



U.S. Department of Justice

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By ECF

Honorable Orelia E. Merchant
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

June 4, 2026

Re: *D.D.T. v. Maldonado*, No. 26-cv-3245 (Merchant, J.)

Dear Judge Merchant:

This Office represents Respondents in this habeas case in which Petitioner D.D.T. filed a petition for a writ of habeas corpus on May 29, 2026 challenging his detention by U.S. Immigration and Customs Enforcement ("ICE"). *See* ECF No. 1. As set forth below, Petitioner is properly detained pursuant to 8 U.S.C. § 1226(a) and the Petition should be denied.

I. Relevant Facts

Petitioner, a national of Mali, unlawfully entered the United States in November 2023 near San Ysidro, California. *See* Declaration of Mincheol So ("Decl.") ¶ 3. Petitioner was encountered by United States Customs and Border Protection ("CBP"), who determined that Petitioner had not lawfully entered the United States and took him into custody. *Id.* Petitioner provided CBP with a birth certificate reflecting a 2004 date of birth, meaning that he was 19 at the time. *Id.* Petitioner was placed in removal proceedings and released from ICE custody on an order of recognizance due to lack of bed space. *Id.* ¶¶ 4-5.

In April 2024, Petitioner's counsel raised concerns with the Immigration Court that Petitioner was under the age of 18. *Id.* ¶ 6. In August 2024, Petitioner's attorney provided ICE with a second birth certificate which, unlike the birth certificate Petitioner originally provided to CBP, listed Petitioner's birth year as 2009, rather than 2004. *Compare id.* ¶ 7, Ex. E, with *id.* ¶ 20, Ex. N. Based on this new document, Petitioner was deemed to be an Unaccompanied Alien Child ("UAC"), and on August 28, 2024, Petitioner was referred to the Department of Health and Human Services ("HHS"), pursuant to 8 U.S.C. § 1232(b)(3). *Id.* ¶ 8-9. On August 28, 2024, Petitioner was placed in the custody of the Office of Refugee Resettlement ("ORR"), a division of HHS, pursuant to 8 U.S.C. § 1232(b)(3). *Id.* ¶ 10.

On April 14, 2025, Petitioner filed an application for relief from removal with U.S. Citizen and Immigration Services ("USCIS"). *Id.* ¶ 13. On July 16, 2025, the Immigration Judge ordered Petitioner's case to be administratively closed pending the adjudication of the application for relief from removal pending with USCIS. *Id.* ¶ 14.

In August 2025, Petitioner, still in ORR custody, was transferred to the Children's Home of Poughkeepsie - Nuevas Alas Shelter, an ORR-funded care provider located in New York, NY. *Id.* ¶ 12. On April 3, 2026, the director of this ORR-funded care provider informed ICE that there

was evidence that Petitioner was an adult and not a minor. *Id.* ¶ 15. In particular, ORR provided ICE with an Age Re-Determination Memorandum reflecting that ORR had determined that Petitioner was an adult with a date of birth in 2004. *Id.*, Ex. F. The Memorandum relied on a communication from the Mali Consulate confirming Petitioner's 2004 birth date, *id.*, Ex. G, as well as a dental age assessment report completed on February 2, 2026, *id.*, Ex. H. ORR further requested an immediate transfer of Petitioner from ORR custody to DHS, as Petitioner was confirmed to be an adult. *Id.*

On April 7, 2026, ICE arrested Petitioner pursuant to a Form I-200, Warrant for Arrest of Alien, at the Children's Home of Poughkeepsie. *Id.* ¶ 16, Exs. I-J. ICE also prepared a Form I-286 custody determination form on April 7, 2026 reflecting that Petitioner would be detained. *Id.* Ex. K. ICE also prepared a custody determination worksheet. *Id.*, Ex. L. At the time, ICE detained petitioner pursuant to 8 U.S.C. § 1225(b)(2)(A). *Id.* ¶ 16.

On April 23, 2026, USCIS denied Petitioner's application for relief from removal and referred the application to EOIR to adjudicate in immigration proceedings. ICE then twice filed motions to recalendar the removal proceedings, with proceedings ultimately recalendared on June 3, 2026. *See id.* ¶¶ 18, 20.

On May 12, 2026, after ICE conducted a review of custody determination forms following the Second Circuit's decision in *Barbosa da Cunha v. Freden*, No. 25-3141, 2026 WL 1146044 (2d Cir. April 28, 2026), ICE conducted an individualized custody determination with respect to Petitioner under 8 U.S.C. § 1226(a). Decl., ¶ 19, Ex. M.

Petitioner is currently being detained by ICE under 8 U.S.C. § 1226(a). *Id.* ¶ 22. A bond hearing has been scheduled for June 9, 2026 at 10:00 a.m. *Id.* ¶ 21.

II. Habeas Petition

Petitioner, through counsel, commenced this action on May 29, 2026. ECF No. 1. While claiming to not know his actual age, Petitioner acknowledges that "Malian authorities have issued him two birth certificates with different dates of birth." Pet. at 1, n.1. He states that he is either "under 18" or "over 18." *Id.* at 2. If he is under 18, then 8 U.S.C. § 1232—part of the Trafficking Victims Protection Reauthorization Act ("TVPRA")—requires that he be in ORR, not DHS, custody, as unaccompanied alien child ("UAC"). Alternatively, Petitioner argues that if he is now over 18, then 8 U.S.C. § 1232, which has protections for who were originally under 18 when in ORR custody (and thus, UACs) but who subsequently "age out"—required DHS to "consider placement in the least restrictive setting after taking into account [his] danger to self, danger to the community, and risk of flight" when Petitioner was transferred out of custody for UACs in April 2026. *Id.*

However, while Petitioner references two Malian birth certificates with two different dates of birth, and he asserts that one of the birth certificates shows that he "turned 18 recently," Pet. ¶ 16, he notably omits mention of what those two dates of birth are and what he means by "recently." Thus, he offers no factual basis in the Petition for his contention that his detention violates 8 U.S.C. § 1232 because he is either under 18 or, alternatively, was under 18 (and thus a UAC) when he first came to the U.S. in November 2023.

To the contrary, the evidence reflects that Petitioner is now over 21 years old, that he was over 19 when he first came to the United States in November 2023, and thus, that he is not now and has never been a UAC within the meaning of the TVPRA. *See* Decl., ¶ 15, Ex. F-H.

III. Argument

A. ICE Has Properly Relied on ORR's Determination That Petitioner Is 21 Years Old and Thus Is Not, and Never Has Been, a UAC Within the Meaning of the TVPRA

As set forth below, Petitioner – who is currently 21 years old, and who was 19 years old when he was first apprehended after unlawfully crossing the border in November 2023 – is properly being detained pursuant to 8 U.S.C. §1226(a). Because he is an adult and was an adult the entire time he was in DHS and ORR custody, the procedures applicable to minors in Department of Homeland Security custody by virtue of the TVPRA are inapplicable to him.

In 2008, the TVPRA codified certain protections related to the custody of UACs. A UAC is defined as an individual who “has no lawful immigration status in the United States;” . . . “has not attained 18 years of age”; and “with respect to whom . . . there is no parent or legal guardian in the United States” or “no parent or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C. § 279 (g).

Congress required that “[e]xcept in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of [HHS] not later than 72 hours after determining that such child is a [UAC].” 8 U.S.C. § 1232(b)(3); *see also* 1232(b)(1). Thus, the TVPRA requires that all UACs in DHS custody be transferred to HHS, and that HHS provide for them so long as they remain in custody. 8 U.S.C. § 1232(c)(2)(B) further provides for a consideration of the least restrictive setting for a UAC.

Importantly for this matter, these provisions do not apply to adult aliens who have already reached adulthood at the time they are first encountered by immigration officials. *See* 6 U.S.C. § 279(g)(2) (UAC status dependent on alien being under 18 years of age). Those individuals are not UACs under the plain meaning of the statute.

Pursuant to the TVPRA, ORR has developed procedures for determining the age of individuals in its custody if ORR suspects that an individual may be 18 or older and thus not a UAC. ORR “considers multiple forms of evidence in making age determinations . . . based upon the totality of evidence.” *See* ORR Unaccompanied Alien Children Bureau Policy Guide, Section 1.6.2, available at <https://acf.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1>. This includes “[o]fficial government-issued documents, including birth certificates” as well as “consult[ation] with the consulate or embassy of the individual’s country of birth.” *Id.* ORR also considers “Medical Age Assessments,” such as dental maturity assessments, in conjunction with other evidence. *Id.* ORR prepares a memorandum documenting its review. *Id.* “If ORR reasonably concludes that an individual is an adult, despite the individual’s claim to be under the age of 18, ORR treats such person as an adult for all purposes.” *Id.* HHS will then coordinate to “transfer the individual out of ORR custody.” *Id.*

Here, consistent with the above-described process, ORR has determined that, contrary to his more recent assertions through counsel, Petitioner was in fact 19 years old when he was first encountered in the United States in 2023. ORR reached this determination based on confirmation from the Mali Consulate, which confirmed via email that Petitioner's correct date of birth was in 2004, as well as a dental maturity assessment conducted by a dentist. *See* Decl. ¶ 15, Ex. F-H. Thus, ICE properly concluded that it has the authority to detain Petitioner as an adult, as Petitioner is not, and has never been, a UAC entitled to additional procedures.

B. Petitioner Is Only Entitled to the Procedures Available Under 8 U.S.C. § 1226(a) and Has Not Availed Himself of Those Procedures

In *da Cunha*, the Second Circuit held that 8 U.S.C. § 1226(a) “applies to noncitizens, like Petitioner, who are present in the United States, but charged as inadmissible for entering the country without inspection and admission.” *See* 2026 WL 1146044, at *5. The Second Circuit also held that 8 U.S.C. § 1225(b)(2)(A) “applies only to (1) noncitizens who are present and have not been admitted, and (2) are requesting (3) lawful entry into the United States after inspection and authorization.” *Id.* at *6. Though Respondents disagree with *da Cunha* and reserve all appeal rights in that case and here, Respondents recognize that *da Cunha* presently controls in this Circuit.

Under *da Cunha*, Petitioner is subject to the detention authority of § 1226(a). In light of that, on May 12, 2026, ICE made a custody determination for Petitioner under § 1226(a) and 8 C.F.R. § 236.1(c)(8). Decl., ¶ 19, Ex. M. ICE determined that Petitioner did not establish that he was not a flight risk in light of his lack of community ties. *Id.* Thus, ICE determined that Petitioner was properly detained under § 1226(a). *Id.*

Under § 1226(a), the Government may arrest and detain an alien during his removal proceedings or release him on bond or conditional parole. Section 1226(a) provides, in relevant part, 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. 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;

8 U.S.C. § 1226(a). By regulation, immigration officers conduct custodial determinations and may release aliens if the alien meets his burden of showing that he “would not pose a danger to property or persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8), (d)(1); *see Hamilton v. Shanahan*, No. 09-cv-6869, 2009 WL 5173927, at *2 (recognizing that the alien bears the burden of proof).

Once ICE makes the individualized custody determination, 8 U.S.C. § 1226(e) jurisdictionally bars courts from reviewing that determination. Section 1226(e) provides that “[ICE]’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by [ICE] under this section regarding the detention of any [noncitizen] or the revocation or denial of bond or parole.” 8 U.S.C. § 1226(e). Thus, “[a] district court has no authority to review ICE’s discretionary determinations made under [Section 1226] or otherwise question their propriety.” *Fontanelli, as Next Friend of Bernal Garcia v. Francis*, No. 26-cv-07715 (JLR), 2025 WL 2773234, at *4 (S.D.N.Y. Sept. 29, 2025) (citing 8 U.S.C. § 1226(e)).

After ICE makes the initial custody determination, the alien detained under Section 1226(a) has yet more process available. He can request a custody redetermination (*i.e.*, a bond hearing) by an immigration judge (“IJ”) at any time before a final order of removal is issued. *See* 8 C.F.R. § 236.1(d)(1). Under 8 C.F.R. § 1003.19(h)(3), an alien may seek a redetermination of custody conditions set by ICE before an IJ must “first demonstrate, by clear and convincing evidence, that release would not pose a danger to other persons or to property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding or interview.” *See Hylton v. Shanahan*, 2015 WL 3604328 (S.D.N.Y. June 9, 2015) (declining to shift burden of proof onto government in a bond hearing in immigration court where respondent was detained under § 1226(a)). If dissatisfied with the IJ decision, the alien can seek review by the Board of Immigration Appeals (“BIA”). *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(F), 1003.38, 1236.1(d)(3); *see also Monterosa v. Decker*, No. 20-cv-02653, 2020 WL 1847771, at *3 (S.D.N.Y. Apr. 11, 2020) (“After ICE makes an initial detention decision, any person who is detained has the right to request a bond hearing before an [IJ]”).

Here, after *da Cunha* rendered Petitioner subject to § 1226(a), Petitioner received the process that the statute and its implementing regulations provide. *See* Decl., ¶ 19, Ex. M. To the extent that Petitioner has recourse, it is not judicial, but administrative, before an IJ. Notably, a bond hearing is scheduled for June 9, 2026 at 10:00 a.m.

Accordingly, Respondents respectfully request that the Petition be denied. Thank you for the Court’s time and attention to this matter.

Respectfully submitted,

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