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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

BERTHA MEJIA ESPINOZA Petitioner, v. TIMOTHY AITKEN, et al., Respondents.	No. C13-0512 EJD **RESPONDENTS' RETURN IN RESPONSE TO ORDER TO SHOW CAUSE AND PETITION FOR HABEAS CORPUS**

I. INTRODUCTION

Respondents Timothy Aitken, Janet Napolitano, and Eric H. Holder, Jr. ("Respondents")[1] hereby respond to the Court's Order to Show Cause ("OSC") and Petitioner's Petition for Writ of Habeas Corpus ("Petition"). The Petition should not be granted because, contrary to Petitioner's arguments, her current detention is required by law and does not violate due process or the Immigration and Nationality Act ("INA" or "the Act").

In September 2011, an Immigration Judge ruled that Petitioner Bertha Mejia Espinoza's ("Petitioner" or "Mejia") multiple convictions for petty theft with priors subject her to

[1] As noted in *Diouf v. Napolitano*, 634 F.3d 1081, 1085, n. 5 (9th Cir. 2011), various immigration enforcement responsibilities of the Attorney General were transferred to the Secretary of the Department of Homeland Security pursuant to the Homeland Security Act of 2002. Because the immigration statutes still refer to the Attorney General, this brief will generally refer to the Attorney General being authorized to take the various actions.

mandatory detention under INA §236(c)(1)(A) (codified at 8 U.S.C. §1226(c))[2] for being inadmissible as an alien who has been convicted of a crime involving moral turpitude. She has now been in custody approximately 16 months. Petitioner asks this Court to order her immediate release or "order a constitutionally adequate hearing before an Immigration Judge." Though there are many issues relating to Mejia's immigration status, the only issue before this Court is whether her current detention is lawful.

Federal immigration statutes classify non-citizens into different groups. These classifications matter. An alien's classification makes "all the difference" in terms of whether, when, under what standard, and in what forum an alien may challenge his detention. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). "Where an alien falls within this statutory scheme can affect whether his detention is mandatory or discretionary, as well as the kind of review process available to him if he wishes to contest the necessity of his detention." *Prieto-Romero v. Clark*, 534 F.3d 1053, 1057-58 (9th Cir. 2008).

Petitioner in this case is an alien, who has never received lawful permanent resident status, who has been convicted of a crime involving moral turpitude[3] and is thus inadmissible. Under such circumstances, the law requires that she be taken into custody. *See* 8 U.S.C. § 1226(c) ("The Attorney General *shall* take into custody" such aliens.).

The Petition was filed on February 6, 2013. On the same date, this Court issued an Order to Show Cause requiring Respondents to file a return within three days of the service of the order, and requiring Petitioner to file a reply or traverse within three days thereafter. On February 7, 2013, the parties submitted a stipulation requesting modifications to that schedule. The Court agreed and issued an order giving Respondents until February 15, 2003 to file their return, and giving Petitioner until February 22, 2013 to file a reply or traverse.

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[2] Respondents will use the United States Code citations to the INA. Unless otherwise noted, statutory references herein will be to Title 8 of the United States Code.

[3] Petitioner does not seem to contest that her multiple criminal convictions place her in the category of aliens described in §1226(c)(1)(A). Instead, she challenges the validity and constitutionality of the mandatory detention process, whether the Attorney General took her into custody at the time allowed under the statute, and whether she should be excused from the provision of § 1226(c) because, ultimately, she might not be removed.

II. STATEMENT OF FACTS

As noted above, in September 2011, an Immigration Judge ruled that Mejia's multiple convictions for petty theft with priors subject her to mandatory detention under INA §236(c)(1)(A) for being inadmissible as an alien who has been convicted of a crime involving moral turpitude. Petition ¶ 20. Mejia filed motions for bond redetermination on October 18, 2012 and again on December 20, 2012. Petition ¶ 26. The Immigration Judge denied the motions on October 23, 2012 and January 14, 2013, respectively. Declaration of Rosy H. Cho in Support of Petition for Writ of Habeas Corpus ("Cho Decl.") Ex. G and H. Mejia asserts that she should have received a bond hearing.

In the meantime, Mejia has continued in her attempts to secure withholding of removal and/or change of status through the U visa process.[4]

On or about January 3, 2012, through her previous attorney, Mejia submitted a U visa application. Cho Decl. ¶ 5. On August 28, 2012, an Immigration Judge denied Mejia's application for asylum and withholding of removal and ordered her removal to El Salvador. Petition ¶ 22. The respondent appealed this decision to the Board of Immigration Appeals ("BIA"). Petition ¶ 24. Mejia's application for a U visa was denied by United States Citizenship and Immigration Services ("USCIS") on or about November 7, 2012. Petition ¶ 23. On or about December 15, 2012, through her current attorney, Mejia submitted a renewed U visa application. Petition ¶ 25. On January 11, 2013, the BIA issued an order remanding Petitioner's case to an Immigration Judge "to ascertain the status of her application for U visa non-immigrant status, and if appropriate, determine whether she has established good cause for a continuance to await adjudication of such application by [USCIS]." Petition ¶ 25 and Declaration of Claire T. Cormier ("Cormier Decl.") ¶4 and Ex. 1. On or about February 1, 2013, USCIS granted

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[4] Pursuant to 8 C.F.R. § 214.14, an undocumented alien is eligible for U–1 nonimmigrant status if, among other things, she is the victim of rape or other qualifying criminal activity that occurred in the United States, and cooperates in the prosecution of the crime. For a discussion of the statutory and regulatory background of the "U" nonimmigrant classification, *see Catholic Charities CYO v. Chertoff*, 622 F.Supp.2d 865, 870 (N.D.Cal. 2008), *aff'd sub nom. Catholic Charities CYO v. Napolitano*, 368 Fed. Appx. 750 (9th Cir. 2010).

expedited processing of her U visa application and determined her to be prima facie eligible for U nonimmigrant classification pursuant to 8 C.F.R. 214.14(b). Cormier Decl. ¶¶3 and 5 and Ex. 2. That eligibility classification expires on the earliest of: 1) its revocation, 2) a final decision on her U visa application, or 3) July 31, 2013. Cormier Decl Ex. 2. Mejia is scheduled for a hearing before an Immigration Judge on March 26, 2013. Cormier Decl. ¶ 6 and Ex. 3. In the meantime, she remains detained pursuant to § 1226(c).

III. ARGUMENT

Petitioner is classified under federal immigration law as a criminal alien. As such, she is considered inadmissible pursuant to 8 U.S.C. § 1182(a)(2). Such aliens "shall" be taken into custody and can be released only under certain very limited circumstances which do not apply here. 8 U.S.C. §1226(c). This is different from the discretionary detention rules applicable to aliens arrested and detained pursuant to warrants issued by the Attorney General, or aliens who have received a final order of removal. *See* 8 U.S.C. § 1226(a) and 8 U.S.C. § 1231(a)(6). The statute expressly states that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e).[5]

A. Section 1226(c) constitutionally mandates Petitioner's detention during the pendency of her removal proceedings.

Petitioner argues that neither the statute nor the Constitution authorize the Attorney General to hold her in prolonged detention without affording her a bond hearing at which the government must "prove by clear and convincing evidence that she is either a flight risk or a danger to the community." Petition ¶ 29. Section 1226(c) does not expressly limit the length of the detention for criminal aliens.

The Supreme Court has ruled that the mandatory detention provision of § 1226(c) – *i.e.*, "detention of deportable criminal aliens *pending their removal proceedings*" – is constitutional.

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[5] The Supreme Court has held that district courts do have jurisdiction over habeas petitions challenging the statutory framework of § 1226(c), but not challenges to discretionary decisions of the Attorney General within that framework. *Demore v. Kim*, 538 U.S. 510, 516-517 (2003).

Demore v. Kim, 538 U.S. 510, 527-528 (2003) (emphasis in original). The Court distinguished its prior decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), which related to detention of aliens under 8 U.S.C. § 1231, which governs detention following a final order of removal. *Demore*, 538 U.S. at 526-527. "[P]ost removal-period detention, *unlike detention pending a determination of removability* . . ., has no obvious termination point." *Id*. at 529 (emphasis in original), quoting *Zadvydas*, 533 U.S. at 697. The Supreme Court did note that most cases of detention during removal proceedings last shorter times than Petitioner's detention here, but it did not set a numerical limit on the permissible length of detention during such proceedings. *See id.* at 530-531. Instead, it held that "[d]etention during removal proceedings is a constitutionally permissible part of" the removal process. *Id.* at 531.

Petitioner argues that the "Ninth Circuit has repeatedly construed immigration detention statutes as implicitly providing for bond hearings to avoid the due process concerns otherwise posed by prolonged detention." Petition ¶ 31. None of Petitioner's cited cases discuss the situation before the Court now: a criminal alien, who has never had lawful permanent resident status, who is detained *during the pendency of her removal proceedings*.

Petitioner cites to *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005), for the proposition that mandatory detention is authorized only during "expeditious removal proceedings" and thus a bond hearing was required for a petitioner who had been detained for over two and a half years. The Ninth Circuit, in its very short majority opinion, found that it was "constitutionally doubtful that Congress may authorize imprisonment of this duration for *lawfully admitted resident aliens* who are subject to removal." *Id*. at 1242 (emphasis added). Though the majority opinion provides virtually no factual background or analysis, it appears from the concurring opinion that, while the case is discussed in terms of detention under §1226(c), Tijani actually had progressed past a final removal order. *Id*. at 1246, 1248, n. 7. (noting that Tijani had a petition for review of the removal order pending before the Ninth Circuit and that he had already received a BIA decision finding him removable). In contrast, Mejia is not a lawful permanent resident, and her removal proceedings are still in progress before the agency.

Petitioner also cites to *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), arguing that it construes § 1226(c) "as applying only to expeditious removal proceedings because 'prolonged detention without adequate procedural protections would raise serious constitutional concerns.'" Petition ¶ 32. However, though the petitioner in *Casas-Castrillon* had been detained during removal proceedings pursuant to § 1226(c), the Ninth Circuit decision related to his continued detention after his removal order had been affirmed by the BIA, and thus "the basis for his detention shifted from § 1226(c) to 1226(a), under which he was entitled to a bond hearing." Petition ¶ 32, citing *Casas-Castrillon* at 948. *See also Zadvydas v. Davis*, 533 U.S. 678 (2001) (discussing limits on detentions after a final removal order). In addition, *Casas-Castrillon* was a lawful permanent resident. 535 F.3d at 944. *Casas-Castrillon* noted that, at the time the petitioner filed his habeas petition, his administrative proceedings had been complete for approximately three years. *Id*. at 945. The Ninth Circuit further stated that, "[o]nce Casas' proceedings before the BIA were complete, the Attorney General's authority to detain him under § 1226(c) ended and that authority shifted instead to § 1226(a)." *Id*. at 948. This remained true even after the Ninth Circuit remanded the case back to the agency. However, the Ninth Circuit concluded that "the mandatory, bureaucratic detention of aliens under § 1226(c) was intended to apply for only a limited time and ended in this case when the BIA affirmed Casas' order of removal in July 2002," at which time he had been detained for almost a year. *Id*. at 944, 948. It also noted that "[s]ection 1226(a), *unlike § 1226(c)*, provides such authority for the Attorney General to conduct a bond hearing and release the alien on bond or detain him if necessary to secure his presence at removal." *Id*. at 951 (emphasis added).

Here, Mejia, who is not a lawful permanent resident, is still in removal proceedings. The BIA has remanded the matter to an Immigration Judge to make a determination on her U visa application. Had Mejia been a lawful permanent resident, and had the BIA affirmed the previous decision by the Immigration Judge to remove Mejia instead of remanding for further proceedings, *Casas-Castrillon* might apply, but it does not under these circumstances.

Mejia also argues that *Diouf v. Napolitano*, 634 F.3d 1081, 1091-92 (9th Cir. 2011), holds that a detention becomes "prolonged" at six months, and that a bond hearing is then

required. Petition ¶ 33. However, as with *Casas-Castrillon* and *Zadvydas*, the detention at issue in *Diouf* was after a final order of removal; in *Diouf*, it was detention under § 1231(a)(6). *Diouf* also noted that, when the Ninth Circuit had reviewed Diouf's prior habeas petition, it found that his "detention was authorized by statute because, although it was prolonged, it was not indefinite." *Id*. at 1084. *Diouf* also noted that detention during the period "pending a decision on whether the alien is to be removed" is mandatory for criminal aliens under § 1226(c) (such as Mejia). *Id.* at 1084-1085, and n. 4.

Similarly, in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), a lawful permanent resident had received a final order of removal, affirmed by the BIA, for which he petitioned for review to the Ninth Circuit. *Id*. at 1200-1201. Accordingly, he received a bond hearing, referred to as a "*Casas* bond hearing," the result of which he was challenging. *Id*. In deciding to remand for a new *Casas* bond hearing, the Ninth Circuit noted that "all detainees afforded *Casas* bond hearings . . . [have] already been ordered removed by a final, administrative order." *Id*. at 1205. There has been no such final, administrative order in the instant case.

Thus, in *Zadvydas*, *Tijani, Casas-Castrillon*, *Diouf*, and *Singh*, the petitioner had completed administrative removal proceedings prior to challenging continued detention, and the courts have noted that this distinction, between detention before versus after a final removal order, is a distinction with a difference. After a final removal order, there is no event (other than actual removal or a lengthy petition for review to the Ninth Circuit) that is anticipated to change the petitioner's immigration situation. There is no end in sight. In contrast, when removal proceedings are still underway, as they are here, there are procedures that will lead to a final decision. In some instances, that takes a significant amount of time. When that final decision is reached, then restrictions on detention may apply. But Petitioner has cited to no Supreme Court or Circuit Court decision requiring bond hearings during the mandatory detention of § 1226(c) prior to a final order of removal.[6]

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[6] Petitioner also cites to *Rodriguez v. Robbins*, No. CV-07-03239 TJH-RNB (C.D. Cal., filed May 16, 2007), a case involving the issuance of an unprecedented injunction requiring ICE to provide bond hearings to essentially all non-citizens in removal proceedings in the Central

Petitioner next argues that § 1226(c) violates the Due Process Clause of the Constitution. Petitioner has cited to no authorities supporting this view under circumstances like those in the instant case. In any event, the Supreme Court has already ruled on the constitutionality of the statute. *See Demore v. Kim*, 538 U.S. 510 (2003). *See also Rodriguez v. Hayes*, 578 F.3d 1032 1043 (9th Cir. 2009), citing *Demore* ("The Supreme Court has held that detention pursuant to Section 1226(c) does not raise any due process concerns.").

B. Section 1226(c) does not require immediate detention after release from criminal custody.

Petitioner argues that the "when. . . released" language in § 1226(c) means that the alien must have been taken into ICE custody immediately upon or very shortly after release from criminal custody. The only Circuit to rule on this issue has held that this is not the meaning of the statute. *See Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012), *citing Matter of Rojas*, 23 I&N

District of California. The long procedural history of that case is instructive. In March 2008, the district court denied class certification in the case without explanation. *Rodriguez v. Hayes*, 591 F.3d.1105, 1111 (9th Cir. 2010). In the absence of a reasoned decision, the Ninth Circuit reviewed the district court's ruling *de novo* and reversed, holding that class treatment was warranted to ensure uniform treatment of detained aliens. *Id*. at 1126. In doing so, however, the Ninth Circuit recognized that some of the class members might be "properly subject to mandatory detention and that the regulations currently implementing the various discretionary detention statutes provide for a different burden of proof at bond hearings." *Id*. at 1125 (observing that "class members may have suffered no injury or different injuries" due to aliens' different immigration statuses). Accordingly, the Ninth Circuit remanded the case for the district court to consider, among other things, "whether formation of subclasses would be appropriate" in light of the different statutory and constitutional standards applicable to different members of the certified class. *Id.* at 1126. On remand, contrary to the Ninth Circuit's guidance, the district court issued an order certifying a single, unified class effectively encompassing every detained alien in the Central District. It also issued a preliminary injunction and, with no analysis to explain its decision, granted sweeping habeas relief compelling ICE to provide a bond hearing before an Immigration Judge for any alien after six months of detention. *Rodriguez v. Robbins*, No. CV-07-03239 TJH-RNB, Docket No. 255. That injunction would encompass even the petitioner in *Demore v. Kim*, whom the Supreme Court held was not entitled to such relief. The Central District's decision has been appealed on an expedited schedule and is set for hearing next month. *See Rodriguez v. Robbins*, No. 12-56734 (filed in Ninth Circuit on November 21, 2012). Respondents submit that the Central District's order in *Rodriguez* should be given no weight since it is contrary to Supreme Court precedent and offers no analysis for this Court to consider.

Dec. 117 (BIA 2001). In *Hosh*, the alien had been out of actual criminal custody for over three years at the time that he was detained. *Hosh* found the language of the statute to be susceptible to more than one interpretation and thus gave deference to the BIA's interpretation that criminal aliens are subject to mandatory detention "despite not having been detained immediately upon release from state custody." *Id*. at 380. *Hosh* was aware that district courts around the country, including this district, had reached differing conclusions on the meaning of this language in § 1226(c), but nevertheless found the BIA's interpretation to be reasonable. *Hosh* also noted that, even if the statute were to be read to require ICE to take immediate custody of such criminal aliens, such noncompliance "does not bestow a windfall upon criminal aliens" and, therefore, Hosh remained subject to mandatory detention. *Id*. at 384.

Here, Petitioner complains that she has been detained for too long under § 1226(c), but argues that she can't be detained under that statute at all because ICE did not begin her detention a year earlier. This is not the law.

C. Petitioner's pending visa application does not excuse her from mandatory detention.

Mejia argues that she is not subject to mandatory detention under § 1226(c) because she is eligible for a U visa and therefore is not "inadmissible" or "deportable." She says that the statute should not apply to noncitizens who have "a substantial claim for relief from removal."

Mejia's removal has not yet been decided. If ultimately she is not removed, she will be released from detention. However, if the final decision is removal, then detention will do exactly what it is supposed to do – allow ICE easy access to her for deportation.

D. If the Court grants any relief, immediate release would be improper.

Though Mejia's Petition should be denied in its entirety for the reasons stated above, should the Court disagree and be inclined to grant some relief, it should not be the immediate release sought by Petitioner. Mejia seems to understand that immediate release would be inappropriate, since she has alternatively requested a bond hearing.

Mejia complains that she has not received a bond hearing at which a proper determination could be made as to whether she should remain in custody. Were she entitled to such a bond

hearing (which she is not), the Attorney General would still have discretion to make a decision based on the evidence at hand. Such a decision, presuming a constitutional process, would not be subject to judicial review. 8 U.S.C. § 1226(e) ("No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."). *See also Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) (noting that the Attorney General's "discretionary judgment . . . shall not be subject to review," even if there can be review of claims that the process itself was constitutionally flawed).

Accordingly, should the Court decide to order any relief, immediate release of the Petitioner would be inappropriate.

IV. CONCLUSION

Section 1226(c) requires the detention of criminal aliens during their removal proceedings with no discretion for release on bond except in very limited circumstances not found here. It does not place a time limit on such detention, presumably because detention proceedings do, eventually, end. Mejia has received all the process that she is due. In addition, as held by the Fourth Circuit, ICE was not required to take her into custody immediately upon her release from criminal custody. Finally, while it is true that the possibility exists that, at the end of her proceedings, Mejia may not be removed, that prospect does not require her release now.

Mejia's petition for habeas corpus should be denied. Should the Court for any reason be inclined to grant her relief, immediate release would be inappropriate. If the Court finds she is entitled to any relief, it should be a bond hearing pursuant to 8 U.S.C. § 1226(a).

Respectfully submitted,

DATED: February 15, 2013

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