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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ORIANA GOMES-VIAFARA,

Petitioner,

v.

Gregory J. ARCHAMBEAULT, Field Office Director of Enforcement and Removal Operations, San Diego Field Office, Immigration and Customs Enforcement; Markwayne MULLIN, Secretary, U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; Todd Blanche, U.S. Attorney General; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; Christopher LAROSE Warden of Otay Mesa Detention Facility

Respondents.

Case No. '26CV4785 TWR VET

VERIFIED EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS, ORDER TO SHOW CUASE WITHIN THREE DAYS AND COMPLAINT FOR DECLARATORY RELIEF

INTRODUCTION

1. Petitioner Oriana Gomes-Viafara is in the physical custody of Respondents at the Otay Mesa Detention Facility. She now faces unlawful detention because the Department of Homeland Security (DHS) and the Executive Office of Immigration Review (EOIR) have concluded Petitioner is subject to mandatory detention.

2. Petitioner is a Portuguese citizen who entered the United States via Miami airport in 2018. *Exhibit A.* She is charged in immigration court with violation of the terms of the Visa Waiver Program (VWP), but requested asylum and similar fear based protections, so the matter was referred to the immigration court. *Exhibit A.*

3. DHS has denied Petitioner release from immigration custody, pursuant to 8 U.S.C. § 1187 and *Matter of AW*, 25 I&N Dec 45 (BIA 2009), which held that aliens admitted under the VWP are not issued a notice to appear and thereby are not entitled to a custody review hearing before an immigration judge. *Exhibit B.* However, "most federal courts that have directly addressed" section 1187 have held it is not a valid basis for detention. *Quispe v. Becerra*, 1:25-cv-2002 CSK Dkt. 15 (E.D. Cal. 12/31/25), *citations omitted.*

4. 8 U.S.C. § 1187 codifies VWP, which allows noncitizens from certain countries to enter for 90 days without a visa, but in turn are limited in how they can challenge removal to asylum and other fear based protections. Section 1187 does not address the Government's authority to arrest and detain VWP overstays. Rather it is 8 U.S.C. § 1226(a) that sets forth the law for detention, bond, and release of arrested aliens.

5. Respondents' reliance on *Matter of AW* to detain Petitioner without a bond hearing is plainly contrary to the statutory framework of 8 U.S.C. § 1187, 1226 and contrary to numerous federal court decisions.

6. Accordingly, Petitioner seeks a writ of habeas corpus requiring that she be released unless Respondents provide a bond hearing under § 1226(a) within fourteen days.

JURISDICTION

7. Petitioner is in the physical custody of Respondents. Petitioner is detained at the Otay Mesa Detention Facility in San Diego, California.

8. This Court has jurisdiction under 28 U.S.C. § 2241(c)(5) (habeas corpus), 28 U.S.C. § 1331 (federal question), and Article I, section 9, clause 2 of the United States Constitution (the Suspension Clause).

9. This Court may grant relief pursuant to 28 U.S.C. § 2241, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the All Writs Act, 28 U.S.C. § 1651.

VENUE

10. Pursuant to *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493- 500 (1973), venue lies in the United States District Court for the Southern District of California, the judicial district in which Petitioner currently is detained.

11. Venue is also properly in this Court pursuant to 28 U.S.C. § 1391(e) because Respondents are employees, officers, and agencies of the United States, and because a substantial part of the events or omissions giving rise to the claims occurred in the Southern District of California.

REQUIREMENTS OF 28 U.S.C. § 2243

12. The Court must grant the petition for writ of habeas corpus or order Respondents to show cause "forthwith," unless the petitioner is not entitled to relief. 28 U.S.C. § 2243. If an order to show cause is issued, the Respondents must file a return "within three days unless for good cause additional time, not exceeding twenty days, is allowed." *Id.*

13. Habeas corpus is "perhaps the most important writ known to the constitutional law . . . affording as it does a *swift* and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1963) (emphasis added). "The application for the writ usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him within the four corners of the application." *Yong v. I.N.S.*, 208 F.3d 1116, 1120 (9th Cir. 2000) (citation omitted).

PARTIES

14. Petitioner Oriana Gomes-Viafara is a citizen of Portugal and Venezuela who has been in immigration detention since approximately April 1, 2026. *Exhibit C, D.* Petitioner sought bond in the immigration court and was denied on purported jurisdictional grounds. *Exhibit B.*

15. Respondent Gregory J. Archambeault is the Director of the San Diego Field Office of ICE's Enforcement and Removal Operations division. As such, Gregory J. Archambeault is Petitioner's immediate custodian and is responsible for Petitioner's detention and removal. He is named in his official capacity.

16. Respondent Markwayne Mullin is the Secretary of the Department of Homeland Security. He is responsible for the implementation and enforcement of the Immigration and Nationality Act (INA), and oversees ICE, which is responsible for Petitioner's detention. Mr. Mullin has ultimate custodial authority over Petitioner and is sued in his official capacity.

17. Respondent Department of Homeland Security (DHS) is the federal agency responsible for implementing and enforcing the INA, including the detention and removal of noncitizens.

18. Respondent Todd Blanche is the Attorney General of the United States. He is responsible for the Department of Justice, of which the Executive Office for Immigration Review and the immigration court system it operates is a component agency. He is sued in her official capacity.

19. Respondent Executive Office for Immigration Review (EOIR) is the federal agency responsible for implementing and enforcing the INA in removal proceedings, including for custody redeterminations in bond hearings.

20. Respondent Christopher LaRose is employed by CoreCivic as Warden of the Otay Mesa Detention Facility, where Petitioner is detained. He has immediate physical custody of Petitioner. He is sued in his official capacity.

LEGAL FRAMEWORK

21. The INA sets forth three basic forms of detention for the vast majority of noncitizens in removal proceedings.

22. First, 8 U.S.C. § 1226 authorizes the detention of noncitizens in standard removal proceedings before an IJ. *See* 8 U.S.C. § 1229a. Individuals in § 1226(a) detention are generally entitled to a bond hearing at the outset of their detention, *see* 8 C.F.R. §§ 1003.19(a), 1236.1(d), while noncitizens who have been arrested, charged with, or convicted of certain crimes are subject to mandatory detention, *see* 8 U.S.C. § 1226(c).

23. Second, the INA provides for mandatory detention of noncitizens subject to expedited removal under 8 U.S.C. § 1225(b)(1) and for other recent arrivals seeking admission referred to under § 1225(b)(2).

24. Last, the INA also provides for detention of noncitizens who have been ordered removed, including individuals in withholding-only proceedings, *see* 8 U.S.C. § 1231(a)–(b).

25. The INA does not provide for detention of VWP overstays in 8 U.S.C. § 1187. This case concerns the detention provisions at § 1226(a) and the Government's misapplication of § 1187.

26. The detention provisions at § 1226(a) and § 1225(b)(2) were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-–208, Div. C, §§ 302–03, 110 Stat. 3009-546, 3009–582 to 3009–583, 3009–585. Section 1226(a) was most recently amended by the Laken Riley Act, Pub. L. No.119-1, 139 Stat. 3 (2025).

27. In a 2009, a decision from the Board of Immigration Appeals (BIA), EOIR adopted the position that VWP overstays are detained under 8 U.S.C. § 1187, not § 1226. *Matter of AW*, 25 I&N Dec 45 (BIA 2009).

28. ICE and EOIR have persisted in this position even though many federal courts have rejected the agency's exact conclusion. *Quispe v. Becerra*, 1:25-cv-2002 CSK Dkt. 15, *supra,* at 7 (gathering cases); *Suarez-Garcia v. Warden...*, 2:26-cv-00687-KCD-DNF Dkt. 18 (M.D. FL 5/19/26).

29. As these cases cited in *Quispe* set forth, section 1187 does not address arrest and detention of VWP overstays. "Perhaps the biggest roadblock to the government's claim that § 1187(c)(2)(E) provides detention authority is the code section's failure to mention detention at all." *Malets v. Horton, et. al.* 4:20-cv-01041-MHH-SGC Dkt. 20 at 4, fn.6 (N.D. AL 9/15/2021)(*rejecting Matter of AW*).

30. Section 1226 generally governs the detention of those "already in the United States." *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). Subsection (a) applies the default rule for such people, providing for discretionary detention "pending a decision on whether the [noncitizen] is to be removed from the United States." These removal hearings are held under § 1229a, to "decid[e] the inadmissibility or deportability of a[] [noncitizen]."

FACTS

31. Petitioner has resided in the United States since 2018, and lives in Florida. In 2019, she gave birth to her daughter, in Florida. She has a work permit. She has applied for and received Temporary Protected Status from Venezuela. She has requested asylum and asylum has not yet been adjudicated. *Exhibits A, E, F.*

32. Petitioner was detained by ICE April 1, 2026 after an arrest in Sarasota County, Florida for "PETIT THEFT…100 to 750." *Exhibit D.* The theft case remains unresolved. ICE has relocated her from Florida to Otay Mesa Detention Center.

33. Petitioner previously worked at a Montessori School and community members speak highly of her character. *Exhibit G.*

34. DHS referred Petitioner to the Immigration Court as an asylum seeking VWP overstay pursuant to 8 C.F.R. 208.2(c). *Exhibit A.*

35. Following Petitioner's arrest and transfer to Otay Mesa Detention Facility, ICE has held Petitioner without the opportunity to post bond. Her request for a bond hearing was denied under *Matter of AW* by the immigration judge. *Exhibit B.*

36. There is no evidence Petitioner is a flight risk or community danger. On the contrary ample evidence demonstrates her positive standing in her community.

37. As a result, Petitioner remains in detention. Without relief from this court, Petitioner faces the prospect of months, or even years, in immigration custody, separated from her daughter and community.

CLAIMS FOR RELIEF

COUNT I

Violation of the INA

38. Petitioner incorporates by reference the allegations of fact set forth in the preceding paragraphs.

39. *Matter of AW* was wrongly decided, 8 U.S.C. § 1187 does not preclude bond hearings for VWP overstays seeking asylum. Petitioner is detained under § 1226 and should be afforded a bond hearing.

40. The application of § 1187 to Petitioner unlawfully mandates continued detention and violates the INA.

COUNT II

Violation of Due Process

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

42. The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

43. Petitioner has a fundamental interest in liberty and being free from official restraint.

44. The government's detention of Petitioner without a meaningful bond redetermination hearing to determine whether he is a flight risk or danger to others violates his right to due process.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

a. Assume jurisdiction over this matter;

b. Order that Petitioner shall not be transferred outside the Southern District of California.

c. Issue a writ of habeas corpus requiring that Respondents release Petitioner or provide Petitioner with a bond hearing pursuant to 8 U.S.C. § 1226(a) within 14 days;

d. Award Petitioner attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), as amended, 28 U.S.C. § 2412, and on any other basis justified under law; and

e. Grant any other and further relief that this Court deems just and proper.

DATED this 20th of August, 2026.

/s/ Nate Crowley

Nate Crowley,

Pro Bono Attorneys for Petitioner

Index of Exhibits

A. Notice of Referral to Immigration Judge as VWP violator seeking asylum

B. Immigration Judge jurisdictional denial of bond for under *Matter of AW*

C. Declaration of immigration attorney

D. Florida theft arrest records

E. Petitioner driver license, social security card, work permit, TPS approval.

F. Petitioner child birth certificate, marriage certificate,

G. Character reference letters

VERIFICATION BY ATTORNEY ACTING ON PETITIONER'S BEHALF PURSUANT TO 28 U.S.C. §2242

I am submitting this verification on behalf of Petitioner. I have reviewed the documents from his immigration court file, as provided to me by his pro bono immigration counsel.

As Petitioner's attorney, I hereby verify that the factual statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated: August 20, 2026 By: /s/ Nate Crowley