

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 26-20537**

DAVID BADER,

Petitioner,

v.

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

Respondent.

_____ /

RESPONDENT'S RESPONSE TO ORDER TO SHOW CAUSE

Respondent Field Office Director, Miami Field Office, U.S. Immigration and Customs Enforcement, respectfully submits this response to the Court's Order to Show Cause (ECF No. 6) why the Petition should not be granted.

INTRODUCTION

Petitioner David Bader, a Hungarian citizen, was admitted to the United States as a tourist pursuant to the Visa Waiver Program in accordance with 8 U. S. C. § 1187(a). Petition at ¶¶ 1, 20. Petitioner overstayed his tourist visa. On January 8, 2021, the Department of Homeland Security entered an administrative order of removal against him pursuant to 8 CFR § 217.4(b)(1), but released him from custody under an order of supervision pursuant to U. S. C. §§ 1231(a)(3) & (c)(2). *Id.* at ¶¶ 22-23.

In July of 2023, Petitioner applied with United States Citizenship and Immigration Services for permanent residence under 8 U. S. C. § 1255(a) based upon his marriage to a U. S. citizen. *Id.* at ¶ 24. On December 4, 2025, when Petitioner attended the interview with USCIS

on his application for permanent resident status, ICE executed a warrant for his arrest and revoked his release on supervision. *Id.* at ¶ 28. Petitioner has remained in ICE custody since. USCIS subsequently denied Petitioner's application for permanent residence. *Id.* at ¶ 30. Petitioner has moved to reopen his application to USCIS for permanent residence. *Id.* at ¶ 31. He has also applied for asylum and his case is pending before an Immigration Judge in what is known as an "asylum-only" proceeding. *Id.* at ¶ 33.

Petitioner argues that he must be provided a bond hearing pursuant to 8 U.S.C. § 1226(a), which he contends is the only statute authorizing his detention. *See* Petition at Count I. Petitioner also argues that his detention without the possibility of release on bond violate his constitutional due process rights. *Id.* at Count II. Petitioner demands either his immediate release or a custody redetermination hearing before an Immigration Judge. *Id.* at p. 12. As explained below, Petitioner is not entitled to the relief he seeks.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Unless otherwise indicated, the following information is provided by Immigration and Customs Enforcement Deportation Officer Joseph Delgado in the Declaration attached hereto as Exhibit K. Petitioner David Bader is a native and citizen of Hungary who last entered the United States on April 8, 2010, as a nonimmigrant waiver-tourist ("WT") through the Visa Waiver Program ("VWP"). *See* Exhibit A, Form I-213, Record of Deportable/Inadmissible Alien, dated December 12, 2020. He was authorized to remain in the United States until July 8, 2010. *Id.*

On December 12, 2020, Petitioner was initially encountered at the Duval County Pre-Trial Detention Facility by Jacksonville, Florida 287(g), Designated Immigration Officers ("DIO"), after Petitioner was arrested for the misdemeanor offenses of possession of not more than 20 grams of marijuana and no valid driver's license. *See* Exhibit A, Form I-213. These

charges were later dismissed. *Id.* Petitioner provided a foreign birthplace and was unable to provide any information or documents to reflect legal status. *Id.*

On January 8, 2021, Petitioner was transferred to the custody of U.S. Immigration and Customs Enforcement (“ICE”). *See* Exhibit B, Detention History. On that same date, Petitioner was issued a Notice of Intent to Issue a Final Administrative Order charging Petitioner with inadmissibility pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act (“Act”), in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, Petitioner remained in the United States for a time longer than permitted, in violation of the Act or any other law of the United States. *See* Exhibit C, ICE Form 71-058, Visa Waiver Program (VWP) Notice of Intent to Issue a Final Administrative Order, dated January 8, 2021.

On January 8, 2021, Petitioner was also served with a Final Administrative Removal Order, finding Petitioner to be a Visa Waiver Program Violator. *See* Exhibit D, ICE Form 71-060, Visa Waiver Program (VWP) Final Administrative Removal Order, dated January 8, 2021. On that same date, Petitioner was served a notice that he was prohibited from entering, attempting to enter, or being in the United States for a period of 10 years from the date of his departure. *See* Exhibit E, ICE Form 71-061, Visa Waiver Program (VWP) Notice to Alien Ordered Removed/Departure Verification, dated January 7, 2021.

On March 31, 2021, Petitioner was released from ICE custody with an Order of Supervision. *See* Exhibit B, Detention History.

On December 4, 2025, ICE Enforcement and Removal Operations (“ERO”) encountered Petitioner at the U.S. Citizenship and Immigration Services (“USCIS”) Oakland Field Office. *See* Exhibit F, Form I-213, Record of Deportable/Inadmissible Alien, dated December 4, 2025. On that same date, a Deportation Officer (“DO”) conducted an informal interview with

Petitioner. *Id.* The DO informed Petitioner that his Order of Supervision had been revoked to affect his removal from the United States. On that same day, Petitioner was served his Notice of Revocation of Release. *See* Exhibit G, Notice of Revocation of Release, dated December 4, 2025. On December 4, 2025, Petitioner was also issued a Warrant for Arrest. *See* Exhibit H, Form I-200, Warrant for Arrest of Alien, dated December 4, 2025.

On January 3, 2026, Petitioner requested a hearing before the Immigration Court pursuant to 8 CFR § 208.2(c). *See* Exhibit I, Form I-863, Notice of Referral to Immigration Judge.

Petitioner is in asylum-only proceedings and next scheduled for a hearing before the Immigration Court on February 24, 2026. *See* Exhibit J, Notice of Hearing, dated January 21, 2026.

Petitioner remains in ICE custody at the Krome North Service Processing Center (“Krome”). *See* Exhibit C, Detention History.

On January 27, 2026, Petitioner filed this habeas petition, challenging his continued detention. Petitioner is a VWP violator properly detained pursuant to section 217(c)(2)(E) of the Act.

ARGUMENT

Title 28 U.S.C. § 2241 grants federal courts the authority to issue writs of habeas corpus whenever an individual is “[i]n custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). Section 2241 is the proper vehicle through which to challenge the constitutionality of a non-citizen's detention without bail. *Demore v. Kim*, 538 U.S. 510, 516-17 (2003).

A. The Visa Waiver Program and *Matter of A-W-*, 25 I&N Dec. 45, 47 (BIA 2009).

Under 8 U.S.C. § 1187, a qualifying visitor may enter the United States without obtaining a visa, so long as a variety of statutory and regulatory requirements are met. Once admitted under the VWP, a visitor may remain in the United States for 90 days. § 1187(a)(1). A VWP visitor is subject to numerous restrictions, including waiver of any right to contest the government's admissibility determinations and removal actions, except that the individual may contest removal actions on the basis of asylum. § 1187(b). A VWP applicant must, prior to admission, present U.S. officers with a completed, signed Form I-94W expressly waiving, the "right . . . to contest, other than on the basis of an application for asylum, any action for removal of the alien." § 1187(b)(2); *Bradley v. Att'y Gen. of U.S.*, 603 F.3d 235, 238-39 (3d Cir. 2010). Additionally, a VWP entrant's removal "shall be determined by the district director who has jurisdiction over the place where the alien is found, and shall be effected without referral of the alien to an immigration judge for a determination of deportability." 8 C.F.R. § 217.4(b). *See also Bradley*, 603 F.3d at 238-39.

Under § 1187(c)(2)(E), the Department of Homeland Security ("DHS") has authority to detain aliens subject to the VWP. *See Matter of A-W-*, 25 I&N Dec. 45, 47 (BIA 2009). In *A-W-*, the Board of Immigration Appeals ("BIA") explained that "Immigration Judges have only been granted authority to redetermine the conditions of custody of aliens who have been issued and served with a Notice to Appear in relation to removal proceedings pursuant to 8 C.F.R. Part 1240" governing removal proceedings *Id.* at 46-47. Immigration judges only have the authority to consider matters delegated to them by the Attorney General and the Immigration and Nationality Act, and the BIA stated that because the Attorney General no longer has authority over bond proceedings relating to noncitizens who have been admitted through the VWP, the

Attorney General cannot delegate such authority to an immigration judge. *Id.* at 48; 8 C.F.R. § 1003.10(b).

Some courts have recognized the authority under § 1187 to detain individuals who entered through the VWP and stayed more than 90 days, while other courts have rejected *A-W-* and concluded that § 1187 does not provide for detention of these individuals without a bond hearing. For example, in *Kim v. Obama*, No. 12-cv-173, 2012 WL 10862140, at *2 (W.D. Tex. July 10, 2012), the court explained that “VWP entrants are not entitled to a bond redetermination proceeding before an Immigration Judge.” In contrast, in *Gjergj G. v. Edwards*, No. 19-cv-5059, 2019 WL 1254561 (D.N.J. Mar. 18, 2019), the court held that § 1187(c)(2)(E) “contains no language which expressly authorizes the detention of VWP aliens sufficient to support the BIA’s conclusion that the statute provides authority for the detention of VWP aliens independent of the general authority to detain aliens pending removal pursuant to 8 U.S.C. § 1226. *Id.* (ordering a bond hearing and quoting *Szentkiralyi v. Ahrendt*, No. 17-cv-1889, 2017 WL 3477739, at *2 (D.N.J. Aug. 14, 2017)) (internal quotations omitted); *see also Kleinauskaite v. Doll*, No. 17-cv-2176, 2018 WL 6112482, at *6-10 (M.D. Pa. Oct. 9, 2018) (analyzing *A-W-* and various cases). However, these cases are from other district courts and not binding on this Court.

Respondents are bound by decisions of the BIA under 8 C.F.R. § 1003.1(g)(1) (“Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States.”). Accordingly, Respondents maintain that under *A-W-*, Petitioner is subject to detention without bond.

B. 8 U.S.C. § 1226(a) and Due Process

Petitioner argues he is being detained under 8 U.S.C. § 1226(a), which provides:

(a) Arrest, detention, and release. 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. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an “employment authorized” endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

8 U.S.C. § 1226(a).

Section 1226 “authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings.” *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). Non-criminal aliens in removal proceedings are typically entitled to a bond hearing. *France v. Ripa*, No 24-cv-24333, 2025 WL 973532, at *3 (S.D. Fla. Apr. 1, 2025); *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 574 (2022) (assuming without deciding that § 1226(a) might be read to require a bond hearing). However, as Petitioner is not in removal proceedings under a Notice to Appeal (he is in asylum-only proceedings and subject to an administrative order of removal), section 1226 does not currently apply.

The Fifth Amendment provides that “[n]o person shall be ... deprived of life, liberty, or property, without due process of law.” U.S. Const. am. V. The Fifth Amendment applies to aliens facing deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). Detaining a VWP violator without a bond hearing does not necessarily amount to a due process violation. *See Hodge v. Barr*, No. 19-cv-6630, 2020 WL 210063, at *4 (W.D.N.Y. Jan. 14, 2020). In *Hodge*, the

petitioner had violated the VWP, and ICE detained him under § 1187 without a hearing. *Id.* The court noted that it was “an unsettled question” whether § 1187 or § 1226 authorized this type of detention, but proceeded to analyze whether the detention violated the petitioner’s due process rights and concluded it had not. *Id.* The court reasoned that the detention had lasted less than 12 months and that if the petitioner’s asylum application was denied, there did not appear to be any barriers to his deportation. *Id.* Thus, the Court held that “[t]he totality of the circumstances leads the Court to conclude that his detention without a bond hearing has not crossed the line into a due process rights violation at this time.” *Id.* Here, Petitioner is in a similar situation to the petitioner in *Hodge*, as he is subject to the VWP provisions, has been detained approximately two months, and is in asylum-only proceedings. Thus, his continued detention does not amount to a Fifth Amendment violation.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court dismiss Petitioner’s Petition and deny all relief sought in the Petition.

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