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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

YAZMIN LILIANA ELIAS OBREGON,
Petitioner,
v.
JEFFERSON B. SESSIONS, et al.,
Respondents.

Case No. [17-cv-01463-WHO](#)

**ORDER REGARDING TEMPORARY
RESTRAINING ORDER**

INTRODUCTION

This case presents an important issue for the periodic bond hearings required by *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) for immigration detainees—under what circumstances does an Immigration Judge commit constitutional error by continuing to detain a non-citizen an additional six months for “dangerousness?” I cannot reach that decision here because the record is incomplete: petitioner Yazmin Liliana Elias Obregon chose to cut short her November 10, 2016 *Rodriguez* hearing and not to emphasize prior to the hearing’s termination that she has a release plan that addresses her alcoholism and rebuts the government’s showing that she is currently dangerous because of her previous convictions for DUI and driving without a license. The motion for a temporary restraining order is DENIED. In light of the significant liberty interest at stake and the reason periodic bond hearings are required by the Constitution, I write to emphasize the burden ICE has to keep a non-citizen for prolonged periods and the potential strength of this petitioner’s case.

PROCEDURAL BACKGROUND

Petitioner is currently in the custody of the Department of Homeland Security (“DHS”) pending civil removal proceedings against her in San Francisco Immigration Court. She seeks a writ of habeas corpus to secure her release, arguing that at a November, 2016 bond hearing DHS

1 failed to present clear and convincing evidence that she poses a present danger to justify her
2 continued detention, in violation of *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2008), *Rodriguez*,
3 and the Fifth Amendment’s Due Process Clause. First Amended Petition (“FAP”) (Dkt. No. 14).
4 She contends that, as a matter of law, DHS failed to show by clear and convincing evidence that
5 she poses a danger to the community and that the Immigration Judge’s (“IJ”) decision that she
6 poses a present danger was legally erroneous. She also argues that the Immigration Court denied
7 her due process by making her choose between postponing her bond hearing by a month before
8 she could finish presenting evidence in her favor and receiving an immediate bond determination
9 from the court. She has moved for a temporary restraining order to secure her immediate release.
10 Dkt. No. 9.

11 The government opposes the motion, arguing that petitioner cannot demonstrate that the
12 IJ’s decision was legally erroneous and that this court does not otherwise have jurisdiction to
13 review the IJ’s discretionary decision. It further contends that the IJ did not deny petitioner due
14 process by giving her the option to receive an immediate bond determination or to continue her
15 bond hearing by a month at which time she would be able to finish presenting evidence in support
16 of her release. Finally, it argues that even if petitioner is entitled to some relief, she should not be
17 released, as the proper relief for an inadequate *Rodriguez* hearing is a new hearing. I heard
18 argument on petitioner’s motion for a temporary restraining order on April 3, 2017.

19 **FACTUAL BACKGROUND**

20 Petitioner is a 34-year old Mexican national who was brought to the United States at the
21 age of four. FAP ¶15. She has lived in the United States for over 30 years and has three U.S.
22 citizen children, whose ages are 17, 14, and 13 years old. *Id.*

23 Petitioner is a victim of significant domestic abuse. She developed substance abuse
24 problems as a result. *Id.* ¶16. The father of her three children, Mr. Garcia, raped her, beat her, and
25 forced her to take methamphetamine in the hopes of causing a miscarriage. *Id.* As a result of this
26 abuse, she developed an addiction to meth and was eventually arrested and convicted of
27 possession of methamphetamine in 2005. *Id.* Following this conviction, she completed a 100-day
28 residential drug treatment program and was able to overcome her addiction. *Id.* She has had no

1 further problems with methamphetamine since completing the program. *Id.*

2 Although petitioner was able eventually to escape the abusive relationship with Mr.
3 Garcia, she entered a second abusive relationship with Mr. De Leon. *Id.* ¶17. Mr. De Leon was
4 an alcoholic and was also physically violent with her. *Id.* She coped with Mr. De Leon’s abuse
5 by self-medicating with alcohol. *Id.* And she drove under the influence as a result. *Id.*

6 Petitioner received her first DUI in 2006: she was pulled over by police for making a
7 wrong turn and was cited, but not arrested, for a DUI. *Id.* ¶18. She was pulled over again in 2009:
8 on this occasion she was cited with a DUI, arrested, and spent two days in jail. *Id.* Following her
9 2009 arrest she was ordered to attend DUI classes, which cost \$300 per month. *Id.* ¶19. While
10 she was still attending the DUI classes, petitioner suffered a serious beating from Mr. De Leon.
11 *Id.* As a result of this beating, petitioner was bedridden for a week – she missed her DUI class,
12 lost her job, making her unable to continue paying for the classes, and stopped going. *Id.* In 2011
13 petitioner was arrested for violating her probation by failing to complete her DUI classes. *Id.* ¶20.
14 She was placed in ICE custody and remained in detention for a week before being released on
15 \$7,000 bond.

16 In addition to petitioner’s DUI convictions, between 2006 and 2011 she also received
17 approximately four convictions for driving without a license. *See* Pet. Ex. X at 66. Despite
18 getting a driver’s permit at the age of 17, she never took the driver test and never acquired a valid
19 license. *Id.* She was cited for driving with a suspended license in 2006, 2009, 2010, and 2011.
20 *Id.* at 66-72.

21 Following her release from custody in 2011, petitioner left Mr. De Leon, stopped drinking
22 alcohol for a year and focused on providing for her children. *Id.* In 2014 she began a relationship
23 with her current partner, Mr. Aguilar. *Id.* ¶21. Mr. Aguilar does not drink and is not physically or
24 emotionally abusive toward her. *Id.*

25 In October of 2015, petitioner went to a birthday party for her sister. She had a few drinks.
26 *Id.* ¶22. Mr. Aguilar drove her to and from the birthday party. *Id.* But after they got home,
27 instead of parking Mr. Aguilar left the car double-parked and walked down the street to get tacos.
28 *Id.* Petitioner became impatient, slid into the driver’s seat, and honked the horn to get Mr.

1 Aguilar’s attention. *Id.* This got the attention of police officers instead, who came by to
2 investigate the excessive honking. *Id.*

3 When the police arrived, petitioner attempted to park the car so that it was not in the
4 middle of the road. *Id.* The police cited her for a DUI and for driving without a license, but did
5 not arrest her. *Id.* A criminal judge determined that petitioner was not a danger to the community
6 and allowed her to enter a rehabilitation program designed for survivors of domestic abuse at
7 Athena House. *Id.* ¶23. Petitioner completed the 3-month program in February, 2016 and then
8 returned home to live with Mr. Aguilar. *Id.* ¶24.

9 As a condition of her probation, petitioner was required to take daily drug and alcohol
10 tests. *Id.* A week after her release from the Athena House, petitioner’s daily test came back
11 inconclusive because she had consumed too much water beforehand. *Id.* This inconclusive test
12 constituted a violation of her probation and she was arrested for two days. *Id.* She went before a
13 criminal judge on February 26, 2016, who indicated she would be released to continue her
14 outpatient rehabilitation. But instead, she was taken into ICE custody, where she remains today.
15 *Id.* ¶25.

16 As a result of the Ninth Circuit’s decision in *Rodriguez*, individuals in extended civil
17 immigration detention are entitled to receive a bond hearing every six months at which DHS has
18 the burden to show by clear and convincing evidence that continued detention is appropriate either
19 because the individual is a flight risk or poses a danger to the community. Petitioner received her
20 *Rodriguez* bond hearing on September 8, 2016. Bond was denied. Pet. Ex. X. She moved for a
21 new bond hearing on the basis that her counsel at her initial bond hearing and first *Rodriguez*
22 hearing was incompetent. Her motion was granted.

23 The new hearing occurred on November 10, 2016. *Id.* It began with DHS cross-
24 examining petitioner to establish her continuing dangerousness by proving her past convictions.
25 After the government rested, petitioner’s testimony started with the circumstances that led to her
26 meth addiction in 2005. It never reached the present or the reasons why less restrictive
27 alternatives are available and sufficient to support of her release. While she planned to
28 demonstrate her rehabilitation and that she was no longer facing the abuse that had contributed to

1 her substance abuse problems, the hearing was cut short. The IJ indicated that he had no more
2 time for the hearing that day and would have to continue the hearing to December 13, 2016, the
3 first date that the attorney for DHS and he were available. *Id.*

4 Faced with a month-long continuance, petitioner asked that the IJ issue a decision on the
5 spot. *Id.* The IJ did so. He declined to release her, concluding that although petitioner had clearly
6 had a very hard life, her criminal history indicated she was a danger to the community. *Id.* On
7 December 9, 2016 the IJ issued a written memorandum opinion explaining that DHS had
8 demonstrated petitioner posed a danger, noting her three DUI convictions, highlighting that she
9 had at least four citations for driving without a license, and stating that although petitioner was
10 participating in a treatment program, she had previously participated in such programs but had
11 always relapsed. Pet. Ex. E.

12 Petitioner appealed her denial of bond to the Board of Immigration Appeals (“BIA”). Pet.
13 Ex. F. On March 23, 2017, counsel for petitioner received BIA’s decision dismissing the appeal.
14 FAP ¶32. The BIA upheld the IJ’s decision that petitioner is a danger to the community.

15 **LEGAL STANDARD**

16 Under section 8 U.S.C. § 1226(a) the Attorney General is empowered to arrest and detain
17 noncitizens awaiting removal proceedings. 8 U.S.C. § 1226(a). The Attorney General has
18 discretion to continue to detain such individuals or release them on bond or conditional parole and
19 has delegated this authority to the IJs. *Id.*; 8 C.F.R. §§ 1003.19, 1236.1 (2006). The BIA has held
20 that a noncitizen should only be kept in continued detention or required to post bond after a
21 “finding that he is a threat to national security, or that he is a poor bail risk.” *Matter of Patel*, 15
22 I&N Dec. 666 (BIA 1976).

23 Petitioner is not a national security risk. To determine whether she is a poor bail risk, in
24 *Matter of Guerra*, the BIA outlined a number of factors that IJs may consider when assessing
25 whether an alien is dangerous or a flight risk: “(1) whether the alien has a fixed address in the
26 United States; (2) the alien’s length of residence in the United States; (3) the alien’s family ties in
27 the United States, and whether they may entitled the alien to reside permanently in the United
28 States in the future; (4) the alien’s employment history; (5) the alien’s record of appearance in

1 court; (6) the alien’s criminal record, including the extensiveness of criminal activity, the recency
2 of such activity, and the seriousness of the offenses; (7) the alien’s history of immigration
3 violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities;
4 and (9) the alien’s manner of entry to the United States.” *See Matter of Guerra*, 24 I&N Dec. 37,
5 40 (BIA 2006). For the purposes of assessing dangerousness, the primary factor is the alien’s
6 “criminal record, including the extensiveness of criminal activity, the recency of such activity, and
7 the seriousness of the offenses.” *Id.*

8 If the IJ’s initial decision is to deny bond, non-citizens must be afforded an individualized
9 bond hearing every six months to assess the continued appropriateness of their detention. *See*
10 *Rodriguez*, 804 F.3d at 1089. At this bond hearing, DHS bears the burden of proving “by clear
11 and convincing evidence that the detainee is a flight risk or a danger to the community to justify
12 the denial of bond.” *Id.* at 1065. There is no question in this case that petitioner is not a flight
13 risk.

14 The jurisdiction of federal courts to review immigration court bond determinations is
15 limited in part by 8 U.S.C. § 1226(e), which provides:

16 The Attorney General’s discretionary judgment regarding the
17 application of this section shall not be subject to review. No court
18 may set aside any action or decision by the Attorney General under
19 this section regarding the detention or release of any alien or the
20 grant, revocation, or denial of bond or parole.

21 Despite this limitation, the Supreme Court has held that section 1226(e) does not limit a court’s
22 habeas jurisdiction or prohibit a federal court from hearing a habeas petition “challenging[ing] the
23 statutory framework that permits his detention without bail” or bringing “constitutional
24 challenge[s].” *See Demore v. Kim*, 538 U.S. 510, 516-17 (2003). The Ninth Circuit has held that
25 federal courts may entertain habeas claims alleging constitutional and legal error in the
26 discretionary process. *Singh v. Holder*, 638 F.3d 1196, 1202 (2011).

27 To succeed on a motion for a temporary restraining order, a plaintiff must “establish that
28 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

1 **DISCUSSION**

2 Petitioner argues that a temporary restraining order is appropriate because she is likely to
3 succeed on her claims that (1) her detention violates due process because DHS failed to
4 demonstrate by clear and convincing evidence that she is a danger to the community and (2) the IJ
5 violated her statutory and constitutional rights to a full and fair hearing at which she could present
6 evidence. She further argues that absent a temporary restraining order she will suffer irreparable
7 harm because she will be forced to remain in DHS custody with no constitutional justification and
8 that the balance of harms and public interest weigh in her favor because the government has no
9 legal interest in continuing to unlawfully detain her.

10 **I. WHETHER IJ’S DETERMINATION THAT PETITIONER IS DANGEROUS WAS**
11 **LEGALLY ERRONEOUS**

12 **A. Petitioner’s Position**

13 Petitioner contends that she is entitled to habeas relief because, as a matter of law, DHS
14 failed to prove by “clear and convincing evidence” that she is a continuing danger to the
15 community and that she was therefore not afforded an adequate *Rodriguez* hearing in violation of
16 her due process rights. At her bond hearing, she submitted declarations and presented testimony
17 that she is a victim of domestic abuse and developed substance abuse problems as a result. She
18 showed that since 2014 she had been in a non-abusive relationship, was committed to her
19 substance abuse treatment, and that her 2015 arrest for DUI was an anomaly. She admitted that
20 she had never acquired a valid driver’s license and stated in a declaration that she appreciated the
21 seriousness of that mistake. She explained that she was planning to rely on public transportation
22 and rides from Mr. Aguilar to get to and from work if she were released, and would no longer
23 drive without a license.

24 Petitioner argues that because DHS focused on her past convictions and did not respond
25 directly to her new evidence of rehabilitation and her supportive, non-abusive boyfriend, it failed
26 as a matter of law to show, by clear and convincing evidence, that she is a present danger to the
27 community. She argues that the IJ therefore erred, as a matter of law, in denying her bond. She
28 asserts that the IJ should have acknowledged that she is more likely to succeed in her current

1 rehabilitation efforts because she now has a supportive partner, and that her 2015 DUI conviction
2 was an anomaly. She asserts that the IJ’s general explanation that DUIs are dangerous was
3 inadequate and did not address the specific circumstances of her case.

4 Petitioner relies primarily on two cases in which federal courts concluded that IJs had
5 committed legal error in relying exclusively on past convictions to assess present dangerousness.
6 In *Judulang v. Chertoff*, 562 F. Supp. 2d 1119, 1127 (S.D. Cal. 2008), the court concluded that
7 DHS had failed to show that a man who had been in immigration custody for five years was a
8 present danger where it pointed only to his past convictions which included a decades old
9 conviction for voluntary manslaughter, a seven-year-old conviction for DUI, and a five-year-old
10 conviction for theft based on the detainee’s theft of his own fiancée’s engagement ring. *Id.* The
11 court reasoned that “[w]here Petitioner’s only relevant conviction for violence is nearly 20 years
12 old and no other evidence was put forward, the IJ’s finding of present dangerousness was an error
13 of law and the denial of bond was inappropriate.” *Id.* In *Mau v. Chertoff*, 562 F.Supp. 2d 1107,
14 1116 (C.D. Cal. 2008) the court concluded that DHS had failed to demonstrate that a man who had
15 been in immigration detention for three years was a present danger where it relied on three past
16 convictions for DUI which were four to six years old. The court concluded “[u]nder the
17 circumstances, the IJ’s reliance on two misdemeanor convictions for DUI and one felony
18 conviction for DUI as the basis for the finding of present dangerousness was an error of law . . .”
19 *Id.* at 1118.

20 Petitioner asserts that the IJ similarly relied exclusively on her past convictions and did not
21 take her current circumstances into account. As a result, she asserts that the IJ erred as a matter of
22 law and that she is entitled to habeas relief.

23 Petitioner also contends that because *Rodriguez* laid out that “longer detention requires
24 more robust procedural protections” and that “a noncitizen detained for one or more years is
25 entitled to greater solicitude than a non-citizen detained for six months,” DHS is required at later
26 *Rodriguez* hearing to provide additional evidence of *current* dangerousness to meet its burden of
27 proof. *See Guevara*, 20 I&N Dec. at 244 (“The legal concept of a ‘burden of proof’ requires that
28 the party upon whom the burden rests carry such burden by presenting evidence.”). She argues

1 that because DHS did not provide new evidence regarding her current dangerousness it failed, as a
2 matter of law, to meet the “clear and convincing evidence” burden of proof.

3 **B. The Government’s Position**

4 The government responds that petitioner’s first claim for relief is not a true constitutional
5 claim but is instead a challenge to the IJ’s discretionary determination regarding her
6 dangerousness and that this court therefore lacks jurisdiction to hear it. While it is true that this
7 court does not have jurisdiction to review discretionary decisions by the IJ, the Ninth Circuit has
8 confirmed that the court may review errors of law and constitutional violations under its normal
9 habeas jurisdiction. *See Singh*, 638 F.3d at 1202. Loss of liberty always implicates constitutional
10 concerns, and I cannot determine whether petitioner states a true habeas claim without reviewing
11 its substance.

12 The government also argues that petitioner’s claim for habeas relief fails because the IJ
13 did not make a legal error in concluding that petitioner was a present danger. It notes that the IJ
14 did not rely solely on petitioner’s past DUIs but also considered the circumstances of those
15 convictions, petitioner’s continuing struggle with alcoholism, petitioner’s previous violations of IJ
16 orders, and petitioner’s various convictions for driving without a license in assessing whether she
17 was a danger to the community.

18 The government asserts that the facts here are similar to *Gomez Ochoa v. Lynch*, No. CV-
19 16-01646-PHX-JJT (BSB), 2017 WL 913597, at *8 (D. Ariz. Feb. 8, 2017), in which a district
20 court considered whether an IJ had erred as a matter of law in denying bond where the detainee
21 had two DUI convictions within the last two years, one of which he incurred while he was
22 enrolled in DUI classes. The district court concluded that “[t]he IJ did not violate due process by
23 concluding that DUI is a serious offense, and by considering Petitioner’s criminal history of DUI,
24 and some of the circumstances related to those convictions, in finding him a danger to the
25 community.” *Id.* The government distinguishes the decisions in *Judulang* and *Mau* by arguing
26 that the convictions in those cases were 5-20 years and 4-6 years old respectively, whereas in this
27 case, petitioner had a DUI conviction that was approximately one year old and that had occurred
28 only several months before she was placed in ICE detention.

1 Further, the government notes that nothing in *Rodriguez* requires DHS to specifically
2 present new evidence at subsequent *Rodriguez* hearings in order to meet its burden of proof.
3 Instead, *Rodriguez* requires IJs to “consider the length of time for which a non-citizen has already
4 been detained” when assessing whether DHS has carried its burden. *See Rodriguez*, 804 F.3d at
5 1089.

6 **C. Analysis**

7 The Due Process Clause prohibits the government from depriving any “person . . . of . . .
8 liberty . . . without due process of law.” The Supreme Court has held that due process prohibits
9 the government from holding noncitizens indefinitely in civil immigration detention without
10 justification. *Zadvydas v. Davis*, 533 U.S. 678 (2001). Although the government has valid
11 interests in detaining individuals that pose a danger to the community, the Supreme Court has
12 “upheld preventive detention based on dangerousness only when limited to specially dangerous
13 individuals and subject to strong procedural protections.” *Id.* at 691.

14 In the context of criminal pretrial detention pursuant to the Bail Reform Act, the Court has
15 concluded that “[w]hen the Government proves by clear and convincing evidence that an arrestee
16 presents an identified and articulable threat to an individual or the community, we believe that,
17 consistent with the Due Process Clause, a court may disable the arrestee from executing that
18 threat.” *United States v. Salerno*, 481 U.S. 739 at 751 (1987). The Ninth Circuit has concluded
19 that this standard also governs dangerousness determinations in civil immigration bond hearings
20 as “the government must prove by clear and convincing evidence that an alien is a flight risk or a
21 danger to the community to justify denial of bond at a *Casas* hearing.” *Singh*, 683 F.3d at 1203.

22 In assessing dangerousness, the BIA has indicated that IJs may consider the alien’s
23 “criminal record, including the extensiveness of criminal activity, the recency of such activity, and
24 the seriousness of the offenses.” *See Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). The
25 Executive Office for Immigration Review does not have any guidelines for Immigration Judges
26 further outlining how to apply the factors laid out by *Matter of Guerra*. Dkt. No. 21. But clearly,
27 one place to look for guidance is cases decided under the Bail Reform Act. While there are certain
28 statutory differences between bond hearings under the Bail Reform Act and the bond hearings that

1 take place before an IJ, in both contexts, Due Process requires the government to demonstrate, by
2 clear and convincing evidence what kind of conduct meets this standard. Decades of precedent in
3 the context of criminal bond hearings offer IJ's the appropriate guidance in assessing whether the
4 government has met its burden of proving dangerousness by "clear and convincing evidence,"
5 limiting detention only to "specially dangerous individuals" as the Court described in *Zadvydas*.
6 Another place to look for guidance is how the court that handled the underlying crime, which
7 makes determinations on dangerousness and the availability of less restrictive alternatives to
8 detention on a daily basis, handled the case at bar or others in similar circumstances.

9 Case law demonstrates that establishing dangerousness by "clear and convincing evidence"
10 is a high burden and must be demonstrated in fact, not "in theory." *United States v. Patriarca*,
11 948 F.2d 789, 792 (1st Cir. 1991) (affirming the district court's conclusion that, although the
12 government had demonstrated the defendant was a Mafia Boss and that "in theory a Mafia Boss
13 was an intimidating and highly dangerous character" it had failed to show that "this Boss posed a
14 significant danger"). As relevant here, a history of DUI violations can meet that high standard.
15 *Castaneda v. Aitken*, No. 15-cv-01635-MEJ , 2015 WL 38882755, * (N.D. Cal. Jun. 23, 2015)
16 (upholding IJ's decision that detainee was danger to the community where he had committed
17 DUIs in 2010 and 2013, which included swerving so badly he was crossing into oncoming traffic;
18 letters of support from family and friends were not convincing where petitioner's supporters were
19 not able to prevent him "from driving on public roads while severely impaired by alcohol and
20 drugs" in 2010 and 2013); *Hernandez v. Lynch*, No. 15-cv-1717, 2016 WL 3406157, *4 (S.D. Cal.
21 Jun. 20, 2016) (IJ was within his discretion to conclude that DUI convictions from 2001, 2004,
22 and 2012 demonstrated that detainee was a danger to the community, despite attempts at
23 rehabilitation; petitioner had committed other crimes and was a flight risk as well).

24 At the same time, courts must consider the remoteness of the DUI and intervening events
25 that might undermine a finding of dangerousness. *See Judulang*, 562 F. Supp. 2d at 1127
26 (evidence of 20-year-old conviction for manslaughter and seven year-old conviction for DUI was
27 not sufficient, as a matter of law, to establish dangerousness); *Mau*, 562 F.Supp. 2d at 1116
28 (government did not establish dangerousness, as a matter of law, by pointing only to past DUI

1 convictions that were four to six years old). And they “ultimately must decide whether any
2 restrictions short of detention” could be implemented. *Rodriguez*, 804 F.3d at 1088.

3 At the hearing in November, the IJ did not rely exclusively on petitioner’s past convictions
4 in assessing dangerousness. In his written order, he found that petitioner had a fairly long criminal
5 history including three DUIs and four convictions for driving with a suspended license. Pet. Ex. E
6 at 3. He noted that her most recent DUI took place in 2015. *Id.* He acknowledged petitioner’s
7 evidence that she was now in a stable relationship and had the support of her community and
8 friends. *Id.* However, he also noted that petitioner has struggled with addiction and alcohol abuse
9 for many years and, despite attending three rehabilitation programs in the past 11 years, has
10 continued to relapse. *Id.* He acknowledged petitioner’s testimony that her 2015 DUI was an
11 anomaly but concluded that this explanation was not convincing given petitioner’s history of
12 DUIs. *Id.* Finally, he noted that petitioner was granted bond in the amount of \$7,000 in 2011, but
13 had continued to violate U.S. law after her release from detention, incurring her 2015 DUI and
14 receiving an additional citation for driving without a license. *Id.*

15 All this is true. But it is not clear that the IJ considered all the evidence in assessing
16 petitioner’s present dangerousness. She notes that the IJ’s written decision indicates that he
17 misunderstood some of the evidence presented. For example, the IJ stated that petitioner had
18 attended in-patient treatment three times in the last 11 years but had always relapsed, when in fact
19 she had successfully overcome an addiction to methamphetamine. He indicated that she had
20 testified that she had an ongoing problem with substance abuse and intended to return to in-patient
21 treatment if she was released, but she testified that she intended to return to out-patient treatment.
22 This mistake may have caused the IJ to overestimate the severity of petitioner’s continuing
23 struggle with substance abuse – something that any addict will continue to struggle with, to
24 varying degrees, throughout her life. The IJ also concluded that the 2015 DUI did not appear to be
25 an anomaly, given petitioner’s past DUIs, but he did not engage with any of the details of that DUI
26 (parking while intoxicated) or to acknowledge that the facts underlying the 2015 DUI differed
27 substantially from her past convictions. He did not address in any way her history as a victim in
28 abusive relationships or that she was no longer in an abusive relationship and, had for the first

1 time, received substance abuse treatment designed specifically for victims of domestic abuse.
2 This all demonstrates that the IJ may not have adequately considered all of the available evidence
3 in assessing petitioner's present dangerousness. And little attention was given to petitioner's plan
4 for out-patient treatment and other measures to justify that the least restrictive alternative was not
5 further incarceration.

6 It is worth considering, as well, that the criminal courts clearly believed that petitioner was
7 entitled to bail *before* she was detained fourteen months ago. As I indicated during oral argument,
8 it is extremely doubtful that any Magistrate Judge on this court would have remanded her to
9 custody based on this record.

10 Perhaps the IJ would have come to a different decision had he heard all of the evidence
11 that petitioner wanted to present. It is not his fault that she chose to receive an immediate decision
12 and that she did not present testimony concerning her plan upon release at the outset of her case.
13 In light of this record, it is a close question whether petitioner received the process that was due
14 her. But the timing of her motion is such that the remedy is at hand: it is time for a new *Rodriguez*
15 bond hearing that assesses her present dangerousness based on all the relevant evidence and
16 determines whether the government has demonstrated, by clear and convincing evidence, that
17 there are no less restrictive alternatives to detention.

18 While I am skeptical that the government can meet that burden, I disagree with petitioner's
19 argument that the government is required to present new evidence of dangerousness. Petitioner
20 functionally argues that, as a matter of law, evidence that is at least six months old cannot support
21 a finding of present danger. That is certainly not true for violent crimes or certain other types of
22 criminal behavior. But when it comes to non-violent crimes, especially those caused by addiction,
23 the passage of time does make a difference, as does the availability of treatment options. It
24 violates due process to keep someone in immigration detention for more than a year on the basis
25 of dangerousness where the overriding reason is that a non-violent crime was committed as a
26 result of that person's addiction and the individual has a viable plan for rehabilitation and
27 compliance with pertinent conditions of release.

28 I ORDER that the next *Rodriguez* bond hearing to which petitioner is entitled be *completed*

1 prior to May 15, 2017.

2 **II. WHETHER THE CONTINUANCE DENIED PETITIONER STATUTORY AND**
3 **CONSTITUTIONAL PROTECTIONS**

4 Petitioner argues that she is entitled to habeas relief because she was not provided a full
5 and fair opportunity to present evidence at her November 10, 2016 bond hearing. Prior to the
6 bond hearing, petitioner’s counsel informed the IJ that petitioner and her partner, Mr. Aguilar,
7 intended to testify on her behalf. On the day of the hearing, the IJ ran out of time and informed
8 petitioner that he would have to continue the hearing to December 13, 2016. At petitioner’s
9 request, the IJ stated that if she did not want to wait until December 13, he would be willing to
10 issue a ruling then. Petitioner’s counsel asked the IJ if he would weigh petitioner’s declaration
11 evidence the same as any oral testimony. After receiving assurances that he would, petitioner
12 opted to receive a decision on her bond hearing that day instead of continuing the hearing until
13 December 13, 2016.

14 Petitioner asserts that the IJ forced her to waive her due process rights to a full and fair
15 hearing in order to avoid spending another month in detention. The government responds that the
16 IJ did not force petitioner to waive her right to produce more evidence and instead gave her a clear
17 option to present more evidence at a later date. Due to the tight schedule of the IJ and government
18 counsel, the earliest possible date for a continued hearing was more than a month away. The
19 government asserts that a one-month delay is not a due process violation and that petitioner made
20 a voluntary choice to forgo presenting additional evidence.

21 As petitioner admits, “the IJ must have some flexibility to manage his schedule, and may
22 need to enforce short continuances.” Pet. at 24. IJs, just like district courts, “are accorded wide
23 latitude in calendar management” and it is not the role of federal courts to “micromanage their
24 scheduling decisions.” *Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir. 2006). By statute, IJs
25 have express authorization to grant adjournments. See I C.F.R. § 1240.6 (“After the
26 commencement of the hearing, the immigration judge may grant a reasonable adjournment either
27 at her own instance or, for good cause shown, upon application by the respondent or the
28 Service.”). While delays may violate a detainee’s due process rights, “there is no talismanic

1 number of years or months, after which due process is automatically violated.” *Coe v. Thurman*,
2 922 F.2d 528, 532 (1990) (concluding, based on a four-factor test, that a four-year delay violated
3 due process). Petitioner does not point to any case in which a one month delay constituted a due
4 process violation.

5 If a continued bond hearing is necessary, it should be scheduled as quickly as possible.
6 The IJ did so here; the one month delay did not violate petitioner’s due process rights, although it
7 would seem to be at the outer limit of a continuance since *Rodriguez* bond hearings are to be held
8 every six months. Petitioner highlights that the IJ allowed the government to cross-examine
9 petitioner for a long time even though he was aware that petitioner intended to present additional
10 evidence. The IJ has discretion to manage his hearings, and he reasonably permitted the
11 government (the party with the burden of proof) to cross-examine petitioner regarding her criminal
12 history and substance abuse problems. There is no support for petitioner’s argument that her
13 evidence should have been given priority over the government’s. As the record shows, the IJ was
14 prepared to allow petitioner time to present her case; there just was not sufficient time that day.
15 That the IJ did not have sufficient time to hear all of petitioner’s evidence on the first day of her
16 bond hearing does not demonstrate a due process violation.

17 An additional month of detention is no small thing and the court certainly understands
18 petitioner’s reluctance to wait for the continued hearing date in lieu of an immediate decision. But
19 while the IJ’s willingness to continue the hearing or give petitioner a decision that day required
20 petitioner to make a difficult choice, the IJ did not force her to waive her right to “a full and fair
21 hearing.” The IJ made clear that petitioner could present additional evidence and testimony at the
22 continued hearing. IJs have burgeoning caseloads, limited resources, and tight calendars. On
23 occasion they will not have sufficient time to complete a bond hearing at a single session. This is
24 what happened here. A delay in the continued hearing might constitute a due process violation
25 under some circumstances, but not the ones presented here.

26 **CONCLUSION**

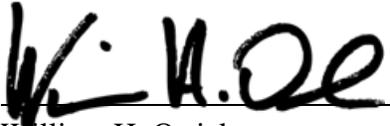
27 Deprivation of liberty should be a rare circumstance for non-citizens in immigration
28 detention, reserved only for those who are a threat to national security or poor bail risks. DHS

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must prove the need for continued detention by clear and convincing evidence every six months. When the issue is dangerousness, the crime is non-violent, and criminal courts have indicated that, in their view, the least restrictive alternatives result in bail, it will be hard for the government to meet the clear and convincing standard, particularly with respect to someone who has already been in prolonged detention. In this case, because of the incomplete record before the IJ, I DENY the request for a temporary restraining order. However, I ORDER that petitioner's next *Rodriguez* bond hearing be *completed* prior to May 15, 2017.

IT IS SO ORDERED.

Dated: April 20, 2017



William H. Orrick
United States District Judge