IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

EASTERN DIVISION

)

Jane Doe, )

)

Petitioner, ) PETITION FOR WRIT

) OF HABEAS CORPUS

v. )

)

Tony Gonzalez, Kenosha County )

Detention Center Facility Administrator; ) CASE No.:

U.S. Citizenship & Immigration Services; )

Ken Cuccinelli, Acting Director of USCIS, )

in his official capacity; and Donald Neufeld, )

Associate Director of Service Center )

Operations, USCIS, in his official capacity; )

)

Respondents. )

)

**PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR ADMINISTRATIVE PROCEDURE ACT RELIEF**

1. **INTRODUCTION**
2. Petitioner Jane Doe petitions this Court to issue a Writ of Habeas Corpus, ordering Respondents to show cause within three days, providing reasons, if any, as to why Petitioner’s detention is lawful. 28 U.S.C. § 2243. Because Petitioner’s detention has been unconstitutionally prolonged, Petitioner urges the Court to grant her petition and order Respondent to release him from detention. 28 U.S.C. § 2241. Petitioner also seeks an order from the Court directing U.S. Citizenship and Immigration Services (USCIS) to adjudicate her petition for a “U” visa; an adjudication that USCIS has unreasonably delayed in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(1).
3. U.S. Immigration and Customs Enforcement (ICE) has detained Petitioner for two years without a bond hearing. Petitioner, an asylum seeker without a criminal history, suffered a decade of physical, verbal, and emotional abuse by her lawful permanent resident husband, who may also have sexually abused her two minor daughters. For two years, she has remained in detention without an individualized bond hearing, separated from her young daughters, despite the fact that she has pursued a “U” visa based on her cooperation with law enforcement related to an incident of domestic abuse in which her husband violently attacked her. She has also pursued asylum, withholding of removal, and Convention Against Torture relief based on her fear of persecution in Mexico by her husband and Mexican drug cartels.
4. Petitioner’s continued detention—for two years—is unlawful for at least three reasons. *First*, Petitioner’s prolonged detention without a hearing on whether she constitutes a danger or a flight risk violates the procedural component of Due Process Clause of the Fifth Amendment. *Second*, because she has valid defenses to removal, including her qualification for a U visa, Petitioner’s mandatory detention also violates the Due Process Clause of the Fifth Amendment. *Third*, because the Board of Immigration Appeals (“Board” or “BIA”) granted her relief from inadmissibility, and because the Seventh Circuit recently ordered a unique and narrow remand to the Board, it is unclear whether any statutory basis for her detention remains.
5. Separately, while ICE has unlawfully prolonged Petitioner’s detention, Defendant U.S. Citizenship and Immigration Services (“USCIS”) has failed to adjudicate Petitioner’s U visa application within a reasonable time. This failure violates the Administrative Procedure Act (“APA”), given that Petitioner filed her application over a year ago and is in immigration detention and facing removal. *See* 5 U.S.C. § 706(1). Petitioner asks the Court under its APA authority to order USCIS to adjudicate her U visa application and place her on the U visa “wait list” so she can stay in the United States.
6. Petitioner asks the Court to issue an order directing the government to “show cause why the writ [of habeas corpus] should not be granted” within three days. *See* 28 U.S.C. § 2243. Further, Petitioner asks the Court to issue a writ of habeas corpus by determining that her detention is not justified because (1) the government has not established by clear and convincing evidence that she presents a risk of flight or danger in light of available alternatives to detention; (2) her mandatory detention violates due process; or (3) she is being detained without statutory authorization. In the alternative, Petitioner asks the Court to issue a writ of habeas corpus and order her release within 20 days unless Defendants schedule a bond hearing before an immigration judge.
7. **JURISDICTION AND VENUE**
8. This Court has jurisdiction pursuant to 28 U.S.C. § 2241, the general grant of habeas authority to the District Courts; Art. I, § 9, cl. 2 of the United States Constitution, 28 U.S.C. § 1361 (federal mandamus statute); 28 U.S.C. § 1331(a) (federal question); 5 U.S.C. § 702 (Administrative Procedure Act). This Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 57.
9. Venue is proper in the Eastern District of Wisconsin because that is where Petitioner is detained and that is where Petitioner’s immediate custodian, facility administrator Tony Gonzalez, resides and works. *See* 28 U.S.C. § 1391(b); *Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006). ***[Note: Venue is proper where the client is detained.]***

# **THE PARTIES**

1. Petitioner Jane Doe is an immigrant from Mexico who is married to a Lawful Permanent Resident of the United States and has been in the process of applying for U-visa status since June 2018. She is currently detained by ICE in the Kenosha County Detention Center.
2. Tony Gonzalez is the facility administrator of the Kenosha County Detention Center (“KCDC”), the facility where Petitioner is currently detained. ***[NOTE: Check your local jurisdiction to determine whether you can also sue ICE/DHS. Here in the 7th Circuit, the law is clear that you can only sue the warden of the facility.]***
3. Defendant USCIS, a component of DHS, is the agency charged with adjudicating applications for U visas, among other things.
4. Defendant Ken Cuccinelli is sued in his official capacity as the Acting Director of USCIS, the Agency charged with adjudicating Plaintiff’s U visa application.
5. Defendant Donald Neufeld is sued in his official capacity as the Associate Director of Service Center Operations. The Vermont Service Center, which Mr. Neufeld oversees, is charged with adjudicating all U visa applications.
6. **FACTUAL ALLEGATIONS**
7. [FACTS OMITTED] ***Here, include facts about client coming to the United States and applications for U visa and other immigration relief. Clearly lay out the client’s equities.***
8. On July 12, 2018, Petitioner applied for a U visa, a relief application for victims of criminal activity, with USCIS. Her application was based on assistance she provided law enforcement regarding crimes of domestic violence her husband committed against her and also cited her cooperation against her cartel-affiliated kidnappers. Petitioner required a waiver of inadmissibility to be eligible for a U visa because of prior immigration violations.
9. Because of bureaucratic delays, there is little likelihood that Defendant USCIS will adjudicate her application before Petitioner is removed from the United States. ICE does not pause removal efforts while bona fide visa applications are pending with USCIS, frustrating the purpose of the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”), which Congress enacted to protect immigrant victims of crime who come forward.
10. A U visa is intended to provide a path to lawful status for immigrant victims of crime who cooperate with law enforcement in the investigation or prosecution of such crimes. 8 U.S.C. § 1101(a)(15)(U). Petitioner cooperated with the investigation and prosecution of her own domestic violence complaint against her husband, a lawful permanent resident of the U.S. The police department in Haywood, California submitted a certification form, attesting to her cooperation. Thus, she is statutorily eligible to apply for a U visa.
11. On August 15, 2018, after a merits hearing, the Immigration Judge (“IJ”) denied Petitioner’s asylum application entirely and ordered her removal from the United States to Mexico. The IJ also denied her application for a waiver of inadmissibility.
12. On February 6, 2019, the BIA issued its decision and order regarding Petitioner’s appeal. Critically, with respect to Petitioner’s request for permission to enter the U.S. as a nonimmigrant, the BIA reversed the IJ decision and approved Petitioner’s application for advance permission to enter the United States as a nonimmigrant, granting her a waiver of inadmissibility under section 212(d)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(3).
13. At the same time, the BIA dismissed Petitioner’s appeal of the IJ’s denial of her applications for asylum, withholding of removal, and protection under the Convention Against Torture.
14. In its decision, the BIA did not expressly enter or affirm a removal order against Petitioner, nor did it otherwise address the effects of its grant of the nonimmigrant waiver of inadmissibility.
15. On February 15, 2019, Petitioner filed a timely Petition for Review of the BIA’s decision in the U.S. Court of Appeals for the Seventh Circuit. Shortly thereafter, Petitioner also moved that Court for a stay of removal during the pendency of her appeal. This stay was granted on March 7, 2019.
16. On May 29, 2019, Petitioner filed her appellate brief in the Seventh Circuit. She argues, *inter alia*, that she is not currently subject to an order of removal because the BIA granted her a waiver of inadmissibility.
17. Following the filing of her appellate brief, Petitioner’s lawyers conferred with counsel for the Department of Justice. The government attorneys said that they were not certain why Petitioner remained in detention. On information and belief, the government plans to remove Petitioner to Mexico if she does not prevail on her appeal.
18. On July 29, 2019, the attorney general filed a motion to remand Petitioner’s appeal to the BIA for further consideration without confession of error.
19. In conferring with Petitioner’s counsel regarding the proposed motion, counsel for the attorney general represented that the government had requested that USCIS expedite its processing of Petitioner’s U visa application. Prior to filing this petition, Petitioner also sought expedited processing of her application via email to USCIS’ Vermont Service Center. *See* Ex. A, Email from Counsel to USCIS Vermont Service Center.
20. On August 12, 2019, Petitioner filed her opposition to the remand motion. She argued, *inter alia*, that she was being detained without authorization, and that the remand motion itself would extend her detention for months even if it were denied as meritless.
21. On August 27, 2019, the Seventh Circuit granted the motion. Its order states: “This appeal is **REMANDED** to the Board of Immigration Appeals for further consideration of whether the petitioner is eligible for asylum or withholding of removal based on mistreatment by her husband. Pursuant to 8 C.F.R. § 1003.6(a), the Petitioner’s removal ‘shall not be executed’ while her case is pending before the Board.”
22. On September 26, 2019, Petitioner filed an application for humanitarian parole based on the equities in her case, her prolonged detention, and the fact that her case was remanded to the BIA, which will undoubtedly result in many more months of detention. Ex. B, Parole Request. ICE has failed to respond to her parole request. Accordingly, Petitioner has exhausted her administrative appeal.
23. In the two years she has been detained, Petitioner has not received an individualized bond hearing where the government has had to prove that she is a flight risk and danger; nor could they.
24. **LEGAL BACKGROUND**
25. **Statutory and Constitutional Limits for Immigration Detention**
26. Petitioner is detained under an immigration statute that mandates the detention of all “arriving aliens” without individualized bond hearings. *See* 8 U.S.C. § 1225(b)(1)(B)(ii).
27. The Fifth Amendment to the U.S. Constitution provides further limits on detention. As the Supreme Court has noted, “[i]t is well-established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.” *Demore*, 538 U.S. at 523 (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of liberty” that the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). This fundamental due process protection applies to all noncitizens, even if they are removable or inadmissible. *See id.* at 721 (Kennedy, J., dissenting) (“[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious.”). Under these due process principles, detention must “bear [a] reasonable relation to the purpose for which the individual [was] committed.” *Id.* at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).
28. Due process therefore requires “adequate procedural protections” to ensure that the government’s asserted justification for physical confinement “outweighs the individual’s constitutionally protected interest in avoiding physical restraint.” *Id*. at 690 (internal quotations omitted). In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention—to mitigate the risks of danger to the community and to prevent flight. *Id*.; *Demore*, 538 U.S. at 538.
29. Following *Zadvydas* and *Demore*, every circuit court to confront the issue has protected the due process rights of people detained in civil immigration detention by requiring a custody hearing for noncitizens subject to unreasonably prolonged detention pending removal proceedings. *See Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).
30. While the Seventh Circuit has not explicitly addressed the issue, the court has noted that “[i]t would be a considerable paradox to confer a constitutional or quasi-constitutional right to release on an alien ordered removed,” as required by *Zadvydas*, “but not on one who might have a good defense to removal.” *Hussain v. Mukasey*, 510 F.3d 739, 743 (7th Cir. 2007). Thus, a noncitizen subjected to prolonged detention “before he is subjected to a final order of removal” may be eligible for habeas relief if there is “[i]nordinate delay” in the proceedings. *Id*. ***[Note: Include any circuit-specific law on constitutional limits to detention.]***
31. In 2018, the Supreme Court considered a challenge to prolonged detention brought by two classes of noncitizens. The Court resolved that case on statutory grounds, holding that the Ninth Circuit erred by interpreting Sections 1226(c) and 1225(b) to require bond hearings as a matter of *statutory construction*. *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). Because the Ninth Circuit Court of Appeals had not decided whether the Constitution itself requires bond hearings in cases of prolonged detention, the Court remanded the case to the Ninth Circuit to address the constitutional questions. *Id*. at 851. Upon then remanding the case to the district court, the Ninth Circuit cast “grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government’s arbitrary deprivation of liberty would have thought so.” *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018). The issue remains pending before the district court.
32. The answer to the question left open by the Supreme Court and at issue here is yes, due process requires that the government provide bond hearings to noncitizens facing prolonged detention. Where the government detains a noncitizen for a prolonged period or is pursuing a substantial defense to removal or claim to relief—such as asylum or a U visa—due process requires an individualized determination that such a significant deprivation of liberty is warranted. *Id.* at 532 (Kennedy, J., concurring) (“individualized determination as to his risk of flight and dangerousness” may be warranted “if the continued detention became unreasonable or unjustified”)*; see also Jackson v. Indiana*, 406 U.S. 715, 733 (1972) (detention beyond the “initial commitment” requires additional safeguards); *McNeil v. Dir., Patuxent Inst*., 407 U.S. 245, 249-50 (1972) (“lesser safeguards may be appropriate” for “short-term confinement”); *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978) (in Eighth Amendment context, “the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards”).
33. Following *Jennings*,courts have routinely found that noncitizens subject to prolonged immigration detention are entitled to due process protections*.* In fact, “[n]early all district courts that have considered the issue agree that prolonged mandatory detention pending removal proceedings, without a bond hearing, will—at some point—violate the right to due process.” *Banda v. McAleenan*, No. 18-1841, 2019 WL 2473815, at \*10 (W.D. Wash. June 12, 2019) (internal citations and quotations omitted).
34. These constitutional due process protections apply where an individual is an arriving alien, like Petitioner. [[1]](#footnote-2) *See Bermudez Paiz v. Decker*, No. 18-CV-4759, 2018 WL 6928794, at \*10 (S.D.N.Y. Dec. 27, 2018) (“Most judges who have squarely faced the question have [held]...that arriving aliens, like criminal aliens, cannot be detained for an unreasonably prolonged period of time without a bond hearing.”).
35. While such courts have failed to adopt a bright-line temporal test, they have generally found that detention for more than a year without a bond hearing violates due process, including courts in this district and other courts within this circuit. *See, Doe v. Beth*, No. 18-C-1672, 2019 WL 1923867, at \*4 (E.D. Wis. Apr. 30, 2019) (habeas granted after 2 ½ years of detention); *Vargas v. Beth*, No. 19-CV-92, 2019 WL 1320330, at \*8 (E.D. Wis. Mar. 22, 2019) (9-month detention); *Baez-Sanchez v. Kolitwenzew*, 360 F. Supp. 3d 808, 816 (C.D. Ill. 2018) (48-month detention).
36. Courts have routinely granted habeas petitions for time periods far shorter than Petitioner’s detention. *See, e.g.*, *Gutierrez Cupido v. Barr,* No. 19-CV-6367-FPG, 2019 WL 4861018, at \*3 (W.D.N.Y. Oct. 2, 2019) (16 months); *Jamal v. Whitaker*, 358 F. Supp. 3d 853, 859 (D. Colo. 2019) (19 months); *Hernandez v. Decker*, No. 18-CV-5026, 2018 WL 3579108, at \*8 (S.D.N.Y. July 25, 2018) (8 months); *Lett v. Decker*, 346 F. Supp. 3d 379, 387 (S.D.N.Y. 2018) (10 months); *Salazar v. Rodriguez*, No. 17-CV-1099, 2017 WL 3718380, at \*6 (D.N.J. Aug. 29, 2017) (12 months). In *Singh v. Choate*, the District of Colorado noted that the government was not able to cite any “case holding that twenty months of detention is reasonable.” No. 19-CV-00909-KLM, 2019 WL 3943960, at \*5 (D. Colo. Aug. 21, 2019).
37. In addition to the amount of time in detention, courts weigh the following factors when assessing reasonableness: (1) how long the detention will likely continue in the absence of judicial relief; (2) the nature and extent of removal proceedings, including whether any delays are attributable to the government or the immigrant; (3) the conditions of detention; and (4) the likelihood that the proceedings and judicial review will end with a removal order. *See Jamal,* 358 F. Supp. 3dat 859-60.
38. Recently, this district court granted a habeas corpus petition after weighing the factors discussed above. *See Doe*, 2019 WL 1923867, at \*4. The Court held that ICE had unconstitutionally prolonged Petitioner’s following the circuit court’s third remand to the BIA. “[A]t some point the continuation of the proceeding may as a practical matter approach the indefinite mark that has mandated a bail hearing in so many other cases. We have reached that point here.” *Id.*  ***[Insert court-specific law in this paragraph.]***
39. **The U Visa Adjudication Process**
40. ***The U Visa Statute and Legislative History***
41. In 2000, Congress created a new visa category for immigrant victims of crime who cooperate with law enforcement in the investigation or prosecution of a crime. *See* Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”), Pub. L. No. 106–386, 114 Stat. 1464 (2000).
42. Congress enacted the U visa provision to strengthen law enforcement’s ability to investigate and prosecute crimes “while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.” VTVPA, Pub.L. 106–386, at § 1513(a)(2)(A). “This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.” *Id.*
43. To be eligible for a U visa,[[2]](#footnote-3) an applicant must show: (1) she was the victim of a enumerated crime in violation of law; (2) she “suffered substantial physical or mental abuse as a result of having been a victim of criminal activity”; (3) she possesses information concerning the criminal activity; and (4) she helped or is helping law enforcement or prosecutors in the investigation or prosecution of criminal activity. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(III).
44. There is an annual statutory cap on U visas. By statute, USCIS may only issue 10,000 visas per year. 8 U.S.C. § 1184(p)(2). In the past several years, U visa applications have far exceeded the 10,000-per-year cap, resulting in a backlog of nearly 90,000 U visa applications awaiting adjudication.
45. ***The “Waiting List” and Deferred Action***
46. Due to the 10,000-visa cap on U visas discussed above, USCIS adopted a regulatory “waiting list,” whereby USCIS conducts an initial adjudication and places “eligible petitioners who, due solely to the cap [of 10,000 visas], are not granted U-1 nonimmigrant status . . . on a waiting list.” 8 C.F.R. § 214.14(d)(2).
47. Significantly, while on the waiting list, USCIS will grant the applicant deferred action, which is a form of prosecutorial discretion protecting an individual from removal,[[3]](#footnote-4) and USCIS may grant work authorization. *Id.* This would also preclude Petitioner’s removal from the United States and would result in her release from detention.
48. According to USCIS’s published processing times, it currently takes more than four years to adjudicate this first phase of adjudication; *i.e.*, to receive deferred action by placement on the waiting list. *See* Ex. C, USCIS Vermont Service Center processing times. To put it simply, there is now a four-year waiting list to get onto the waiting list.

# **COUNT ONE**

**Violation Of The Due Process Clause Of The Fifth Amendment To The U.S. Constitution For Detention Exceeding Sixth Months**

1. Petitioner re-alleges and incorporates by reference each allegation contained above.
2. The Due Process Clause of the Fifth Amendment forbids the government from depriving any “person” of liberty “without due process of law.” U.S. Const. amend. V.
3. Detention without a bond hearing is unconstitutional when it exceeds six months.
4. ICE has detained Petitioner for two years. Because her detention has lasted beyond the six-month benchmark relied upon by courts – in fact, four times that benchmark – it has become unconstitutionally prolonged. *See Maniar v. Warden Pine Prairie Correctional Ctr*., No. 6:18-CV-00544,Report & Recommendation, at 14 (W.D. La. July 11, 2018), attached as Ex. D (“Based on existing precedent this Court agrees detention for a period of time up to six months is presumably constitutional; however, after six months, detention without the opportunity to at least seek a hearing offends the Due Process Clause.”).
5. To justify Petitioner’s ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decision maker, that Petitioner’s detention is justified by clear and convincing evidence of flight risk or danger, even after consideration whether alternatives to detention could sufficiently mitigate that risk.
6. For these reasons, Petitioner’s ongoing prolonged detention without a hearing violates due process.

**COUNT TWO**

**Violation Of Fifth Amendment Procedural Due Process As Applied To Individuals With Viable Legal Defenses To Removal**

1. Petitioner repeats and realleges the allegations contained in each preceding paragraph.
2. Petitioner is entitled to procedural due process protections. Although the mandatory detention statute has been upheld against a facial constitutional challenge, it may still be unconstitutional as applied.
3. The removal process takes many months or years to conclude, particularly when the noncitizen has a viable claim for relief. Petitioner’s removal proceedings have lasted nearly two years, and the attorney general has now successfully sought to remand her case to the BIA for further proceedings.
4. As applied to individuals with viable claims for relief, such as asylum and a U visa, mandatory detention fails under *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), which requires a court to weigh the individual’s interest and the risk of erroneous deprivation of that interest against the government’s interest.
5. Here, Petitioner’s interest is substantial—freedom from physical restraint is an interest that “lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas*, 533 U.S. at 690.
6. The government’s interest in detaining noncitizens during deportation proceedings is to effectuate removal. As to noncitizens with viable legal defenses, this interest is diminished. In Petitioner’s case, for example, where the BIA has granted a waiver of inadmissibility, the likelihood that the government will be legally permitted to remove her is reduced.
7. Absent judicial relief, Petitioner will likely spend over another year in detention. Because the BIA failed to adequately explain its denial of Petitioner’s asylum claims, the case has now been remanded to the BIA after petitioner filed a full merits brief before the Seventh Circuit. Based on the timing of the proceedings in this and other cases, Petitioner’s counsel estimates it will take at least six months to receive a decision from the BIA and, if necessary, several more months to appeal that decision to the Seventh Circuit.
8. Significant delays have been attributable to the government. Most recently, for example, the DOJ lawyers sought over a month extension to file their response to Petitioner’s opening brief. Ultimately, however, the DOJ filed a two-page motion to remand the appeal to the BIA. Further, because of the BIA’s error in failing to properly enter a removal order, Petitioner’s case has been prolonged.
9. Petitioner’s conditions of detention further render her confinement unreasonable. She is thousands of miles away from her family in the United States, who live primarily in California. And she has already had to request a transfer out of the Chicago facility where she was held because she was being harassed because of her race and national origin.
10. Petitioner’s proceedings are unlikely to end in a removal order. Given that the BIA has already granted her a waiver of admissibility, it should make clear that she should be permitted to remain in the United States while her U visa is processed. And, thus far, the BIA’s rejection of her asylum claims has been based on facially erroneous interpretation of both governing precedent and the factual basis of her claims.

**COUNT THREE**

**Detention in Violation of the Due Process Clause**

1. Alternatively, under the case-by-case reasonableness approach adopted by many courts post-*Jennings*, Petitioner’s detention has become unconstitutionally prolonged for the following reasons:
   1. Petitioner’s detention has exceeded six months four times over—she has been detained for two years. *See Chavez-Alvarez*, 783 F.3d at 476; *see also Jamal A.*, 358 F. Supp. 3d at 859 (“Jamal has been in ICE custody over 19 months. This is a very long time, even for an alien who may be entitled to less protection under the Due Process Clause than an alien detained under § 1226(c) or another provision of the immigration laws.”).
   2. Petitioner has raised two “good faith” challenges to removal—that is, the challenge is “legitimately raised” and presents “real issues.” *Chavez-Alvarez*, 783 F.3d at 476. On a petition for review to the Seventh Circuit, the government has conceded that her case should be remanded to the Board of Immigration Appeals for further proceedings. Additionally, she has a *bona fide* application for a U visa on file with USCIS.
   3. It is likely that Petitioner’s detention will continue pending future proceedings; namely, her case has been remanded to the BIA, proceedings which may last many more months. *See id.* at 478 (finding detention unreasonable after ninth months of detention, when the parties could “have reasonably predicted that Chavez–Alvarez’s appeal would take a substantial amount of time, making his already lengthy detention considerably longer”); *see also Sopo*, 825 F.3d at 128; *Reid*, 819 F.3d at 500. Her case may then be remanded to the immigration court and Petitioner could easily be in detention for another year.
   4. Finally, Petitioner has not been the source of the delay in this case. Rather, errors at the BIA have caused the Seventh Circuit to remand the case, resulting in Petitioner sitting in ICE detention far longer than she needs to.
2. To justify Petitioner’s ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decision-maker, that Petitioner’s detention is justified by clear and convincing evidence of flight risk or danger, even after consideration of whether alternatives to detention could sufficiently mitigate risk.
3. For these reasons, Petitioner’s ongoing prolonged detention without a hearing violates due process.

**COUNT FOUR**

**Detention Without Statutory Authority**

1. Petitioner repeats and realleges the allegations contained in each preceding paragraph.
2. Given the unique and limited nature of the Seventh Circuit’s August 2019 remand order, and the original February 2019 order of the Board, it remains unclear whether Petitioner remains in removal proceedings or is subject to an order of removal. If neither basis for her detention is satisfied, she must be released.

**COUNT FIVE**

**Violation Of The APA For USCIS’s Failure To Place Petitioner On The U Visa “Waiting List” Within A Reasonable Amount Of Time**

1. Petitioner repeats and realleges the allegations contained in the preceding paragraphs.
2. Petitioner’s U visa petition has been pending for more than one year.
3. USCIS has not adjudicated Petitioner’s application in a reasonable time. *See* 5 U.S.C. § 555(b).
4. Adverse factors exist that make this delay unreasonable as applied to Petitioner under *Telecommunications Research & Action Center (“TRAC”) v. FCC*, 750 F.2d 70, 77-78 (D.C. Cir. 1984):
5. **Rule of Reason.** USCIS adjudicates U visa petitions in the order received, a rule that is unjustifiable as it pertains to individuals like Petitioner who are in detention and facing imminent deportation. Petitioner asks USCIS to prioritize her case over those U visa applicants who are not detained and not in removal proceedings. While USCIS may only grant 10,000 visas per year, Petitioner does not seek one of these 10,000 visas; she merely asks USCIS to complete the first phase of adjudicating and place her application on the waiting list (which has no numerical limits) so she may receive deferred action from removal. 8 C.F.R. 214.14(c)(1)(ii).
6. **Whether human health and welfare interests are at stake.** This case is not about economic interests. It is about whether ICE will imminently deport Petitioner back to Mexico, away from her U.S. citizen children, both of whom have been seriously abused by Petitioner’s lawful-permanent-resident husband, and to whom Petitioner has provided emotional and financial support. Further, Petitioner, an asylum seeker with no criminal history, has been detained for ***two years.*** Her prolonged detention and the restriction of liberty raises serious concerns for her health and welfare.
7. **The effect of expediting delayed action on agency activities of a higher or competing priority.** Petitioner recognizes that there are others seeking a waiting list adjudication. But Petitioner’s interests are different because, unlike most U visa applicants, she is sitting in immigration detention and has been for two years. Additionally, if the BIA enters a removal order, the government will seek to remove her. So while there may be others awaiting a U visa, most applicants are not detained and most applicants are not in removal proceedings. Therefore, they do not have the same need for urgent adjudication of their U visa applications.
8. **The nature and extent of the interests at stake.** For Petitioner, the nature of the interests at stake could not be more compelling—her ability to stay in the United States with her daughters. Irreparable harm will result from her removal—if ICE forces Petitioner to leave the country, she will necessarily need to await adjudication of her U visa in Mexico. This will take another nine to ten years. And once her U visa is adjudicated, there is no certainty she will be able to reenter, as she will need to seek a waiver from USCIS. This will harm both Petitioner and her daughters who rely on her.
9. Having sought expedited review of her U visa application, Petitioner has exhausted her administrative remedies. *See* Ex. A.

# **PRAYER FOR RELIEF**

WHEREFORE, Petitioner respectfully asks the Court to:

1. Assume jurisdiction over this matter;
2. Issue a Writ of Habeas Corpus requiring the Respondents to produce the Petitioner and to show why Petitioner’s detention is not unlawful;
3. Declare the continued detention of the Petitioner to lack statutory authorization;
4. Declare that the Petitioner is not now subject to any outstanding Order of Removal;
5. Grant temporary and permanent injunctive relief, ordering the Respondents to release the Petitioner from custody immediately;
6. Grant temporary and permanent injunctive relief ordering the Respondents to cease and desist from detaining the Petitioner, in the absence of any other lawful order of removal against the Petitioner; or in the alternative, order a bond hearing where the government must show she is a flight risk and/or a danger by clear and convincing evidence, and where bond is considered in light of her ability to pay;
7. Declare that USCIS has not made a “waiting list” determination regarding Petitioner’s U visa application “within a reasonable time,” in violation of the APA, 5 U.S.C. § 555(b);
8. Order USCIS to make a “waiting list” adjudication of Petitioner’s application;
9. Award petitioner her attorneys’ fees and costs; and
10. Grant such other relief as the Court deems necessary and proper.

Respectfully Submitted,

*/s/ Katherine E. Melloy Goettel*  DATE: October 11, 2019

Attorneys for Petitioner

Katherine E. Melloy Goettel

Charles Roth

National Immigrant Justice Center

224 S. Michigan Avenue, Suite #600

Chicago, Illinois 60604

T (312) 660-1335

F (312) 660-1505

Robert E. Shapiro

Andrew E. Nieland

Jeffrey J. Koh

Barack Ferrazzano Kirschbaum &

Nagelberg LLP

200 West Madison Street, Suite 3900

Chicago, IL 60606

Tel.: (312) 984-3100

rob.shapiro@bfkn.com

andrew.nieland@bfkn.com

1. *See, e.g.*, *Gutierrez Cupido v. Barr,* No. 19-CV-6367-FPG, 2019 WL 4861018, at \*3 (W.D.N.Y. Oct. 2, 2019); *Banda v. McAleenan*, No. 18-1841, 2019 WL 2473815 (W.D. Wash. June 12, 2019); *Tuser E. v. Rodriguez*, 370 F. Supp. 3d 435, 442 (D.N.J. 2019); *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 859 (D. Minn. 2019); *Moore v. Nielsen*, No. 18-CV-01722, 2019 WL 2152582 (N.D. Ala. May 3, 2019) (report and recommendation) (R&R later withdrawn because the statutory authority for Petitioner’s detention changed to the post-final order statute, 8 U.S.C. § 1231(a)); *Hernandez v. Decker*,No. 18-CV-5026, 2018 WL 3579108, at \*8 (S.D.N.Y. July 25, 2018); *Sajous v. Decker*, 18-CV-2447 (AJN), 2018 WL 2357266, at \*11 (S.D.N.Y. May 23, 2018); *Otis v. v. Green*, No. CV 18-742 (JLL), 2018 WL 3302997, at \*5 (D.N.J. July 5, 2018); *Salazar v. Rodriguez*, No. 17-1099, 2017 WL 3718380, at \*6 (D.N.J. Aug. 29, 2017); *but see Poonjani v. Shanahan*, 319 F. Supp. 3d 644 (S.D.N.Y. 2018). [↑](#footnote-ref-2)
2. These visas are referred to as “U” visas due to their placement in the statute at 8 U.S.C. § 1101(a)(15)(U). [↑](#footnote-ref-3)
3. Deferred action is a method of prosecutorial discretion that the immigration agencies may grant “[t]o ameliorate a harsh and unjust outcome.” 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998), *quoted in Reno v. Am.-Arab Anti-Discrimination Comm*., 525 U.S. 471, 484 (1999). Through deferred action, ICE may “decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.” *Id. “*Approval of deferred action status means that . . . no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated.” *Id.* [↑](#footnote-ref-4)