his status as a defense to removal. Bradley’s VWP waiver squarely forecloses him from contesting his removal on this basis.”)

overstayed under the VWP is detained under § 1187, not § 1226. ICE and the Immigration Court must therefore follow the BIA and continue to respectfully assert that position before this Court.

Lastly, as to his waiver argument, this Court lacks jurisdiction to a challenge to a VWP removal order. *See Bradley v. Att’y Gen. of U.S.*, 603 F.3d 235, 240 (3d Cir. 2010) (rejecting claim that waiver of rights to contest removability was invalid); *Vargas v. U.S. Dep’t of Homeland Sec.*, No. 17–356, 2017 WL 962420 at *2–3 (W.D. La. Nov. 10, 2017) (same).

BACKGROUND

I. Relevant Law

A. The VWP Under 8 U.S.C. § 1187

Under § 1187(a)(1), an alien 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 a VWP alien “shall be effected without referral of the alien to an immigration judge” unless the alien applies for asylum. 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 him 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 § 1187 is found within the statute itself. Section 1187(c)(2)(E) provides:

The government of the country accepts for repatriation any citizen, former citizen, or national of the country against whom a final executable order of removal is issued not later than three weeks after the issuance of the final order of removal. Nothing in this subparagraph creates any duty for the United States or any right for any alien with respect to removal or release. Nothing in this subparagraph gives rise to any cause of action or claim under this paragraph or any other law against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

And, as the BIA held,

the statutory authority for the applicant's detention is contained in section 217(c)(2)(E) of the Act, 8 U.S.C.A. § 1187(c)(2)(E) (West Supp. 2008), not section 236 of the Act, 8 U.S.C. § 1226 (2006). The authority to detain the applicant has been transferred to the Secretary of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, which created the Department of Homeland Security and assigned or transferred to the Secretary of Homeland Security many of the functions previously exercised by the Attorney General. *See id.* tit. IV, § 441, 116 Stat. at 2192; see also 6 U.S.C. § 251 (2006). We note in this regard that the references to the Attorney General in section 217 of the Act now refer to the Secretary of Homeland Security. *See id.* tit. XV, § 1517, 116 Stat. at 2311; *see also* 6 U.S.C. § 557 (2006). Because the Attorney General no longer has authority over bond proceedings relating to aliens, like the applicant, who have been admitted pursuant to the Visa Waiver Program, he

cannot delegate any such authority to the Immigration Judge.

Matter of A.W., 25 I. & N. Dec. at 47-48.

B. Detention under 8 U.S.C. § 1226(a)

Section 1226 provides for arrest and detention on a warrant “pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Under § 1226(a), immigration officials may detain an alien during his removal proceedings, release him on bond, or release him on conditional parole.² By regulation, immigration officers can release an alien if the alien demonstrates that he “would not pose a danger to property or persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien can also request a custody redetermination (i.e., a bond hearing) by an Immigration Judge at any time before a final order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19.

At a custody redetermination, the Immigration Judge may continue detention, release the alien on bond, or release the alien on conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). Immigration Judges have broad discretion in deciding whether to release an alien on bond. *Matter of Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006) (listing nine factors for IJs to consider). But regardless of the factors

² Being “conditionally paroled under the authority of § 1226(a)” is distinct from being “paroled into the United States under the authority of § 1182(d)(5)(A).” *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007) (holding that because release on “conditional parole” under § 1226(a) is not a parole, the alien was not eligible for adjustment of status under § 1255(a)); *Matter of Cabrera-Fernandez*, 28 I. & N. Dec. 747, 749 (BIA 2023).

Immigration Judges consider, an alien “who presents a danger to persons or property should not be released during the pendency of removal proceedings.” *Id.* at 38.

II. Petitioner’s Immigration History

Petitioner is a citizen of Spain who entered the United States with his mother when he was a minor on December 24, 2017, under the Visa Waiver Program (“VWP”), 8 U.S.C. § 1187. *See* Exhibit A (Form I-213) at 2. Under the VWP, he was authorized to remain in the United States until March 23, 2018. *Id.* Petitioner failed to depart the country. *Id.* On July 15, 2025, Petitioner filed a Form I-130, Petition for Alien Relative and Form I-485, Application to Register Permanent Residence or Adjust Status. *Id.* On October 8, 2025, ICE arrested him for overstaying the 90-day period and issued a Final Administrative Removal Order. *See* Exhibit B (VWP Final Administrative Removal Order dated Oct. 8, 2025) at 1. Petitioner remains detained pursuant to § 1187 pending removal from the United States.

III. Petitioner’s Habeas Claims

On October 24, 2025, Petitioner filed this habeas action under § 2241 arguing that his detention is governed by § 1226(a), not § 1187, and he is thus entitled to a bond hearing or immediate release. Petition, ¶ 27. He claims that his detention without a bond hearing violates § 1226(a) and the Due Process Clause. Petition, ¶¶ 26-28, 32-33. He further claims that “Respondents have violated procedural and substantive requirements of the Fifth Amendment and the Immigration and Nationality Act by detaining and seeking to deport [him] on the basis of an alleged waiver of rights that [he], as a minor, could not have knowingly and voluntarily

executed,” contrary to the APA. *Id.*, ¶¶ 36-37. Petitioner does not allege that he has filed any applications for asylum or allege that he did not overstay after entering under the VWP. *See generally* Petition.

STANDARD OF REVIEW

28 U.S.C. § 2241(c)(3) authorizes a court to grant a writ of habeas corpus where a prisoner “is in custody in violation of the Constitution or laws or treaties of the United States.” Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, which is applicable to § 2241 petitions through Rule 1(b), provides this Court with the authority to dismiss a habeas petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief.” *See also Moncrieffe v. Yost*, 367 F. App’x 286, 288 n.2 (3d Cir. 2010) (noting summary dismissal of a § 2241 habeas petition is appropriate pursuant to Rule 4 of the Rules Governing Section 2254 Cases). “Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face.” *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (citing 28 U.S.C. § 2254, Rule 4).

ARGUMENT THE COURT SHOULD DISMISS THE HABEAS PETITION

Petitioner is not entitled to release or a bond hearing because he is detained under § 1187. *See* INA § 217, 8 U.S.C. § 1187.

The VWP statute 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. *But see Gjergi G. v. Edwards*, No. 19-5059 (SDW), 2019 WL 1254561 (D.N.J. Mar. 18, 2019) (holding § 1226(a) governed petitioner’s detention and requiring a bond hearing); *Emila N. v. Ahrendt*, No. 19-5060 (SDW), 2019 WL 1123227 (D.N.J. Mar. 12, 2019) (same).

Moreover, the length of Petitioner’s detention without bond is reasonable. Courts typically review prolonged detention due process claims 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, which is analogous to Petitioner’s situation because he is also detained subject to an order of removal, albeit a final administrative order under the VWP. Under § 1231, 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 Supreme Court has interpreted that requirement to mean that detention of six months is presumptively reasonable. *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). In this District, Courts often

dismiss challenges to detention without bond that fall short of the six-month timeframe in *Zadvydas*. See e.g. *Kevin A.M. v. Essex Cnty. Corr. Facility*, No. 21-11212 (SDW), 2021 WL 4772130, at * 2 (D.N.J. Oct. 12, 2021) (challenge to post-removal-order detention by alien detained for less than six months must be dismissed as premature); see also *Luma v. Aviles*, No. 13-6292 (ES), 2014 WL 5503260, at *4 (D.N.J. Oct. 29, 2014) (same). Because Petitioner has been detained for roughly a month, his claim is similarly meritless.

Lastly, Petitioner argues that Respondents have violated the APA by holding him to a § 1187(b) waiver that he claims is invalid. Petition ¶¶ 36-37 (alleging “as a minor, [he] could not have knowingly and voluntarily executed” a waiver of rights to challenge his removal). This claim fails for the same reasons set out in *Bradley*, where the Third Circuit rejected the argument of a VWP entrant that his waiver of the right to contest removability was invalid. 603 F.3d at 239–41. *Bradley*, a citizen of New Zealand, lawfully entered the United States under the VWP, but overstayed the 90-day period by almost a decade. When he applied to adjust his status to that of a lawful permanent resident based on his marriage to a United States citizen, he was arrested and ordered removed. He argued that the removal order was invalid because the Government could not produce the signed I-94 waiver form and because he was too drunk to make a knowing or voluntary waiver when he signed the form.

The Court rejected the claim because “Bradley’s claim amounts to a challenge of his removal order under the Due Process Clause of the Fifth Amendment, and consequently, he cannot prevail without an initial showing of substantial prejudice.”

Id. at 240 (quotation marks omitted). And, here, as in *Bradley*, no such showing could be made because, even if his waiver was not voluntary, he would be in the same position he is in now. *Id.* That is, “[i]f he had signed the waiver anyway, knowing full well what it said, he would be in the same situation as he is now. If he had refused to sign, he would have been removed summarily at the border because he did not have a proper visa.” *Id.* (quoting *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir.2010) (en banc)). Accordingly, Petitioner’s attempt to challenge the validity of his waiver fails.

CONCLUSION

For the foregoing reasons, the Court should dismiss or deny the Petition.

Respectfully submitted,

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