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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Yuli Marisela Velarde-Flores, et al.,
Petitioners,
v.
Jefferson B. Sessions, III, et al.,
Respondents.

No. CV 18-00031-PHX-DJH (BSB)

ORDER

Petitioners Yuli Marisela Velarde-Flores, Ibeth Cristina Corral, and Liliana Reyes Diaz have filed, through counsel, a Petition Under 28 U.S.C. § 2241 for a Writ of Habeas Corpus by a Person in Federal Custody (Doc. 1) and paid the filing fee. Petitioners have also filed a Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2). The Court will grant Petitioners a Temporary Restraining Order, and will require an expedited answer to the Petition and the Motion for Preliminary Injunction.

I. Background

Petitioners are natives of Mexico. All three are currently subject to final orders of removal, and have been ordered to self-report for deportation tomorrow (January 5, 2018). All three Petitioners have also applied for U Nonimmigrant Status visas (UVisas) as the victims of violent crimes pursuant to the Battered Immigrant Women Protection Act of 2000 (BIWPA). Ms. Velarde-Flores applied for a UVisa in August 2016; that application remains pending. Ms. Corral applied for a UVisa in January 2017; that application remains pending. Ms. Reyes applied for a UVisa in January 2017; that

1 application was denied in May 2017, and the denial is currently under appeal.

2 **II. Petition**

3 In their Petition, Petitioners name as Respondents: United States Attorney General
4 Jefferson B. Sessions, III; United States Department of Homeland Security Kirstjen
5 Nielson; United States Immigration and Customs Enforcement (ICE) Director Thomas
6 Homan; and ICE Arizona Field Office Director Enrique Lucero. Petitioners raise three
7 interrelated grounds for relief, alleging that their removal before their UVisa applications
8 are final violates BIWPA and their due process rights under the Fifth Amendment.

9 **III. Stay of Removal**

10 Petitioners have filed a Motion for Temporary Restraining Order and Preliminary
11 Injunction seeking to enjoin Respondents from removing them before their UVisa
12 applications are final. The standard for a stay of removal pending adjudication of a
13 petition requires “consideration of four factors: ‘(1) whether the stay applicant has made
14 a strong showing that he is likely to succeed on the merits; (2) whether the applicant will
15 be irreparably injured absent a stay; (3) whether issuance of the stay will substantially
16 injure the other parties interested in the proceeding; and (4) where the public interest
17 lies.’” *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (quoting *Hilton v. Braunskill*, 481
18 U.S. 770, 776 (1987)). The applicant bears the burden of persuasion. *Id.* “The first two
19 factors . . . are the most critical.” *Id.* It is not enough for an applicant to show “a mere
20 ‘possibility’ of relief” to satisfy the first factor. *Id.* Nor is it enough for an applicant to
21 “simply show[] some ‘possibility of irreparable injury’” in order to satisfy the second
22 factor. *Id.* (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

23 But the standard is not inflexible—“so long as the alien has made the threshold
24 showing that irreparable harm is probable absent a stay, we continue to weigh the relative
25 equities along [a] ‘continuum,’ delineated on one end by a showing of a strong likelihood
26 of success on the merits and that the public interest does not weigh heavily against a stay;
27 and, on the other end, by a showing of a substantial case on the merits and that the
28 balance of hardships tips sharply in favor of a stay.” *Leiva-Perez v. Holder*, 640 F.3d

1 962, 971 (9th Cir. 2011).

2 For the reasons set forth below, the Court will grant Petitioners' request for a
3 Temporary Restraining Order enjoining their removal pending briefing and a hearing, if
4 necessary. Respondents will be directed to answer the Motion to the extent it seeks a
5 Preliminary Injunction, and must also respond to the Petition.

6 **A. Irreparable Harm**

7 Petitioners allege that they will suffer irreparable harm absent a stay in that they
8 will be deported and separated from their minor children, at least two of which have
9 medical issues such as autism. The Court finds that Petitioners have established that they
10 will suffer irreparable harm absent a stay of removal.

11 **B. Substantial Case on the Merits**

12 Although the necessary showing of likelihood of success on the merits varies
13 depending on the relative strength of the other stay factors, "a petitioner must show, at a
14 minimum, that she has a substantial case for relief on the merits." *Id.* at 968. Petitioners
15 allege that following the passage of BIWPA, the United States Customs and Immigration
16 Services (USCIS) promulgated several regulations and procedures to carry out the statute.
17 One Memorandum (the "Yates Memorandum") provided that "no one who appeared to
18 be eligible to apply to U nonimmigrant status be removed from the United States until
19 he/she has had the opportunity to avail him/herself of the provisions of the [Victims of
20 Trafficking and Violence Protection Act, in which BIWPA is contained]."¹ As a
21 practical matter, this meant that for aliens in removal proceedings — such as Petitioners
22 — those removal proceedings would be terminated once USCIS determined that an
23 applicant had demonstrated *prima facie* eligibility for a UVisa. Petitioners allege that
24 they have all made a *prima facie* showing of eligibility for a UVisa, including providing
25 the requisite certification from a law enforcement agency declaring them to be the

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27 ¹ See Memorandum from William R. Yates, Associate Director of Operations, USCIS,
28 Assessment of Deferred Action in Requests for Interim Relief from U Nonimmigrant Status
Eligible Aliens in Removal Proceedings (May 6, 2004), *available at*
<https://www.uscis.gov/archive/archive-laws/archive-memos> (last viewed Jan. 4, 2018).

1 victims of criminal activity.

2 The Court’s jurisdiction to enjoin the Attorney General and other Respondents
3 from removing Petitioners while they seek relief is extremely limited. As amended by
4 the REAL ID Act, 8 U.S.C. § 1252(g) deprives the courts of jurisdiction, including
5 habeas corpus jurisdiction, to review “any cause or claim by or on behalf of an alien
6 arising from the decision or action by the Attorney General to commence proceedings,
7 adjudicate cases, or execute removal orders against any alien under this chapter.” 8
8 U.S.C. § 1252(g) (emphasis added). The Supreme Court has held that § 1252(g) does not
9 “cover[] the universe of deportation claims,” but rather “applies to only three discrete
10 actions that the Attorney General may take: her ‘decision or action’ to ‘commence
11 proceedings, *adjudicate* cases, or *execute* removal orders.” *Reno v. American-Arab*
12 *Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999) (emphasis in original). In the
13 process of considering why Congress would deprive the courts of jurisdiction over these
14 three discrete actions, the Court explained that “[s]ection 1252(g) was directed against a
15 particular evil: attempts to impose judicial constraints upon prosecutorial discretion.” *Id.*
16 at 485 n.9. Thus, Petitioners may not challenge the Attorney General’s discretionary
17 decision to execute their removal orders. They might, however, escape this jurisdictional
18 bar if they could demonstrate that their removal would be unlawful, rather than just an
19 abuse of discretion.

20 The Court finds that Petitioners have shown that there are, at the very least,
21 substantial questions on the merits of the claims. Petitioners do not challenge their
22 removal orders, but instead argue that their removal while their UVisa applications
23 remain pending is unlawful because it would violate BIWPA and the Fifth Amendment.
24 Accordingly, the Court finds that, for purposes of this order and on the limited record
25 available at this juncture, that Petitioners have demonstrated that they have a substantial
26 case on the merits.

27 **C. Balance of Hardships and the Public Interest**

28 Under *Nken*, the Court must assess the balance of hardships to the parties and

1 weigh the public interest. “These factors merge when the Government is the opposing
2 party.” *Nken*, 129 S. Ct. at 1761. “There is always a public interest in the prompt
3 execution of orders of removal,” but there is also “a public interest in preventing aliens
4 from being wrongfully removed.” Here, because Petitioners have demonstrated that they
5 have demonstrated that there is a substantial question as to whether their removal would
6 be wrongful, that the balance of hardships and the public interest tips sharply in favor of a
7 stay.

8 **IT IS THEREFORE ORDERED:**

9 (1) Petitioners’ Motion for Emergency Stay of Removal and Motion for
10 Emergency Temporary Restraining Order (Doc. 2) is **granted to the extent it seeks a**
11 **Temporary Restraining Order**. Respondents are **enjoined** from removing Petitioners
12 Yuli Marisela Velarde-Flores (Agency No. A089-347-642), Ibeth Cristina Corral
13 (Agency No. A095-343-778), and Liliana Reyes Diaz (Agency No. A089-814-411) from
14 the United States until after the Court resolves the underlying Motion for Preliminary
15 Injunction and/or Petition for Writ of Habeas Corpus; and, at that time, Petitioner(s) may
16 be removed only if their removal is consistent with the Court’s ruling on the underlying
17 Petition.

18 (2) **The Clerk of Court must forthwith fax a copy of this Order to the**
19 **United States Attorney for the District of Arizona, to the attention of Peter Kozinets**
20 **at (602) 514-7760, and to Petitioners’ counsel Benjamin T. Wisinger at (602) 952-**
21 **9790.**

22 (3) The Clerk of Court must also send by certified mail a copy of the
23 Summons, the Petition, and this Order to the United States Attorney General pursuant to
24 Rule 4(i)(1)(B) **and** to Respondents pursuant to Rule 4(i)(2) of the Federal Rules of Civil
25 Procedure.

26 (4) No later than 5:00 p.m. January 5, 2018, Respondents must answer the
27 Motion for Emergency Stay of Removal and Motion for Emergency Temporary
28 Restraining Order (Doc. 2) to the extent it seeks a preliminary injunction. Petitioners

1 may file a Reply within three (3) of service of the Response.


2 (5) The Clerk of Court shall serve a copy of the Summons, Petition (Doc. 1), and
3 this Order upon the United States Attorney for the District of Arizona by certified mail
4 addressed to the civil process clerk at the office of the United States Attorney pursuant to
5 Rule 4(i)(1)(A) of the Federal Rules of Civil Procedure. The Clerk of Court also shall send
6 by certified mail a copy of the Summons, Petition, Motion, Memoranda and this Order to the
7 United States Attorney General pursuant to Rule 4(i)(1)(B) and to Respondents pursuant to
8 Rule 4(i)(2)(A).

9 (6) Respondents shall answer the Petition within twenty (20) days of the date of
10 service. Respondents shall not file a dispositive motion in place of an answer without first
11 showing cause as to why an answer is inadequate.

12 (7) Regarding courtesy copies of documents for chambers, Respondent is
13 directed to review Section II(D) of the Court's Electronic Case Filing Administrative
14 Policies and Procedures Manual, which requires that "a courtesy copy of the filing,
15 referencing the specific document number, **shall be printed directly from CM/ECF.**"
16 See <http://www.azd.uscourts.gov/sites/default/files/documents/adm%20manual.pdf> (emphasis
17 added).

18 (8) Petitioner may file a reply within 10 days from the date of service of the
19 answer.

20 Dated this 4th day of January, 2018.

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23 
24 Honorable Diane J. Humetewa
United States District Judge
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