

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION

SEAMUS THOMAS CULLETON, )

PETITIONER, )

v. )

MARY DE ANDA-YBARRA, Field Office Director )

ERO of U.S. Immigration and Customs Enforcement )

TODD LYONS, Acting Director, U.S Immigration )

and Customs Enforcement )

KRISTI NOEM; Secretary of the U.S. Department )

Homeland Security; )

PAMELA BONDI, Attorney General of the United )

States, and )

ANGEL GARITE, in his official capacity )

as Assistant Field Office Director of the El Paso Field )

Office of U.S. Immigration and Customs )

Enforcement and Enforcement Removal Operations, )

RESPONDENTS. )

Docket No. 3:25-cv-554

**PETITION FOR WRIT OF  
HABEAS CORPUS**

**ORAL ARGUMENT  
REQUESTED**

**PETITIONER’S REPLY TO THE GOVERNMENT’S OPPOSITION TO  
PETITIONER’S WRIT OF HABEAS CORPUS**

Petitioner respectfully submits this reply pursuant to the Court’s December 3, 2025 Order directing Petitioner to respond to the arguments raised by Respondents. See ECF No. 7 at ¶ 2. As a preliminary matter, Petitioner contends that contrary to the government’s position that Petitioner is contesting his removal order, Petitioner does not at dispute that he is removable under the Visa Waiver Program (VWP). This habeas petition neither contests the Administrative Removal Order nor does it seek to litigate removability.

This Habeas petition challenges the legality of Petitioner's unlawful detention and the government's refusal to adjudicate an immediate relative green card petition that was lawfully initiated before Petitioner was detained by ICE and/or before a removal order was served on Petitioner. The government's attempt to construe this case as a collateral attack on the removal order while also challenging the jurisdiction of this court misstates the nature of the claim. See ECF No. 6 at ¶ 3. Petitioner has been in custody for exactly 90 days; since September 9, 2025 with no administrative removal order served on him until November 14, 2025.

The government argues that the VWP "no contest" clause categorically eliminates all forms of judicial review except asylum. While this is legally incorrect, it is pertinent to note that even where the waiver forecloses certain challenges to removability, it does not waive Petitioner's constitutional due process rights, nor does it bar Habeas review of unlawful detention. The Supreme Court has long recognized that a noncitizen subject to removal, even one with limited statutory rights, retains basic constitutional protections. See, *Zadvydas v. Davis*, 533 U.S. 678 (2001). 533 U.S. at 678, 693. A statutory waiver cannot extinguish core constitutional guarantees unless Congress unmistakably states so, and the VWP statute contains no such language. The Courts have long recognized the importance of the habeas statute in providing a swift remedy in all cases of unlawful detention. See, *Fay v Noia*, 372 U.S. 391, 400 (1963).

## I. ARGUMENT

### A. Fifth Amendment Due Process Violation

The government's response, based on *McCarthy v. Mukasey*, 555 F.3d 459 (5th Cir. 2009), stands only for the proposition that a VWP entrant may not contest removability. See ECF No. 6 at ¶ 7. Petitioner does contest this. Petitioner challenges the actions of ICE in detaining him for over 60 days without any reason while adjudicating his I-130 and I-485 adjustment application and at the same time serving him a final administrative order once the habeas petition was filed.

The conduct of DHS is arbitrary, capricious and in bad faith. The prolonged detention without serving charging documents or a removal order is a clear deprivation of Petitioner's liberty interest without procedural fairness. The Supreme Court has held that indefinite or arbitrary detention of noncitizens raises serious constitutional concerns. See *Zadvydas v. Davis*, 533 U.S. 678 (2001). None of the cases the government cites hold that a VWP entrant waives all due process rights, nor do they address a situation like one of the petitioners, where the government itself affirmatively accepted and began processing Petitioners I-130 and I-485 (green card) applications and even scheduling him and his U.S citizen spouse for an interview and then suddenly invoking the VWP waiver to foreclose the very process it instigated. Bottomline, the VWP waiver prevents a challenge to the charge of removability, not a challenge to unlawful detention or government misconduct. Petitioner's due process rights includes the right to be served with a charging document when arrested, the right to attend a scheduled immigration interview that would confer on him the very status that would inoculate him from Respondents' arbitrary action in removing him from the United States .

In *McCarthy v. Mukasey*, the petitioner entered the United States as a non-immigrant under the Visa Waiver Program (VWP). *McCarthy* was authorized to remain in the United States until May 7, 2006. On May 5, 2006, McCarthy allegedly married her U.S. citizen spouse. Subsequently, on or about May 8, 2007, McCarthy filed her marriage-based adjustment of status application. On May 10, 2007, the Department of Homeland Security (DHS) issued a notice of intent to remove *McCarthy* for remaining in the United States beyond the ninety-day period. In *McCarthy*, the petitioner had resided in the United States for only one year prior to the issuance of the removal order. In the case at bar, the petitioner has resided in the United States since March 1, 2009; approximately 16 years. He is married to a U.S. citizen and had filed a green card application four (4) months prior to his encounter with ICE. He has no criminal record and owns his construction

company where he works as a plasterer. He has established strong familial ties and relationships in his community. The act of denying Petitioner the opportunity to remain in the United States after 16 years violates his Fifth amendment due process rights. In *McCarthy*, the petitioner's limited ties and brief residence did not give rise to substantial constitutional due process protection arguments beyond those afforded by statute. The brevity of residence as well as the fact that the petitioner had not developed the kind of deep community, economic, or familial roots that supported a constitutionally protected liberty interest is also a distinguishing factor from the case at bar. The court held in *McCarthy* that the petitioner's act of signing the VWP information form, amounted to waiver of her right to contest any action for removal and to seek judicial review of the DHS's decision. Here, the Petitioner, Seamus Culleton, does not seek judicial review of the DHS final administrative order.

Furthermore, a USCIS Policy Memorandum issued on November 14, 2013, provides that the USCIS *shall* adjudicate adjustment of status applications cases filed by immediate relatives of U.S. citizens who were last admitted to the United States under the VWP. It further provides that adjudication shall occur prior to referral to ICE unless ICE issued a removal order. See Exhibit A: USCIS Policy Memorandum. The decision of the Court in *McCarthy* predates this policy memorandum which clarifies that USCIS must process and consider pending applications or requests for relief, rather than relying on prior judicial interpretations or procedural shortcuts that automatically deny adjudication. This policy represents a formal, contemporaneous agency determination that promotes adjudication in cases like Petitioner's.

The USCIS in *McCarthy* reviewed the I-130 and I-485 applications but never scheduled a marriage-based adjustment of status interview following her filings. On the contrary, DHS issued a notice of intent to remove *McCarthy* for remaining in the United States beyond the ninety-day

period. In contrast, the Petitioner in the case at bar entered the United States as a non-immigrant under the Visa Waiver Program (VWP) on March 1, 2009. Petitioner married his U.S. citizen spouse, Tiffany Smith on April 4, 2025. On June 20, 2025, USCIS accepted Petitioner's marriage-based adjustment application. USCIS began adjudicating this petition by scheduling Petitioner and his wife for their initial marriage-based interview on November 5, 2025. The USCIS notice was dated September 25, 2025. DHS never served the Petitioner with a final administrative removal order until a Habeas was filed by Petitioner.

Most significantly, Respondents have produced a slew of documents in its response to the Habeas petition that raise significant issues in this case that may impugn on Petitioner's due process rights. For instance, DHS made zero mention of this jurisdictional bar (final administrative removal order) during its motion to reconsider the bond the immigration judge originally set in this case and yet has presented a document titled, "final administrative removal order" issued on September 10, 2025. How would DHS fail to raise a clear and decisive jurisdiction bar argument both during the bond hearing on October 16, 2025, as well as in its motion to reconsider the grant of bond filed on October 17, 2025 if the final removal order existed at the time and deprived the immigration court of jurisdiction. See Exhibit B: DHS Motion to Reconsider Rather, the motion stated that the immigration judge had no jurisdiction to grant bond, insisting that the Petitioner misstated his initial non-immigrant entry status as a B-1/B-2 instead of a VWP entrant. (p.2 of DHS Motion to Reconsider). DHS's motion to reconsider failed to state that they have already issued a final removal order which would have divested the court of jurisdiction. This omission is deeply suspect. Notice also that this same order was purportedly served on Petitioner who refused to sign on November 14, 2025, the same date the Habeas was filed. See Exhibit C: VWP Final Administrative Order of Removal.

In essence, Petitioner is held by the government without any formal charging document from September 9, 2025 until November 14, 2025 when he filed a Habeas Petition challenging his unlawful detention. It is no coincidence that he got the order of removal the same day he files the Habeas. The same government continues to adjudicate his marriage-based green card petition and schedules him for an interview, first on November 5, 2025 See Exhibit E – Form I-797C Notice of Action dated September 25, 2025; then deprives him of the chance to attend that interview despite the pleas of his immigration attorney. The government does not deny his petition and reschedules him for another interview on December 18, 2025. See Exhibit F: Form I-797C Notice of Action dated November 2, 2025. These are egregious, capricious, and bad faith violations of petitioner's constitutionally protected due process rights, and he seeks justice from this court.

The 2013 USCIS policy memorandum directly supports adjudication of Petitioner's application or request for relief, creating a framework that is materially different from the circumstances in *McCarthy v. Mukasey*. Reliance on *McCarthy* is therefore misplaced. Under the current policy, Petitioner is entitled to a full, merits-based adjudication, which strengthens both his statutory and constitutional claims and supports granting the requested relief.

B. Adjustment of Status and VWP Entrants.

The VWP provides that participating aliens must waive any right to contest, other than on the basis of an application for asylum, any action for removal. On November 5, 2025, USCIS scheduled the Petitioner for a green card interview for his marriage-based adjustment of status interview. Immigration Counsel for the Petitioner reached out to the facility holding the Petitioner to avail a virtual option given his detention. The immigration counsel also suggested having the scheduled interview transferred from Boston to Texas. These requests were denied, and the Petitioner sought a rescheduling of the interview to which the USCIS issued a new receipt notice

for December 18, 2025. See Exhibit D: Immigration Attorney's Declaration. This new date was premised in the hope that Petitioner would have been released from ICE custody to enable him to attend his scheduled interview. The actions of the government effectively undermining the same interview they scheduled that would grant Petitioner a green card is a egregious violation of his constitutionally protected due process rights.

It is important to note that humanitarian factors weigh in favour of the immediate release of the petitioner. In the case at bar, the petitioner has resided in the United States since March 1, 2009. He works as a self-employed plasterer and has established strong familial ties and relationships in his community. He has no criminal entry whatsoever in his record since he has been in this country. The petitioner's long residence of 16 years in the U.S., his marriage to his U.S. citizen spouse, his ongoing marriage-based adjustment of status process, and unlawful detention supports a rescission of this removal order. The petitioner's detention serves no legitimate government interest, as he has a pending scheduled marriage-based adjustment of status interview and he is not a flight risk. While DHS has discretion in this case, the exercise of this discretion by serving him with a removal order is clearly an abuse of discretion.

For all these reasons, the Petitioner's continued detention is unlawful and unsustainable. The Government's actions have not only obstructed the adjudication of his properly filed marriage-based adjustment application but have also violated the due process protections to which he is constitutionally entitled.

C. Existence of a Removal Order Dated September 10, 2025

DHS alleges that it possessed a final administrative removal order on September 10, 2025, and served Petitioner with same on September 11, 2025. See ECF No. 6-1 at page 3. As previously argued, DHS made zero mention of this jurisdictional bar (final administrative removal order) during its motion to reconsider the bond the immigration judge originally set in this case. DHS failed to raise a clear and decisive jurisdiction bar both during the bond hearing on October 16, 2025 as well as in its motion to reconsider the grant of bond filed on October 17, 2025. See Exhibit B: DHS Motion to Reconsider. This omission is inexplicable and clearly shows that no removal order existed around September 10 and 11, 2025. In fact the USCIS rescheduled the original green card interview from November 5, 2025 to December 18, 2025 during a time DHS alleges a removal order was in existence. USCIS, DHS officers, ICE attorneys, and OPLA are aware that the existence of a final order terminates immigration court custody jurisdiction. The fact that DHS argued only the fact that Petitioner was a VWP entrant which divests the immigration court of jurisdiction and never mentioned a final administrative removal order suggests that no such order existed at that time. This silence strongly undermines the authenticity and timing of this newly produced final administrative removal order.

DHS now produces a removal order bearing a signature date of September 10, 2025. Still, that order allegedly was never served on Petitioner until November 14, 2025, nearly two months later, after the October 16, 2025, bond hearing and even after the motion to reconsider filed by DHS on October 17, 2025, and on the same date that the Habeas Petition was filed. This delayed service date is consistent with the inference that the order was created, finalized, or “rediscovered” only after the bond proceedings had been concluded, and not on the date written on the order and it is retaliatory in nature stemming from the fact that a Habeas was filed.

The government also asserts that the client acknowledged receipt of the Notice of Intent to Issue a Final Administrative Removal Order. The client unequivocally denies ever signing such a receipt. See Exhibit G: Petitioner's Affidavit. Without a contemporaneous corroboration from October 2025, the alleged signature is suspect. The most reasonable inference is that the "Final Administrative Removal Order", the "Notice of Intent to Issue a Final Administrative Order acknowledgment", or both, were created, altered, or finalized after the fact, most likely around November 14, 2025, when DHS claims it attempted service. The government's documents do not align with its own litigation behavior. The sequence of events makes the authenticity and chronology of the documents inherently suspect.

Once USCIS accepted the I-130 petition and began using its formal adjudicatory process, including biometrics, notice requirements, and an interview, it conferred on Petitioner and his U.S. citizen wife, a procedural due process interest in fair adjudication of the benefits for which he was statutorily eligible.

Petitioner argues that USCIS's acceptance and processing of his green card and marriage based petitions created a due process interest in ensuring its fair adjudication. Congress expressly permits VWP overstays to adjust status if they are immediate relatives. 8 U.S.C. §1255(c)(4). USCIS's initiation of the process is what triggers procedural protections. Certain classes of non-immigrants may petition the Attorney General for adjustment of status to that of a lawful permanent resident. Included in the class of non-immigrants who may petition for LPR status are VWP entrants, but only those who seek adjustment pursuant to an immediate relative petition. 8 U.S.C. § 1255 ; § 1255(c)(4). See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). Under the regulatory regime associated with adjustment of status, alien applicants are afforded various procedural benefits. Among these benefits, an applicant "retains the right to renew his or her application" if it has been denied. 8 C.F.R. § 245.2(a)(5). If the adjustment of status application is

renewed after removal proceedings have been initiated, as would have been the procedure in the applicant's situation, an IJ would review and rule upon the application. 8 C.F.R. § 245.2(a)(1).

With respect to these renewal and review procedures, the Ninth Circuit, *ibid*, has also held that there is no exception in the statute or regulations for aliens who are in the United States under any particular status; the procedures apply to any applicant for adjustment of status. Indeed, having granted VWP visitors the right to seek an adjustment of status, it makes no sense for Congress to have intended that these preferred visitors, by definition, citizens of certain favored countries, should have second-class status once they enter into the adjustment of status process. See *Crandal u. Ball, Ball & Brosamer*. 99 F.3d 907, 910 (9th Cir. 1996) ("A statute should be read in a manner which attributes a rational purpose to the legislature.").

A clear reading of 8 U.S.C. § 1255(c) (4)'s allows VWP entrants to adjust their status. This interpretation is reinforced by the statute's purpose and the agency's acceptance of Alien relative Petition I-130 and consequent scheduling for an interview. Petitioner argues that upon the proper filing of I-130 application for alien relative, he became assimilated into the adjustment of status procedural regime. Particularly, the actions of ICE in detaining the Petitioner for over 60 days without any reason while adjudicating his I-130 application and immediately serving a final administrative order upon the filing of the habeas petition is a violation of his due process rights.

#### D. Conclusion

Petitioner reiterates that he does not challenge that DHS has the authority to serve him with a removal order. Petitioner does not deny that he is removable under the VWP. He does however assert fundamental due process violations which includes: his unlawful detention without any charging document, a clear abuse of discretion by DHS in the issuance of the removal order after the USCIS had accepted and processing his marriage based green card including granting him an employment authorization document as a result of his green card application; and also Respondents

arbitrary action in preventing his attendance of the same green card interview that they scheduled. That green card interview is rescheduled to December 18, 2025.

For the afore-mentioned reasons, Petitioner requests that his petition for Habeas Corpus be granted and that this Honorable Court Order DHS to Rescind the Final Administrative Order of Removal in this case to allow Culleton to be release from custody immediately in time to attend his scheduled green card interview on December 18, 2025

Dated: December 10, 2025

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Ogor Winnie Okoye, do hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: December 10, 2025

Respectfully submitted,

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