UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NDEILE YAKHOUB,

DETAINED

Petitioner,
v.

25-CV-06734-MAV

PHILIP L. RHONEY, Acting Deputy Field Office Director,
Buffalo Federal Detention Facility, et al.,;

Respondents.

PETITIONER'S ANSWER TO RESPONDENT'S RESPONSE TO ORDER TO SHOW CAUSE

Respondents acknowledge that this Court has issued prior rulings concerning similar challenges and specifically acknowledges the decision in *Da Cunha v. Freden*, 25-CV-06532-MAV, ECF No. 25 (W.D.N.Y. Oct. 20, 2025). Petitioner agrees that the legal reasoning in *Da Cunha v. Freden, supra,* is applicable to this petition and asks that the Court apply the same reasoning and direct Petitioner be provided a bond hearing under 8 U.S.C. § 1226(a).

Petitioner believes this matter involves a purely legal issue and does not require the Petitioner's presence. This Court has previously addressed the legal issue raised in the petition. Petitioner does not believe an evidentiary hearing or oral argument is necessary. Petitioner does dispute Respondent's position that the burden of proof should be on the Petitioner if the Court orders Petitioner be provided a bond hearing pursuant to 8 U.S.C. § 1226(a).

Petitioner raised constitutional due process claims in addition to the statutory argument addressed in *Da Cunha v. Freden, supra.* The Petitioner in this matter and in *Da Cunha v.*

Freden, supra, both filed an I-589 application for asylum with USCIS prior to their detention and were detained while awaiting adjudication of the I-589 by USCIS.

Respondents appear to be requesting that the Court apply 8 C.F.R. § 236.1(c)(8) imposing a presumption of detention that requires the alien to establish, to the satisfaction of the arresting officer, that release would not pose a danger to property or persons and that the individual is likely to appear for any future hearings. Petitioner argues this regulation is only applicable to the initial custody determination by the arresting officer and not in any subsequent bond redetermination hearing. *Velasco Lopez v. Decker,* 978 F.3d 842 (2d Cir. 2020)

In this alien's case he previously met the requirement of 8 C.F.R. § 236.1(c)(8) when he was first encountered and released on his own recognizance on June 21, 2023. While DHS subsequently declined to file the Notice to Appear with EOIR and allowed Petitioner to pursue his asylum application before USCIS, he did previously meet the 8 C.F.R. § 236.1(c)(8) burden when DHS believed he was detained pursuant to 8 U.S.C. § 1226(a) and released him pursuant to 8 U.S.C. § 1226(a). When Petitioner was re-detained in 2025, DHS took the position that he was ineligible for bond and therefore conducted no 8 C.F.R. 236.1 process to determine if he presented a danger to the community or a flight risk.

Petitioner is at the initial step of removal proceedings and even under an expedited detention docket, his detention in jail-like conditions could easily exceed 18 months with appeals. In Counsel's experience, Counsel has limited her practice to immigration law since 1997, the asylum merits matter in Batavia Immigration Court could take four to six months, the Board of Immigration Appeals process could take six months, and a petition for review before the Second Circuit if necessary could take eight months. These time frames may be conservative

considering the significant backlog at EOIR of 3.8 million cases and a limited number of Immigration Judges.

Petitioner argues he has a liberty interest under the U.S. Constitution and protected by the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *Zadvydas v. Davis,* 533 U.S. 678 (2001). 87 U.S.C. § 1226(c) is silent as to which party bears the burden of proof at a custody redetermination hearing and the evidence necessary to meet that burden. Petitioner argues due process requires the government bear the burden of proving by clear and convincing evidence that detention is justified.

Mathews v. Eldridge, 424 U.S. 319, 332 (1976) is the case which sets out the three factor balancing test to determine whether a violation of procedural due process has occurred. The three part test as applied to the fact of this case:

Private interest: Petitioner's right to be free from arbitrary civil detention not mandated by statute and to pursue his asylum claim on the Immigration Court's non-detained docket.

Risk of Erroneous Deprivation: Petitioner was provided no process, nor notice about the cancellation of his release on his own recognizance prior to his re-detention by ICE. Petitioner was previously found not to pose a flight risk or danger to the community when DHS released him under INA § 236 (8 U.S.C. § 1226) in 2023. DHS has provided no evidence Petitioner violated his release conditions and in fact premises his detention solely on a presidential proclamation. When Petitioner sought a bond hearing under the statutory process, the Immigration Judge held he had no jurisdiction under *Matter of Yajure Hurtado*, 29 I&N Dec. 217 (BIA 2025). Petitioner exhausted his administrative remedies.

Petitioner argues the risk of erroneous depravation of liberty for him is higher than an individual who has never previously been granted release by DHS. In this matter, DHS has collected his biometrics over two year ago, completed background checks and been provided a detailed biographic history in his I-589 application of Petitioner's immediate family, parents, and siblings. He has provided DHS with his work and residence addresses for five years, including those outside the United States. He has explained why he fears return to his own country and if he has ever been arrested in that country. He has applied for and been granted employment authorization in the United States for five years. Finally, Petitioner has already been denied a full and fair bond hearing on the merits before the Immigration Judge as well as the opportunity to be provided bond at the time of the 2025 arrest due to an erroneous interpretation of the law that he is detained pursuant to INA § 235 and not INA § 236.

Government's interest: Petitioner acknowledges the government interest in the current procedure it normally applies in 8 U.S.C. § 1226(a) bond hearings where the burden is on the alien pursuant to administrative precedent. Petitioner argues his detention did not arise from the normal procedure. An 8 U.S.C. § 1226(a) bond hearing would normally occur after an initial arrest by DHS for removal proceedings, an administrative bond determination by DHS, and then a request to the Immigration Court for a determination of bond pursuant to 8 U.S.C. 1226(a). In Petitioner's case, he is detained because of a change in policy directing detention of asylum seekers pursuing their statutory procedure to seek asylum who entered the United States without a via or parole. DHS states Petitioner's detention in 2025 is based on the "Presidential Proclamation" and not any change in circumstances raising concerns about danger to the community or flight risk. The government's interest, beyond satisfying the demands of the

presidential proclamation, are unclear. The Petitioner, who is neither a flight risk nor a danger to the community according to a 2023 DHS determination is costing tax payers somewhere between $150 - $200 per day to cover the cost of his detention. DHS's own determination in 2023 has proved to be true over the two years Petitioner was free of detention. Petitioner's case on the detained docket will take up government resources better used in expediting the cases of aliens who are a danger to the community or a flight risk. Petitioner's detention, without explanation of how he violated the conditions of his release, undermines all citizens belief that our immigration system is fair and that the federal government treats people fairly. Petitioner's detention undermines the public's belief that all persons in the United States are entitled to due process, particularly when they lose their liberty and are held in a criminal style facility for a violation of civil law. There is a public interest in the Government's observance of the U.S. Constitution and laws. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992)

This matter arises under the jurisdiction of the U.S. Court of Appeals for the Second Circuit and Petitioner argues the Constitution concerns over due process discussed in *Velasco Lopez v. Decker,* 978 F.3d 842 (2d Cir. 2020) are equally applicable to the Petitioner. Petitioner faces a lengthy detention, if not release on bond, due to the overburdened EOIR that does not have enough Immigration Judges to handle the millions of pending cases. Additionally, DHS previously determined to release Petitioner on his own recognizance in 2023 and his detention is based on a policy change and not some indication Petitioner is a danger or a flight risk.

Petitioner respectfully requests a constitutionally adequate bond hearing where the burden is on the government to establish by clear and convincing evidence that the Petitioner's detention is justified base on his dangerousness to the community or a flight risk.

Respectfully submitted,

/S/ Anne E. Doebler

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