

Donovan J Dunnion
Law Office of Donovan J Dunnion
600 West Broadway, Suite 700
San Diego, CA 92101
(619)231-8688

Attorney for Petitioner
Nester Paul Hernandez-Morales

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

) Case No. '25CV2551 BJC MMP

NESTOR PAUL HERNANDEZ-
MORALES,

Petitioner,

v.

PAM BONDI, Attorney General of the
United States, in her official capacity;
KRISTI NOEM, Secretary of the U.S.
Department of Homeland Security, in her
official capacity; TODD LYONS, Acting
Director of U.S. Immigration and Customs
Enforcement, in his official capacity;
PATRICK DIVVER, ICE Field Office
Director for San Diego County, in his
official capacity.

Respondents.

) PETITION FOR WRIT OF
) HABEAS CORPUS AND
) COMPLAINT FOR
) DECLARATORY AND
) INJUNCTIVE RELIEF

INTRODUCTION

1. Petitioner NESTOR PAUL HERNANDEZ-MORALES (“Petitioner”) is a native and citizen of El Salvador who has lived in the United States for more than twenty years. He is married to a U.S.-citizen spouse, serves as the primary caregiver for his disabled wife and his five-year-old U.S.-citizen grandson diagnosed with Level-3 autism, and has no criminal record.

2. Petitioner is currently detained by U.S. Immigration and Customs Enforcement (ICE) at the Otay Mesa Detention Center in San Diego County, California.

3. On June 20, 2025, Petitioner—through counsel—filed a Motion to Reopen his removal proceedings before the Board of Immigration Appeals (BIA), presenting:

(a) statutory eligibility for cancellation of removal under 8 U.S.C. § 1229b(b) based on more than two decades of residence and exceptional hardship to his U.S.-citizen family;

(b) eligibility for adjustment of status based on an approved I-130 visa petition filed by his U.S.-citizen wife and a pending Parole-in-Place application filed by his active-duty-military U.S.-citizen stepson; and

(c) new, previously unavailable evidence of materially changed country conditions in El Salvador, including the ongoing nationwide “State of Exception,” under which individuals with tattoos are routinely detained, tortured, or killed.

4. On June 23, 2025, the BIA summarily denied Petitioner’s request for an administrative stay of removal without addressing the merits of the motion to reopen. The motion to reopen itself remains pending.

1 5. Petitioner then filed a protective petition for review and motion for stay in the
2 Ninth Circuit. On September 24, 2025, the Ninth Circuit dismissed the petition as
3 premature and lifted its temporary stay of removal, explaining that Petitioner may
4 file a new petition for review within thirty days of any future BIA merits decision.
5 No stay of removal now exists.
6

7 6. DHS has indicated its intent to execute Petitioner's 2012 removal order
8 imminently—before the BIA rules—threatening to moot the pending statutory
9 motion to reopen and to deprive both the Board and the Ninth Circuit of
10 jurisdiction to adjudicate the merits.
11

12 7. Removal at this stage would inflict irreparable injury: Petitioner faces a
13 substantial risk of arbitrary detention, torture, or death if returned to El Salvador
14 under the current “State of Exception,” and his disabled U.S.-citizen wife and
15 autistic grandson would be left without their sole caregiver and financial support.
16

17 8. Petitioner therefore brings this Petition for Writ of Habeas Corpus under 28
18 U.S.C. §§ 2241 & 2243 and Complaint for Declaratory and Injunctive Relief under
19 28 U.S.C. § 1331 and 5 U.S.C. §§ 702 & 705, seeking a narrowly tailored order
20 preserving the *status quo*:

21 1. barring removal until the BIA rules on the pending motion to reopen;

22 2. if the motion is denied, preserving the stay for seven days thereafter to permit
23 the timely filing of a petition for review and stay motion in the Ninth Circuit; and
24

25 3. Enjoin Respondents from transferring Petitioner out of the Southern District
26 of California or otherwise taking any action to remove him from this Court's
27 jurisdiction during the pendency of this action.
28

///

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. §§ 2241(c)(3) and 2243 because Petitioner is in custody within the Southern District of California and challenges the legality of that custody and the imminent execution of a removal order. If carried out now, removal would nullify Petitioner's pending statutory motion to reopen and defeat congressionally prescribed procedures for adjudication and judicial review.

10. Jurisdiction also lies under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. §§ 702 and 705, because Petitioner seeks declaratory and injunctive relief to prevent agency action—namely, DHS's plan to remove him before the Board of Immigration Appeals rules on his motion to reopen—that is arbitrary, capricious, contrary to law, and unconstitutional.

11. Statutory channeling provisions such as 8 U.S.C. §§ 1252(b)(9), 1252(f)(1), and 1252(g) do not strip this Court of jurisdiction over Petitioner's individual, process-based challenge to imminent removal. See *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011) (habeas jurisdiction lies to prevent removal that would moot a pending motion to reopen); *Jennings v. Rodriguez*, 583 U.S. 281, 290 (2018) (§ 1252(b)(9) does not subsume detention challenges); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (§ 1252(g) applies only to commencement, adjudication, or execution of removal); *Hernandez v. Sessions*, 872 F.3d 976, 988 n.9 (9th Cir. 2017) (§ 1252(f)(1) does not bar individual injunctive relief).

12. Venue is proper in this District under 28 U.S.C. § 1391(e) because Petitioner is detained at the Otay Mesa Detention Center in San Diego County and

1 his immediate custodian resides here.

2 PARTIES

3
4 13. Petitioner Nestor Paul Hernandez-Morales (A# ) is a native and
5 citizen of El Salvador who has resided in the United States for more than twenty
6 years. He is presently detained by U.S. Immigration and Customs Enforcement
7 (ICE) at the Otay Mesa Detention Center in San Diego County, California.

8
9 14. Respondent Pam Bondi is the Attorney General of the United States and is
10 sued in her official capacity as the head of the Department of Justice. The Attorney
11 General is responsible for the fair administration of the laws of the United States.

12 15. Kristi Noem, Secretary of the U.S. Department of Homeland Security
13 (DHS), is sued in his official capacity as the Cabinet official charged with
14 administration and enforcement of the immigration laws, including custody and
15 release authority. See 8 U.S.C. § 1103(a).

16
17 16. Respondent Todd Lyons, Acting Director of U.S. Immigration and Customs
18 Enforcement (ICE), is sued in his official capacity as the DHS component head
19 responsible for the detention, transportation, and removal of non-citizens and for
20 the operational execution of removal orders.

21 17. Patrick Divver is the Immigration and Customs Enforcement Field Office
22 Director for San Diego County, including the Otay Mesa detention facility and is
23 sued in his official capacity.

24 LEGAL BACKGROUND

25
26 18. Removal orders under the Immigration and Nationality Act (INA) are
27 subject to a defined system of administrative and judicial review. Congress has
28 provided that non-citizens may seek reopening of removal proceedings when new

1 facts or materially changed country conditions arise, and courts of appeals retain
2 jurisdiction to review final decisions of the Board of Immigration Appeals (BIA).
3 This case concerns the preservation of that congressionally mandated review
4 process.

5
6 19. Congress enacted a statutory motion-to-reopen procedure, 8 U.S.C. §
7 1229a(c)(7), to ensure that non-citizens may present new evidence—including
8 evidence of materially changed country conditions—that was unavailable at the
9 time of the original removal hearing. This safeguard reflects Congress’s intent to
10 allow individualized reassessment when circumstances evolve.

11
12 20. Congress enacted a statutory motion-to-reopen procedure, 8 U.S.C. §
13 1229a(c)(7), to ensure that non-citizens may present new evidence—including
14 evidence of materially changed country conditions—that was unavailable at the
15 time of the original removal hearing. This safeguard reflects Congress’s intent to
16 allow individualized reassessment when circumstances evolve.

17
18 21. Federal courts have consistently held that effectuating removal while a
19 motion to reopen is pending undermines the statutory scheme by mooted the
20 application and foreclosing judicial review. See *Singh v. Holder*, 638 F.3d 1196,
21 1202 (9th Cir. 2011) (“If Singh were removed before the BIA adjudicated his
22 motion to reopen, the motion would be moot and Singh would lose the opportunity
23 to obtain review of the BIA’s denial.”).

24
25 22. Petitioner’s pending motion to reopen seeks three forms of relief authorized
26 by Congress: (a) Cancellation of removal under 8 U.S.C. § 1229b(b), based on
27 more than two decades of residence, good moral character, and exceptional
28 hardship to qualifying U.S.-citizen relatives, including a disabled spouse and U.S.-

1 citizen grandchild; (b) Adjustment of status under 8 U.S.C. § 1255(a), grounded in
2 an approved I-130 petition and a pending Parole-in-Place application, reflecting
3 DHS's prior discretionary engagement; and (c) Protection under asylum,
4 withholding of removal, and the Convention Against Torture, pursuant to INA §§
5 208, 241(b)(3), and 8 C.F.R. §§ 208.16–208.18, based on materially changed
6 country conditions and a present fear of persecution or torture.
7

8 23. The INA and implementing regulations mandate that any non-citizen who
9 articulates a present fear of persecution or torture must receive a credible-fear
10 screening prior to removal. See INA §§ 208(a)(1), 235(b)(1)(B); 8 C.F.R. § 208.30.
11 DHS's refusal to provide such screening here contravenes these statutory and
12 regulatory obligations.
13

14 24. At present, Petitioner's motion to reopen remains pending before the BIA.
15 The BIA has denied only an administrative stay of removal. No automatic stay is in
16 effect, and DHS has announced its intent to execute the 2012 removal order before
17 the Board adjudicates the motion.
18

19 25. This action seeks only to preserve the integrity of that statutory and
20 regulatory process—ensuring that Petitioner's motion is adjudicated by the BIA
21 and, if necessary, reviewed by the Ninth Circuit—before any removal is executed.
22 The requested relief does not seek to preempt agency adjudication, but to prevent
23 irreparable harm and jurisdictional nullification.
24

25 FACTUAL BACKGROUND

26 26. Petitioner Nestor Paul Hernandez-Morales is a native and citizen of El
27 Salvador who has lived in the United States since approximately 2002. Over more
28 than two decades he has operated a licensed construction business and paid taxes

1 while supporting his U.S.-citizen family (Exh. B, Amended Decl. ¶¶ 1-2; Exh. E –
2 Contractor’s License; Exh. G – tax records).history beyond a minor traffic
3 infraction. His extended U.S.-citizen family and long-term residence underscore
4 his deep ties to the community.
5

6 27. Petitioner is married to a U.S.-citizen spouse who suffers severe spinal and
7 vascular disabilities that limit her mobility and prevent her from lifting or caring
8 for their five-year-old U.S.-citizen grandson, a child diagnosed with Level-3
9 Autism Spectrum Disorder requiring constant supervision to prevent self-injury
10 (Exh. B, Amended Decl. ¶¶ 3-4; Exh. I – autism diagnostic report; Exh. J –
11 spouse’s supporting declaration).
12

13 28. Petitioner has long been the family’s primary caregiver and breadwinner;
14 his removal would leave them without essential daily care.

15 29. Petitioner is the beneficiary of an approved I-130 immigrant-visa petition
16 filed by his U.S.-citizen wife and also has a pending Parole-in-Place application
17 filed by his active-duty-military U.S.-citizen stepson, now deployed overseas (Exh.
18 B ¶ 5; Exh. H – I-130 approval notice; Exh. K – stepson declaration re PIP).
19

20 30. These applications make Petitioner statutorily eligible to apply for
21 adjustment of status under INA § 245(a) once his removal proceedings are
22 reopened or administratively closed.

23 31. Petitioner’s underlying removal order dates from 2012. For more than a
24 decade thereafter, DHS took no steps to execute that order. During that period
25 Petitioner’s former immigration counsel passed away, and a fire destroyed his
26 home and all immigration files, leaving him unable to access his prior record (Exh.
27 B ¶ 7; Exh. M – fire-loss documentation).
28

1 32. These events explain the delay in seeking reopening and support equitable
2 tolling of any procedural deadlines.

3 33. Petitioner was detained on June 18, 2025, when he appeared in good faith
4 for a scheduled adjustment-of-status interview at the USCIS San Diego Field
5 Office. DHS immediately placed him in ICE custody at the Otay Mesa Detention
6 Center, where he has remained ever since.

7 34. At the time of detention, he voiced a new, present-day fear of persecution
8 and torture if returned to El Salvador because of drastically changed country
9 conditions. Since March 2022, the Salvadoran government has maintained a
10 nationwide “State of Exception,” under which security forces have arrested more
11 than 85,000 individuals—often solely because of tattoos—without due process and
12 transferred them to the CECOT maximum-security “mega-prison.”

13 35. International monitors—including the U.S. Department of State, Amnesty
14 International, and Human Rights Watch—have documented torture, starvation,
15 denial of medical care, and extrajudicial deaths under these conditions (Exhs. N–Q
16 – country-conditions reports).

17 36. Petitioner has several benign tattoos acquired decades ago for personal and
18 familial reasons, including small “three-dot” designs on his wrist and finger and
19 script-style names of loved ones on his chest, arms, leg, and neck (Exhs. R-1 to R-
20 5 – tattoo photographs & cultural-meaning references).

21 37. Under current Salvadoran profiling practices, these markings are widely and
22 erroneously presumed to signify gang affiliation, placing Petitioner at heightened
23 risk of arbitrary arrest, indefinite detention in CECOT, torture, and even death if
24 removed.

1 38. Although Petitioner requested protection and expressed a fear of
2 persecution and torture based on materially changed country conditions, DHS
3 declined to provide any credible-fear screening, contrary to the requirements of
4 INA §§ 208(a)(1) and 241(b)(3) and the implementing regulations at 8 C.F.R. §§
5 208.30 and 208.16-.18, instead taking the position that his prior 2012 removal
6 order obviated any such obligation.
7

8 39. On June 20, 2025, Petitioner, through counsel, filed a Motion to Reopen
9 with the Board of Immigration Appeals, supported by sworn declarations,
10 photographs, and medical and country-conditions evidence.
11

12 40. The motion seeks:

13 (a) Cancellation of Removal under INA § 240A(b) based on his two
14 decades of residence and the exceptional hardship removal would cause to his
15 disabled U.S.-citizen wife and autistic grandson;

16 (b) Adjustment of Status under INA § 245(a) based on the approved I-130
17 and pending Parole-in-Place; and
18

19 (c) Relief under the Convention Against Torture (CAT) in light of the
20 State of Exception and Petitioner's individualized risk due to tattoos (Exh. D –
21 Motion to Reopen with exhibits).

22 41. On June 23, 2025, the BIA summarily denied Petitioner's request for an
23 administrative stay of removal, issuing a one-line order that did not address the
24 merits of the motion to reopen (Exh. A – BIA stay-denial order).
25

26 42. The motion to reopen itself remains pending.

27 43. That same day Petitioner filed a protective Petition for Review and motion
28 for stay in the Ninth Circuit. On September 24, 2025, the Ninth Circuit dismissed

1 the petition as premature and lifted its temporary stay of removal, noting that
2 Petitioner may file a new PFR within thirty days of any future BIA decision on the
3 motion to reopen (Exh. C – Ninth-Circuit dismissal order).
4

5 44. No stay of removal now exists.

6 45. DHS has indicated its intent to execute the 2012 removal order imminently,
7 notwithstanding the still-pending statutory motion to reopen and the absence of any
8 individualized credible-fear review.

9 46. Premature removal would moot the pending motion, deprive both the BIA
10 and the Ninth Circuit of the opportunity to adjudicate the merits, and inflict
11 catastrophic and irreparable harm: Petitioner would be returned to a country where
12 he faces a substantial risk of arbitrary detention, torture, or death, and his disabled
13 wife and autistic grandson would be left without their sole caregiver and source of
14 financial support.
15

16 CAUSES OF ACTION

17 COUNT I

18 Count I – Habeas Corpus (28 U.S.C. §§ 2241, 2243)

19
20 47. Petitioner repeats, re-alleges, and incorporates by reference each and every
21 allegation in the preceding paragraphs as if fully set forth herein.

22 48. Respondents' plan to execute Petitioner's 2012 removal order while his
23 statutory motion to reopen remains pending before the Board of Immigration
24 Appeals constitutes unlawful imminent execution of removal while Petitioner
25 remains in custody.
26

27 49. Such action violates the Immigration and Nationality Act (INA), the
28 Administrative Procedure Act (APA), and the Due Process Clause of the Fifth

1 Amendment by mooted the pending motion, foreclosing judicial review, and
2 depriving Petitioner of access to congressionally authorized relief.

3
4 COUNT II

5 Declaratory Relief (28 U.S.C. §§ 1331, 2201; 5 U.S.C. § 702)

6 50. Petitioner repeats, re-alleges, and incorporates by reference each and every
7 allegation in the preceding paragraphs as if fully set forth herein.

8 51. Petitioner seeks a declaration that removal prior to adjudication of his
9 motion to reopen is arbitrary, capricious, and contrary to law under the APA, and
10 violates procedural due process by denying him a meaningful opportunity to
11 pursue statutory relief and judicial review.

12
13 COUNT III

14 Count III – Injunctive Relief (5 U.S.C. § 705; U.S. Const. amend. V

15 52. Petitioner repeats, re-alleges, and incorporates by reference each and every
16 allegation in the preceding paragraphs as if fully set forth herein.

17 53. Court's equitable powers) Petitioner seeks an injunction preserving the
18 status quo by postponing the effective date of the 2012 removal order until the
19 Board adjudicates the pending motion to reopen and, if denied, for a period of
20 seven (7) days thereafter to permit the timely filing of a Petition for Review and
21 motion for stay in the Ninth Circuit. Such relief is necessary to prevent irreparable
22 harm, protect Petitioner's constitutional rights, and preserve this Court's
23 jurisdiction.
24

25 PRAYER FOR RELIEF

26 Petitioner respectfully requests that this Court:

27 A. D A. Issue a writ of habeas corpus directing Respondents to refrain from
28 removing Petitioner from the United States until the Board of Immigration Appeals

1 adjudicates his June 20, 2025 motion to reopen and, if denied, for a period of seven
2 (7) days thereafter to permit the timely filing of a Petition for Review and motion
3 for stay in the Ninth Circuit;
4

5 B. Declare that executing removal under these circumstances is arbitrary,
6 capricious, and contrary to law under the Administrative Procedure Act, and
7 violates Petitioner's rights under the Due-Process Clause of the Fifth Amendment;

8 C. Enjoin Respondents, pursuant to 5 U.S.C. § 705 and the Court's equitable
9 powers, to maintain the status quo and to provide at least seventy-two (72) hours'
10 written notice to counsel of any planned transfer or removal;
11

12 D. Grant such other and further relief—temporary, preliminary, and
13 permanent—as the Court deems just and proper, including costs and reasonable
14 attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, or other
15 applicable authority.

16 E. Petitioner will concurrently or shortly hereafter move for an emergency
17 temporary restraining order to preserve this Court's jurisdiction and prevent
18 removal while the motion to reopen remains pending..
19

20 Dated: September 26, 2025

21 Respectfully submitted,

22 s/Donovan J Dunnion

23 Attorney for Petitioner,
24 Nester Paul Hernandez
25
26
27
28

EXHIBIT LIST

Exh. A Board of Immigration Appeals Order Denying Administrative Stay of Removal (June 23, 2025).

Exh. B Amended Declaration of Nestor P. Hernandez-Morales describing residence, business history, family hardship, and loss of immigration records.

Exh. C Ninth Circuit Order dismissing protective Petition for Review as premature and lifting temporary stay of removal (Sept. 24, 2025).

Exh. D Motion to Reopen filed with the BIA on June 20, 2025, with supporting declarations, photographs, medical records, and country-conditions evidence.

Exh. E California Contractor's License for Petitioner's construction business.

Exh. G Federal and State Tax-Filing Records demonstrating Petitioner's long-term tax compliance.

Exh. H I-130 Immigrant-Visa Petition Approval Notice (spousal petition).

Exh. I Autism Diagnostic Evaluation Report for Petitioner's five-year-old U.S.-citizen grandson (Level-3 ASD).

Exh. J Declaration of Petitioner's U.S.-citizen spouse describing severe disabilities and caregiving needs.

Exh. K Declaration of Petitioner's active-duty-military stepson supporting pending Parole-in-Place application.

Exh. M Fire-Loss Documentation confirming destruction of Petitioner's home and immigration records.

1 Exhs. N–Q Country-Conditions Reports on El Salvador’s “State of
2 Exception” (U.S. Department of State, Amnesty International, Human Rights
3 Watch, and related NGO documentation).
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5 Exhs. R-1–R-5 Photographs of Petitioner’s benign tattoos with cultural-
6 meaning references demonstrating non-gang significance.
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