UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Lateef Abiodun Shobande,

Petitioner,

-v-

Todd M. Lyons, Acting Director of US ICE; Miguel Vergara, San Antonio Field Office Director, US Immigration and Customs Enforcement; Daren K. Margolin, Director of the Executive Office for Immigration Review; Warden, T. Don. Hutto Detention Center,

Respondents.

Case No: 1:25-cv-01744-RP-DH

Motion for Temporary Restraining Order

Petitioner's Brief in Support of Temporary Restraining Order

Petitioner requests that the Court grant a Temporary Restraining Order to order his release, or in the alternative that Respondents provide him a full bond hearing. This extraordinary request is necessitated by Petitioner's continued unlawful detention by Respondents. Petitioner is a lawful permanent resident of the United States who was detained as a result of criminal charges which have long since been dismissed. Respondents have refused to release him from detention despite this material change in his circumstances, or even to justify his detention. Additionally, his request for an immigration bond was denied by an immigration judge who stated that he could not grant bond absent a court order. Petitioner asks for the Court to order his immediate release, or alternatively to order the immigration judge to consider Petitioner's release on bond.

I. Petitioner's Detention is Unlawful

Petitioner has been detained by Respondents since approximately September 14, 2025. His detention is unlawful because he has not been provided with a warrant or legal justification. He was initially transferred from state custody following his arrest on criminal charges. However, those charges were dismissed on September 12, 2025, prior to his transfer, and no longer justify his detention. Respondents have not given Petitioner a clear explanation as to why he cannot be released.

As a lawful permanent resident, the only detention authority that could apply to Petitioner is 8 U.S.C. § 1226(a). This section provides that:

> *"On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."*

8 U.S.C. § 1226(a). Petitioner has not been provided with a warrant stating the basis for his detention. Respondents are not authorized to arbitrarily arrest and detain permanent residents; they must comply with all statutory and regulatory requirements. Petitioner asks the Court to grant his immediate release. Should Respondents assert that a warrant has been issued and provide a copy of that warrant to the parties and the Court, Petitioner alternatively asserts that he is eligible for release on bond.

II. The Denial of Bond to Petitioner is a Violation of his Fifth Amendment Rights

Petitioner applied for a bond from the immigration court and was denied on purely jurisdictional grounds. This decision is erroneous as it lacks any statutory or regulatory basis. The immigration judge's reliance on an inapplicable decision of the Board of Immigration Appeals does not bind this Court, but Petitioner will not be able to obtain bond without this Court's order.

On October 28, 2025, Petitioner attended a bond hearing in his case. The immigration judge denied him bond on purely jurisdictional grounds on this date. The entirety of the immigration judge's decision was that:

> *"The Court observes that the Respondent is in rescission proceedings and has not been served with a Notice to Appear. The Attorney General has not delegated authority to Immigration Judges, under 8 C.F.R. § 1236.1(d), to redetermine the conditions of custody imposed by the Department of Homeland Security with respect to aliens who have not been issued and served with a Notice to Appear (Form I-862) in relation to removal proceedings pursuant to 8 C.F.R. Part 1240. See Matter of A-W-, 25 I&N Dec. 45 (BIA 2009)."*

This decision is erroneous because Petitioner has a clear right to bond pursuant to 8 U.S.C. § 1226(a)(2)(A). That paragraph provides that the Attorney General:

> *"may release the alien on...bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General."*

Additionally, regulations at 8 CFR 1003.19(a) delineate the rights of respondents in immigration proceedings to request review of their custody determinations as well as the procedures to request bond. There are no provisions stripping jurisdiction for bond proceedings from individuals who are in rescission proceedings. The immigration judge's determination that he did not have jurisdiction was based on an erroneous reading of a BIA decision, *Matter of A-W-*, 25 I&N Dec. 45 (BIA 2009).

Matter of A-W- does not apply to individuals who are in rescission proceedings. Instead, it relates to individuals who entered the United States without a visa pursuant to the visa waiver program. Such individuals generally lack the right to removal proceedings and are only entitled to seek certain benefits such as asylum. Even so, numerous courts have found that such individuals are entitled to bond determinations. *See, e.g., Sutaj v. Rodriguez*, 2017 WL 66386 (D.N.J.), 5; *Neziri v. Johnson*, 2016 WL 2596017, at *2; *Szentkiralyi v. Ahrendt*, No. CV 17-1889 (SDW), 2017 WL 3477739, at *4 (D.N.J. Aug. 14, 2017).

The Board's reasoning in *Matter of A-W-* has been found to be flawed, even when according the agency *Chevron* deference. The Court owes no such deference to the Board's reasoning in *Matter of A-W-*. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 376 (2024). Although counsel is not aware of any court decisions relating to individuals in rescission proceedings specifically, courts have rejected similar attempts to curtail bond proceedings based on *Matter of A-W-*. In *Cardin Alvarez v. Rivas*, the court found that *Matter of A-W-* was inapplicable to a Cuban national, writing that:

> *Matter of A-W-, 25 I. & N. Dec. 45, 47 (BIA 2009), considered custody with respect to noncitizens under the Visa Waiver Program ("VSP"), and it is not clearly applicable to Cardin Alvarez's situation. In Matter of A-W- the BIA held that a noncitizen admitted to the United States pursuant to the VWP, who had not been served with a NTA, was not entitled to a custody hearing before an IJ. Id. at 48. Historically, Cuban nationals have not been included in the VWP. Instead, Cuban immigrants have been subject to distinct immigration policies, such as the Cuban Adjustment Act ("CAA"), which provides a pathway to legal permanent residency for certain Cuban nationals who are physically present in the United States. The VWP is a separate program with its own eligibility criteria and does not appear to intersect with policies specific to Cuban immigrants.*

No. CV 25-02943 PHX GMS (CDB), 2025 WL 2898389, at *8 (D. Ariz. Oct. 7, 2025). This reasoning also applies to Petitioner, who is a citizen of Nigeria. Nigeria has never been designated for the Visa Waiver Program. Nor did Petitioner enter the US through the visa waiver program. The only relevance that *Matter of A-W-* has on the present matter is that the Board's decision generally stated that individuals who have not been served with a Notice to Appear are not entitled to a custody hearing. This statement, devoid of any statutory analysis, would allow the Board to enact a new jurisdictional bar to bond proceedings which was not contemplated by Congress.

Petitioner urges the Court to reject this attempt to use *Matter of A-W-* as a general jurisdictional stripping provision. Petitioner is in rescission proceedings, which have somewhat

different procedures from removal proceedings. One of those differences is that a Notice to Appear is not issued for rescission proceedings. As a result, *Matter of A-W-* would result in circular logic in cases such as Petitioner's; he is ineligible for bond because he was not issued a Notice to Appear, but a Notice to Appear is never issued to individuals as part of rescission proceedings. Petitioner is entitled to bond because he is detained pursuant to 8 U.S.C. § 1226(a). Nothing in 8 U.S.C. § 1226 modifies the immigration courts' jurisdiction with respect to rescission proceedings. Furthermore, Petitioner should not be required to appeal the immigration judge's denial of bond to the Board of Immigration Appeals.

1. **Exhaustion before the BIA is futile in Petitioner's case**

Respondents may contend that Petitioner must appeal bond denial to the Board of Immigration Appeals (BIA) and wait for a decision prior to petitioning for a writ of habeas corpus. However, there is no statutory exhaustion requirement in 28 U.S.C. § 2241. The courts have routinely reviewed the detention of immigrants pursuant to different statutes in habeas proceedings. *See, e.g., Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008). Furthermore, exhaustion is inappropriate here because appeal to the Board of Immigration Appeals is futile and inadequate. Appeal to the BIA is futile because the agency has already issued a precedential decision holding that immigration judges have no jurisdiction to grant bond, and the immigration judge relied on this decision to deny Petitioner bond. *See Matter of A-W-*, 25 I&N Dec. 45 (BIA 2009).

2. **There are no jurisdictional bars to the relief sought**

In similar circumstances, Respondents have argued that the district courts are prohibited from deciding such matter for lack of subject matter jurisdiction. This argument is incorrect, and there are no jurisdictional bars whether under 8 U.S.C. §§ 1252(a)(5), (b)(9), (g), or 8 U.S.C. § 1226(e).

Section 1252(a)(5) narrowly "specifies that the only means of obtaining judicial review of a final order of removal, deportation, or exclusion is by filing a petition with a federal court of appeals." *Duarte v. Mayorkas*, 27 F.4th 1044, 1051 (5th Cir. 2022). Here, there is no final order of removal which Petitioner seeks review before this Court.

Section 1252(b)(9) limits judicial review of "questions of law and fact…arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter". 8 U.S.C. § 1252(b)(9). This provision is a jurisdictional channeling provision intended to prevent review of issues prior to the end of administrative proceedings. See *Maldonado v. Olson*, No. 25-CV-3142 (SRN/SGE), 2025 WL 2374411, at *7 (D. Minn. Aug. 15, 2025) (citing *Aguilar v. U.S. Immigr. & Customs Enf't*, 510 F.3d 1, 11 (1st Cir. 2007)). Petitioner is not challenging the initiation of removal proceedings or any action that occurred during those proceedings. He is challenging the constitutionality of his detention.

Section 1252(g) strips jurisdiction over "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). Here, Petitioner does not seek this review, and Congress did not intend to sweep in additional claims that were not explicitly included here. *Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828, at *4 (W.D. Tex. Sept. 22, 2025) (citing *Jennings v. Rodriguez*, 583 U.S. 281 at 924 (2018). Additionally, this provision carves out habeas petitions; the jurisdictional bar is "notwithstanding any other provision of law (statutory or nonstatutory), including section 2241". 8 U.S.C. § 1252(g).

Section 1226(e) does not apply to Petitioner's claim because he "challenges to the statutory framework that permits the alien's detention without bail." *Jennings*, 583 U.S. at 295,

138 S.Ct. 830 (cleaned up) (quoting *Demore v. Kim*, 538 U.S. 510, 516, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003)); see also *Zadvydas v. Davis*, 533 U.S. 678, 688, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). Petitioner is not challenging an individualized bond hearing determination but rather his indefinite detention without the opportunity to have such a hearing. In other similar cases before the Western District, Respondents' jurisdictional arguments have been found unavailing. See Lopez-Arevelo at *5.

III. A Temporary Restraining Order is appropriate in Petitioner's case.

A Temporary Restraining Order is committed to the "equitable discretion" of the court and preserves the status quo during the pendency of litigation. *Texas v. United States Dep't of Homeland Sec.*, 747 F. Supp. 3d 1005, 1009 (E.D. Tex. 2024). "Resolution of a motion for a TRO…rests on considerations of irreparable injury to the plaintiff without a TRO, the burden to the defendant of a TRO, the public interest, and the probability of plaintiff's ultimate success." Id. (*citing Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

First, Plaintiff here is suffering irreparable injury at this time and will continue to suffer during the pendency of this litigation if a TRO is denied. Plaintiff is detained and is unlikely to be released from detention except by order of this Court. He will never be able to recover this time that he has been confined to a detention center and separated from his family. The ongoing violation of his constitutional rights is a separate and significant injury that cannot be remedied by any other manner than by forcing Respondents to adhere to the law.

Second, Respondents' burden in complying with the law and releasing Petitioner, who they unlawfully detained, is minimal compared to Petitioner's suffering. Petitioner remains in removal proceedings and his personal information, including his address and other identifying information is known to Respondents. There is no basis to suggest that Petitioner might abscond

or prevent his detention given that he was detained at a routine check-in with Respondents. Furthermore, this Court's order would implicate only this Petitioner and his release would be a routine and minimal effort on Respondents' part.

Third, the public interest is not negatively affected by this Court's issuance of a TRO. In fact, the public is currently paying government contractors a substantial amount of money to unlawfully detain Petitioner. As a law-abiding, gainfully-employed lawful permanent resident, Petitioner's release would actively serve the public interest.

Finally, the Court should find that Petitioner's arguments in support of this TRO are likely to succeed on the merits, if further litigation is required. Petitioner is likely to succeed for the reasons outlined above.

Respectfully submitted,

/s/ Joseph Krebs Muller

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