UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. _____

DAVID BADER,

Petitioner,

v.

FIELD OFFICE DIRECTOR,
Miami Field Office,
U.S. Immigration and Customs Enforcement,

Respondent.
_____/

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, David Bader, submits this Verified Petition for Writ of Habeas Corpus, by and through the undersigned, and alleges as follows:

INTRODUCTION

1. Mr. Bader was admitted to the United States pursuant to the Visa Waiver Program in accordance with the terms of 8 U. S. C. § 1187(a), which allows a person to be admitted to the United States as a tourist under § 1101(a)(15)(B) without having to formally obtain a visa through consular processing pursuant to §§ 1201–1202. In exchange for that benefit, a person must waive the right "to contest, other than on the basis of an application for asylum, any action for [their] removal." § 1187(b)(2). He is currently in immigration custody seeking asylum.

2. Section 1187 does not provide any detention authority for the government to detain Visa Waiver entrants. Thus, the default detention provisions would apply as in any other case.

3. Here, administrative precedent denies the petitioner a bond hearing as guaranteed to him by § 1226(a). See, e. g., Order (D.E. 11), *Semelik* v. *Field Off. Dir.*, No. 1:24-cv-24924-

RKA (S.D. Fla. Dec. 31, 2024); Stipulation and Order (D.E. 14), *Krause* v. *Joyce*, No. 1:25-cv-2379-AT (S.D.N.Y. Mar. 27, 2025). Alternatively, his subjection to an agency-created mandatory detention rule violates due process.

PARTIES

4. The petitioner, **David Bader**, is currently detained by the respondent and his or her agents at the Krome Service Processing Center in Miami, Florida. (**App.**, Ex. A, p. 1.)

5. The respondent **Field Office Director**, Miami Field Office, U.S. Immigration and Customs Enforcement is sued in his or her official capacity. In this capacity, the Field Office Director has jurisdiction over the detention facility in which the petitioner is held, is authorized to release the petitioner, and is a legal custodian of the petitioner.

JURISDICTION

6. This action arises under the Constitution of the United States of America, 28 U. S. C. § 2241 *et seq.* (habeas corpus), the Immigration and Nationality Act (INA), 8 U. S. C. § 1101 *et seq.*, and Title 8 of the Code of Federal Regulations.

7. The Court has jurisdiction over this case under 28 U. S. C. § 2241 (habeas corpus), and § 1331 (federal question).

8. The Court may grant relief pursuant to the U.S. Const., art. I, § 9, cl. 2 (Suspension Clause), 28 U. S. C. § 1651 (All Writs Act), 28 U. S. C. §§ 2201–02 (declaratory relief), and 28 U. S. C. § 2241 (habeas corpus).

VENUE

9. Venue is proper in this district under 28 U. S. C. § 2241 because this is the district where the "the custodian can be reached by service of process." *Rasul* v. *Bush*, 542 U. S. 466, 478–79 (2004).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

10. No exhaustion is statutorily required for the petitioner's habeas claims because "Section 2241 itself does not impose an exhaustion requirement," *Santiago-Lugo* v. *Warden*, 785 F. 3d 467, 474 (CA11 2015)."

11. Exhaustion in the habeas context is at most a "non-jurisdictional," *id.*, at 475, "judicially-created . . . doctrine," *Haitian Refugee Ctr., Inc.* v. *Nelson*, 872 F.2d 1555, 1561 (CA11 1989) (*HRC* v. *Nelson*), aff'd sub nom. *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U. S. 479 (1991), subject to various exceptions. See *Jaimes* v. *United States*, 168 Fed. Appx. 356, 359, n. 4 (CA11 2006) ("judicially-created exhaustion requirements may be waived by the courts for discretionary reasons") (quoting *Gallo Cattle Co.* v. *U. S. Dep't of Agric.*, 159 F. 3d 1194, 1197 (CA9 1998)); *Richardson* v. *Reno*, 162 F. 3d 1338, 1374 (CA11 1998) (*Richardson I*), cert. granted, judgment vacated on other grounds, 526 U.S. 1142 (1999) ("judicially developed exhaustion requirements might be waived for discretionary reasons by courts").[1]

12. For example, "a petitioner need not exhaust his administrative remedies 'where the administrative remedy will not provide relief commensurate with the claim.' " *Boz* v. *United States*, 248 F. 3d 1299, 1300 (CA11 2001), abrogation on other grounds recognized by *Santiago-Lugo*, 785 F. 3d, at 474–75 n. 5 (quoting *HRC* v. *Nelson*, 872 F. 2d, at 1561).

13. **First**, no statute, regulation, or other legal source with binding authority exists to provide the remedy that the petitioner's constitutional claim seeks to remedy.

14. "Because the BIA does not have the power to decide constitutional claims—like

[1] In a revised opinion following remand, the Eleventh Circuit "readopt[ed] and reaffirm[ed] the reasoning in *Richardson I* except to the extent it relied on INA § 242(g) to support its holding." *Richardson* v. *Reno*, 180 F. 3d 1311, 1313 (CA11 1999) (*Richardson II*).

the validity of a federal statute— . . . certain due process claims need not be administratively exhausted." *Warsame* v. *U. S. Att'y Gen.*, 796 Fed. Appx. 993, 1006 (CA11 2020); accord *HRC* v. *Nelson*, 872 F. 2d, at 1561 (exhaustion had "no bearing" where petitioner sought to make a constitutional challenge to procedures adopted by the INS); see also *Matter of Punu*, 22 I. & N. Dec. 224, 229 (BIA 1998) ("this Board cannot entertain constitutional challenges") (citations omitted).

15. The petitioner urgently seeks and is entitled to habeas relief because he has no meaningful opportunity to challenge the constitutionality of his detention through any available administrative process. See *Boumediene* v. *Bush*, 553 U. S. 723, 783 (2008).

16. **Second**, the petitioner's statutory claim challenging the agency's precedent in *Matter of A-W-*, 25 I. & N. Dec. 45 (BIA 2009), is not subject to prudential exhaustion.

17. In addition to the rule that prudential exhaustion is not required " 'where the administrative remedy will not provide relief commensurate with the claim,' " *Boz*, 248 F. 3d, at 1300 (citation omitted), the same is also true where "the nature of [a] challenge [to agency] procedures is such that relief at the administrative review level would [be] unlikely," *HRC* v. *Nelson*, 872 F. 2d, at 1561. This analysis is conducted by balancing the nature of a claim against "[t]he policies advanced by allowing the administrative process to run its full course" to determine whether such policies "are not thwarted by judicial intervention in [a] case." *Haitian Refugee Ctr.* v. *Smith*, 676 F. 2d 1023, 1034 (CA5 Unit B 1982) (*HRC* v. *Smith*) (precedential under *Stein* v. *Reynolds Sec., Inc.*, 667 F. 2d 33, 34 (CA11 1982), disapproved of on other grounds by *Jean v. Nelson*, 727 F. 2d 957, 976, n. 27 (11th Cir. 1984) (en banc).

18. As noted by precedent, "the Supreme Court [has] deemed it insignificant that [an] agency . . . possesse[s] the power to change the content of its procedures and thus could . . . pretermi[t] the necessity for judicial intervention." *HRC* v. *Smith*, 676 F. 2d, at 1034 (citing

Mathews v. *Eldridge*, 424 U. S. 319 (1976)). As "[t]he [Supreme] Court commented: 'It is unrealistic to expect that the [agency head] would consider substantial changes in the current administrative review system at the behest of a single [regulated party] raising a [legal] challenge in an adjudicatory context.' " *Id.*, (quoting *Mathews*, 424 U. S., at 330). In the immigration context, "[an] assumption that the INS or the BIA would . . . substantially revis[e] the procedures established for [a specific] program is equally naive." *Id.*

19. Here, where agency precedent denies the availability of a bond hearing pursuant to 8 U. S. C. § 1226(a) under *Matter of A-W-*, 25 I. & N. Dec. 45 (BIA 2009), the petitioner need not exhaust (and waste time) asking the Board to reverse its existing precedent seeking judicial review — a claim that the Board "would not be required even to consider," *Mathews*, 424 U.S., at 330 — especially where the Board has failed to even consider doing so for several years in the face of a slew of district courts rejecting said precedent. See also, e. g., *Puga* v. *Assistant Field Off. Dir., Krome N. Serv. Processing Ctr.*, No. 25-24535-CIV, 2025 WL 2938369, at *2 (S.D. Fla. Oct. 15, 2025) (not requiring administrative exhaustion in the face of agency precedent denying access to bond hearings).

FACTUAL BACKGROUND

20. The petitioner, David Bader, is a native and citizen of Hungary. (**App.**, Ex. B, p. 2.) He was admitted to the United States as a tourist on April 8, 2010, via use of the Visa Waiver Program pursuant to 8 U. S. C. § 1187(a). (*Id.*)

21. On or about December 12, 2020, Mr. Bader was encountered by immigration authorities following an arrest by local police, and he was taken into immigration custody for several months. (**App.**, Ex. C, pp. 3–8.)

22. While in custody, on or about January 8, 2021, the Department of Homeland Security entered an administrative order of removal against Mr. Bader pursuant to 8 CFR § 217 .4(b)(1). (**App.**, Ex. D, pp. 9–11.)

23. On or about March 31, 2021, the Department released Mr. Bader from its physical custody under an order of supervision pursuant to 8 U. S. C. §§ 1231(a)(3) & (c)(2).

24. On or about July 10, 2023, Mr. Bader filed an application for permanent residence under 8 U. S. C. § 1255(a) using Form I-485 with USCIS based upon his marriage to a U. S. citizen, along with an immigrant visa petition filed by his wife using Form I-130. (**App.**, Ex. F, p. 19.)

25. USCIS scheduled Mr. Bader for an interview on his application for permanent residence at its local Field Office in Oakland Park for December 4, 2025. (**App.**, Ex. F, pp. 19–20.)

26. Mr. Bader attended the interview on his application for permanent residence.

27. That day, USCIS approved the Form I-130 petition filed by Mr. Bader's wife on his behalf. (**App.**, Ex. G, p. 21.)

28. However, Immigration and Customs Enforcement (ICE) arrested Mr. Bader during the interview pursuant to a revocation of his release on supervision and a warrant of arrest. (**App.**, Ex. H, pp. 22–23.)

29. Mr. Bader has been in the respondent's custody since then.

30. On December 11, 2025, USCIS denied Mr. Bader's application for permanent residence as a matter of discretion (**App.**, Ex. I, pp. 24–27) because, among other things, of his "[b]eing apprehended by Immigration and Customs Enforcement (ICE) on December 4, 2025 at the Oaklan Park, Florida Field Office" (*id.*, at p. 25).

31. On January 13, 2026, Mr. Bader delivered a motion to reopen and reconsider the denial of his permanent residence application to USCIS. (**App.**, Ex. J, pp. 28–55 (excerpts of

motion).)

32. On January 3, 2026, Mr. Bader's case for removal was referred to an immigration judge for consideration of an application asylum and related protective relief in a specialized regulatory "asylum-only proceeding." (**App.**, Ex. K, pp. 56–57); see 8 CFR § 1208.2(c)(1)(iii).

33. In such proceedings, agency rules permit the immigration judge to consider only an application for asylum and related protective relief, and no other issue at all. Immigr. Ct. Pract. Manual § 7.4(g)(2) (scope of proceedings), available at https://www.justice.gov/eoir/reference-materials/ic/chapter-7/4 (accessed Dec. 11, 2024).

34. Mr. Bader's asylum only proceeding remains pending before an immigration judge, with the next non-trial master hearing[2] set for February 24, 2026. (**App.**, Ex. K, p. 58.)

35. As long as Mr. Bader remains in the United States, USCIS continues to retain jurisdiction to grant his application for permanent residence because the immigration judge lacks the jurisdiction to do so. See 8 CFR § 245.2(a)(1).

LEGAL BACKGROUND

I. Basics of the Visa Waiver Program.

36. The Visa Waiver Program, codified at 8 U. S. C. § 1187(a), allows nationals of certain designated countries to be admitted to the United States as a tourist under § 1101(a)(15)(B) for a shortened period of 90 days without having to formally obtain a tourist visa through consular processing pursuant to §§ 1201–1202.

37. In exchange for the benefit of a Visa Waiver admission to the United States, a person must, among other things, waive the right "to contest, other than on the basis of an application

[2] See Immigr. Ct. Pract. Manual § 4.15 (master calendar hearing), available at https://www.justice.gov/eoir/reference-materials/ic/chapter-4/15 (accessed Dec. 11, 2024).

for asylum, any action for [their] removal." § 1187(b)(2).

38. As such, an immigration enforcement officer can determine the deportability of a person admitted to the United States under the Visa Waiver Program, and order said person deported without referral to an immigration judge. 8 CFR § 217.4(b)(1).

39. However, a person "who was admitted as a Visa Waiver Program visitor who applies for asylum in the United States must be issued a Form I–863 for a proceeding in accordance with 8 CFR 208.2(c)(1) and (c)(2)." *Id.*

40. In that circumstance, an immigration judge will have exclusive jurisdiction over the person's applications for asylum and other protective relief. §§ 208.2(c)(1)(iv), 1208.2(c)(1)(iv).

41. "The scope of review in" that proceeding is "limited to a determination of whether the [person] is eligible for asylum or withholding or deferral of removal, and whether asylum shall be granted in the exercise of discretion." §§ 208.2(c)(3)(i), 1208.2(c)(3)(i). No other "issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief," will be considered in that proceeding." *Id.*

42. Nothing in the statute or regulations governing the Visa Waiver Program, or the processing of the removal or relief from removal for such persons addresses custody or detention. 8 U. S. C. § 1187, 8 CFR pt. 217, & §§ 208.2(c), 1208.2(c).

43. Custody redetermination proceedings (bond hearings) before immigration judges are separate, apart, and independent from other types of proceedings, and have their own set of rules. 8 CFR §§ 1003.19, 1003.19(d) ("Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding."), & 1236.1(d)(1).

44. Further, all issues regarding custody, arrest, detention, and release in the civil immigration detention context are ultimately governed by statute, notwithstanding any inconsistent regulations or other agency rule to the contrary.

II. Background Constitutional Framework for Civil Immigration Detention.

45. Civil immigration detention is presumptively unconstitutional absent its authorization by a special justification enacted pursuant to an Act of Congress. *Sopo* v. *U. S. Att'y Gen.*, 825 F. 3d 1199, 1210 (CA11 2016) ("Under the Due Process Clause, civil detention is permissible only when there is a 'special justification' that 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.' ") (citation omitted), vacated on mootness grounds, 890 F. 3d 952 (2018).

46. Thus, absent a special statutory justification, civil immigration detention is unlawful and unconstitutional.

47. Further, only criminal detention, following a lawful conviction by jury trial, may be utilized for punitive purposes.

48. Civil detention becomes punitive when it is being used for purposes that are not contemplated within the special statutory justification authorizing its use. See *Bell* v. *Wolfish*, 441 U. S. 520, 539 (1979) ("Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.") (citations and footnotes omitted); *In re Grand Jury Proc.*, 877 F. 2d 849, 850 (CA11 1989) ("Civil contempt is a coercive device imposed to secure compliance with a court order and

if the circumstances illustrate that the sanction will not compel compliance, it becomes punishment and violates due process.") (citation omitted); *Lynch* v. *Baxley*, 744 F. 2d 1452, 1463 (CA11 1984) ("A court must decide whether the restriction is imposed to punish or whether it is simply an incident of legitimate governmental purpose. . . . Absent an express intent to punish, that determination will turn on whether the restriction appears excessive in relation to the alternative purpose assigned to it. . . . If a restriction is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court may infer that the purpose of the government action is punishment.") (citations omitted); *United States* v. *Vasquez-Escobar*, 30 F. Supp. 2d 1364, 1365 (M.D. Fla. 1998) (ruling that improper use of civil immigration detention was unconstitutionally punitive).

49. Thus, where civil immigration detention becomes punitive in its nature, it has become unlawful and unconstitutional.

50. In sum, civil immigration detention is lawful only when: (1) it is being administered in accordance with the terms of duly enacted statutes; (2) which are based upon a special justification that outweighs the deprivation of liberty at stake; and (3) it is being carried out in a manner that is consistent with and reasonably related to that special statutory justification.

CLAIMS FOR RELIEF

COUNT I:
Civil Immigration Detention in Violation of Statutory Law

51. The allegations in paragraphs 1-50 are realleged and incorporated herein.

52. No immigration statute aside from 8 U. S. C. § 1226(a) authorizes the petitioner's ongoing and continued civil immigration detention.

53. And yet, the government's administrative precedent denies the petitioner his right to pursue release from custody before an immigration judge as guaranteed by him under

§ 1226(a)(2) and its implementing regulations which are consistent with the statute and due process.

54. As such, the petitioner's ongoing and continued civil immigration detention is unlawful.

55. Therefore, the petitioner is entitled to a writ of habeas corpus ordering: (1) that he be immediately released from the respondent's custody; or (2) that he be immediately given a custody redetermination before an immigration with adequate procedural safeguards, including but not limited to, (a) the placement of the burden of proof upon the government to demonstrate by clear and convincing evidence that the petitioner is a danger or a flight risk, and (b) a prohibition against the government from seeking a stay of the immigration judge's custody order either automatically, on an emergency basis, or otherwise without a meaningful opportunity for the petitioner to respond and be heard.

COUNT II:
Civil Immigration Detention in Violation of Due Process

56. The allegations in paragraphs 1-50 are realleged and incorporated herein.

57. Alternatively, to the extent the immigration agencies are constitutionally and lawfully permitted to create mandatory detention rules in the absence of a Congressionally enacted statute requiring such mandatory detention, the BIA's rule in *Matter of A-W-*, 25 I. & N. Dec. 45 (BIA 2009), is not premised upon a special justification that outweighs the deprivation of liberty at stake.

58. Further, the BIA's rule of mandatory detention in *Matter of A-W-* is not reasonably related to any legitimate government objective because it is arbitrary or purposeless.

59. As such, the petitioner's subjection to mandatory detention under *Matter of A-W-* violates constitutional due process.

60. Therefore, the petitioner is entitled to a writ of habeas corpus ordering: (1) that he be immediately released from the respondent's custody; or (2) that he be immediately given a custody redetermination hearing before an immigration with adequate procedural safeguards, including but not limited to, (a) the placement of the burden of proof upon the government to demonstrate by clear and convincing evidence that the petitioner is a danger or a flight risk, and (b) a prohibition against the government from seeking a stay of the immigration judge's custody order either automatically, on an emergency basis, or otherwise without a meaningful opportunity for the petitioner to respond and be heard.

PRAYER FOR RELIEF

WHEREFORE, the petitioner prays that the Court grant the following relief:

(a) Assume jurisdiction over this matter;

(b) Set this matter for expedited consideration pursuant to 28 U.S.C. § 1657;

(c) Order the respondents to show cause why the writ should not be granted within three days, and allowing the petitioner three days to file a traverse, and, if necessary, set a hearing on this petition within five days of the submission of the return, pursuant to 28 U. S. C. § 2243;

(d) Order the respondents to refrain from transferring the petitioner out of the jurisdiction of this Court during the pendency of this proceeding and while the petitioner remains in the respondents' custody;

(e) Grant the petitioner a writ of habeas corpus ordering his immediate release from the respondents' custody because that custody has become unconstitutionally punitive;

(f) Alternatively, grant the petitioner a writ of habeas corpus ordering that the petitioner be immediately given a custody redetermination hearing before an immigration judge

with adequate procedural safeguards, including but not limited to: (i) the placement of the burden of proof upon the government to demonstrate by clear and convincing evidence that the petitioner is a danger or a flight risk, and (ii) a prohibition against the government from seeking a stay of the immigration judge's custody order either automatically, on an emergency basis, or otherwise without a meaningful opportunity for the petitioner to respond and be heard;

(g) Award Petitioner attorneys' fees and costs under the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 2412, and on any other basis justified under law; and

(h) Grant any other and further relief that the Court deems just and proper.

Dated: January 27, 2026

s/ Mark A. Prada
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VERIFICATION BY SOMEONE ACTING ON THE PETITIONER'S BEHALF PURSUANT TO 28 U.S.C. § 2242

I, Mark A. Prada, am submitting this verification on behalf of the petitioner because I am the petitioner's attorney in these proceedings. Based upon a review of the administrative record, discussions with the petitioner's other attorney, and/or discussions with the petitioner, I hereby verify that the statements made in the foregoing Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated: January 27, 2026

s/ Mark A. Prada
Fla. Bar No. 91997