

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Felix Tracy LORRY,

Petitioner,

v.

25-CV-1 154-LJV

Joseph FREDEN et. al.,

Respondents.

**MEMORANDUM OF LAW IN OPPOSITION TO PETITION
FOR WRIT OF HABEAS CORPUS**

Respondents respectfully submit this memorandum of law in opposition to the Petition for Writ of Habeas Corpus and in accordance with the Court's order dated November 14, 2025.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Petitioner is a native and citizen of Guyana who entered the United States on May 6, 2015, with a nonimmigrant visa authorizing his status until November 5, 2015.

On October 17, 2025, Petitioner was arrested by U.S. Customs and Border Protection after disclosing during a traffic stop in Andover, New York that he had no valid immigration documents authorizing his continued presence in the United States. Exh. A, page 6. Petitioner was issued a Notice to Appear for removal proceedings and is being held by U.S. Immigration and Customs Enforcement ("ICE") pursuant to 8 U.S.C. § 1226(a) at the Buffalo Federal Detention Facility in Batavia, New York. Exh. A, page 1.

On November 6, 2025, the Petitioner was given a bond hearing before an immigration judge. After reviewing documentation provided by Petitioner's counsel, the immigration judge ruled that Petitioner appeared to be a risk of flight and ordered the Petitioner to be held

without bond. Exh. A, pages 7-8.

On November 7, 2025, Petitioner filed a Petition for Writ of Habeas Corpus claiming there to have been a violation of due process and requesting a new bond hearing with the burden of proof placed on the government.

STATEMENT OF LAW

The immigration laws authorize immigration officials to arrest aliens subject to removal and detain them during their removal proceedings. *See Abel v. United States*, 362 U.S. 217, 233-34 (1960). Congress has enacted a multi-layered statutory scheme for the civil detention of aliens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. “Detention during removal proceedings is a constitutionally valid aspect of the deportation process.” *Velasco Lopez*, 978 F.3d at 848 (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)).

Pursuant to 8 U.S.C. § 1226(a), “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). The Attorney General and the Department of Homeland Security (“DHS”) thus have broad discretionary authority to detain an alien during removal proceedings. *See* 8 U.S.C. § 1226(a)(1) (DHS “may continue to detain the arrested alien” during the pendency of removal proceedings); *Nielsen v. Preap*, 586 U.S. 392, 409 (2019) (highlighting that § 1226(a) “gives the Secretary broad discretion” regarding arrest and release of aliens). Petitioner has no right to be released during the pendency of his immigration proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (“Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.”)

When an alien is apprehended, a DHS officer makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). DHS “may continue to detain the arrested alien.” 8 U.S.C. § 1226(a)(1). “To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings.” *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Adeniji*, 22 I. & N. Dec. at 1113). If DHS decides to release the alien, it may set a bond or place other conditions on release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8).

If DHS determines that an alien should remain detained during the pendency of his removal proceedings, that individual may request a custody redetermination hearing—*i.e.*, a bond hearing—before an immigration judge. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge then conducts a bond hearing and decides whether to release the alien based on an evaluation as to whether the alien poses a flight risk or danger to the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *see also* 8 C.F.R. § 1003.19(d) (“The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].”).

Section 1226(a) grants DHS and the Attorney General broad discretionary authority to determine whether to detain or release an alien during his removal proceedings. *See Matter of D-J-*, 23 I. & N. Dec. at 575 (citing *Carlson v. Landon*, 342 U.S. 524, 534 (1952)). In the exercise of this discretion and consistent with the DHS regulations, the BIA—whose decisions are binding on immigration judges—placed the burden of proof on the alien, who “must establish to the satisfaction of the Immigration Judge and [the BIA] that he or she does not present a danger to persons or property, is not a threat to the national security, and does not

pose a risk of flight.” *Matter of Guerra*, 24 I. & N. Dec. at 38; accord *Matter of Adeniji*, 22 I. & N. Dec. at 1114. The BIA’s “to the satisfaction” standard is equivalent to a preponderance of the evidence standard. See *Matter of Barreiros*, 10 I. & N. Dec. 536, 537 (BIA 1964).

If, after the bond hearing, the immigration judge concludes that the alien should not be released, or the immigration judge has set a bond amount that the alien believes is too high, the alien may appeal that decision to the BIA. See 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3). Moreover, if the alien’s circumstances materially change following his initial bond hearing, he may request a subsequent hearing, see 8 C.F.R. § 1003.19(e), and the outcome of that hearing is also appealable to the BIA, see *Matter of Uluocha*, 20 I. & N. Dec. 133, 134 (BIA 1989).

ARGUMENT

Lorry contends that his detention under 8 U.S.C. § 1226(a) requires the burden of proof to be shifted to the government as a result of this Court’s ruling in *Ortiz v. Freden*, 2025 WL 3085032 (Nov. 4, 2025). Respondents continue to assert, however, that Petitioner should bear the burden of proving that he is neither a flight risk nor a danger to the community.

The Supreme Court’s decision in *Jennings* rejects any argument that § 1226(a) should be read to require the government to carry the burden of proof in a bond hearing under that section. In *Jennings*, the Court rejected the position that § 1226(a) required the Government to provide “periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien’s continued detention is necessary.” 138 S. Ct. at 847. In rejecting that reading, the Court held: “Nothing in § 1226(a)’s text—which says only that the Attorney General ‘may release’ the alien ‘on . . . bond’—even remotely

supports the imposition of either of those requirements.” *Id.* While the precise question presented in *Jennings* was not identical to the one here, the *Jennings* Court held that it is “clearly contrary” to § 1226(a) to require the government to bear the burden of proof to justify prolonged detention, 138 S. Ct. at 848, it follows that § 1226(a) (and due process) should not require more robust procedures here.

Similarly, the Second Circuit’s decision in *Velasco Lopez v. Decker* demonstrates that there is no due process violation where an immigration judge placed the burden of proof on one detained under 8 U.S.C. § 1226(a) at an initial bond hearing. *Velasco Lopez* involved a claim of prolonged detention for an individual who had been detained “for fifteen months without an end in sight...” *Id.* at 855. Petitioner Lorry cannot make a prolonged detention argument as the length of his detention at the time of his initial bond hearing was only a few weeks. In *Velasco Lopez*, the Second Circuit required the burden to be shifted at a bond hearing only *after* a finding that detention had become prolonged. Thus, there is no basis to require such additional protection here where the Petitioner was detained for only a few weeks before being accorded a bond hearing at which the immigration judge correctly placed the burden of proof on the Petitioner.

The district court in *Velasco-Lopez* agreed with the petitioner’s primary claim that, regardless of the length of his detention, his prior bond hearings violated due process because the government had not borne the burden to justify detention by clear and convincing evidence. No. 19 Civ. 2912 (ALC), 2019 WL 2655806, at *3 (S.D.N.Y. May 15, 2019). On appeal, despite the government squarely presenting the issue of burden of proof at an initial § 1226(a) bond hearing, the Second Circuit affirmed the district court’s judgment based solely on its application of the *Mathews* balancing test to the petitioner’s alternative prolonged-detention

claim. *See Velasco Lopez*, at 855. In its *Mathews* analysis, the Second Circuit repeatedly emphasized the petitioner's length of detention—15 months—and expressly declined “to establish a bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden.” *Id.* at 855 n.13; *Cf. Hylton v. Decker*, 502 F. Supp. 3d 848, 855 (S.D.N.Y. 2020) (*Velasco Lopez* holds “that the Constitution requires that the Government bear the burden of proof by clear and convincing evidence at bond hearings for aliens held for *prolonged detention* pursuant to § 1226(a)” (emphasis added)). This supports the respondents' position that placing the burden of proof on the detainee at an initial § 1226(a) bond hearing comports with Due Process.

CONCLUSION

Respondents contend that adequate procedural safeguards were accorded to the Petitioner at his first bond hearing and the Petitioner's detention is not so prolonged as to warrant a new bond hearing or the shifting of the burden of proof to the government. For the foregoing reasons, the Petition should be dismissed.

Respectfully submitted,

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