1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

CHRISTIAN FELIPE SALAZAR-LEYVA, Plaintiff,

v.

JEFFERSON B. SESSIONS, et al., Defendants.

Case No. 17-cv-04213-EMC

ORDER GRANTING PETITIONER'S TEMPORARY RESTRAINING ORDER

Docket No. 2

Petitioner Christian Felipe Salazar-Leyva has filed a habeas petition pursuant to 28 U.S.C. § 2241. In his petition, he argues that he is entitled to habeas relief because the Board of Immigration Appeals violated the Constitution and/or other federal law by ordering his detention without bond pending removal proceedings. Currently pending before the Court is Mr. Salazar's motion for a temporary restraining order ("TRO"). The Court held a hearing on Mr. Salazar's motion on July 27, 2017. At the hearing, the Court **GRANTED** the motion. This order memorializes the Court's oral ruling and provides additional analysis, as necessary.

I. **DISCUSSION**

Legal Standard

The standard for issuing a temporary restraining order is essentially the same as that for issuing a preliminary injunction. See Missud v. State of Cal., No. C-14-1503 EMC, 2014 U.S. Dist. LEXIS 73376, at *1 (N.D. Cal. May 28, 2014). The moving party must demonstrate that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of relief; (3) the balance of equity tips in its favor; and (4) the injunction is in the public interest. See

At the time that Mr. Salazar filed his petition, he was not in custody but, by the time of the hearing, he had surrendered to government authorities.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Beaty v. Brewer, 649 F.3d 1071, 1072 (9th Cir. 2011) (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)).

The Ninth Circuit has adopted a sliding scale approach wherein the robustness of the requisite showing on the merits varies with the balance of hardships; temporary injunctive relief may be issued where, e.g., the likelihood of success is such that serious questions going to the merits are raised and the balance of hardships tips sharply in the plaintiff's favor. See Alliance For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011).

В. Irreparable Harm and Balance of Hardships

Mr. Salazar claims irreparable injury because, if he is detained while removal proceedings are ongoing,² then he will not be present to bond with his soon-to-be-born child and co-parent his other children (both biological and nonbiological). Cf. Andreiu v. Ashcroft, 253 F.3d 477, 484 (9th Cir. 2001) (en banc) (where asylum applicant moved for a stay of removal pending review of his asylum application, stating that "[o]ther important factors include separation from family members").

In response, the government did not contest this injury claimed by Mr. Salazar. The government simply argued that there was a public interest in keeping an individual who had been adjudicated a danger to the community confined. The government disavowed that there was anything unique about Mr. Salazar or his situation to weigh specially in favor of confinement.

The Court finds that Mr. Salazar has adequately established irreparable harm in the absence of a TRO and that the balance of hardships weighs in his favor. Whether Mr. Salazar is in fact a danger to the community is the underlying question; the immigration judge ("IJ") found that he was not, but the BIA disagreed so at the very least that proposition is debatable. Moreover, there is nothing to indicate that Mr. Salazar is a flight risk should he be released from custody temporarily. The IJ found he was not and the government does not contend otherwise. Mr. Salazar has been in the United States since 1989, is raising several children, and is due to become a father again soon. In addition, there is no indication that, while Mr. Salazar was free from

² At the hearing, Mr. Salazar represented that his next removal hearing is not until October 2018.

For the Northern District of California

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

detention on bond, there were any problems. Given these circumstances, the hardship balance tips sharply in Mr. Salazar's favor.

C. Likelihood of Success on the Merits/Serious Questions Going to the Merits

Because the balance of hardships tips sharply in favor of Mr. Salazar, he need only show serious questions going to the merits to be entitled to temporary injunctive relief. For purposes of the TRO, Mr. Salazar argues that there are serious questions going to the merits on two of the four claims asserted in his habeas petition. The Court agrees.

In his first claim, Mr. Salazar argues that the BIA violated federal law by engaging in independent fact finding in violation of the Code of Federal Regulations. See 8 C.F.R. § 1003.1(d)(3)(i), (iv) (providing that the BIA will review facts determined by the IJ, including findings on credibility, for clear error and that the BIA will not engage in factfinding in the course of deciding appeals); see also Zumel v. Lynch, 803 F.3d 463, 475 (9th Cir. 2015) (stating that "the BIA may not make its own findings or rely 'on its own interpretation of the facts'[;] [i]f the IJ has left certain factual disputes unresolved and the BIA believes that it cannot decide the case unless they are resolved, it cannot make its own factual findings but instead 'must remand to the IJ for further factual findings"). More specifically, Mr. Salazar contends that the BIA made independent findings of fact that he had failed to accept responsibility for two domestic violence incidents that took place in 2004 and 2015, respectively. See ER 10 (BIA decision) (stating that the IJ "erred by discounting the fact that the respondent had minimized his responsibility and characterized himself as the non-aggressor in the domestic violence incidents"). The IJ made no express findings regarding Mr. Salazar's failure to accept responsibility. Even if the IJ implicitly made findings of fact on the 2015 incident, see ER 17 (IJ decision) (noting that testimony of Mr. Salazar and his wife were similar with respect to the 2015 incident -i.e., that physical contact was accidental – and seemingly crediting that testimony), the government has not pointed to any evidence (at least not at this juncture) that the IJ made findings of fact (either explicit or implicit) on the 2004 incident. For example, nothing in the IJ's written order indicates that he found Mr. Salazar credible on his claim that he was not the aggressor in the 2004 incident. The Court therefore finds serious questions going to the merits on Mr. Salazar's first claim for relief.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

The Court likewise finds serious questions going to the merits on Mr. Salazar's second claim for relief. Here, Mr. Salazar argues that, at the time of the bond determination before the IJ, he could have argued against removability (the ultimate merits) based on the domestic violence waiver of 8 U.S.C. § 1227(a)(7)(A) and, therefore, it was improper for the BIA to, in effect, punish him (or at least subject him to a heightened risk of detention) for presenting evidence that he was not the aggressor in the domestic violence incidents by saying that, for purposes of bond determination, this showed he lacked acceptance of responsibility. As the Court noted at the hearing, Mr. Salazar's argument is not without some appeal, particularly given that an analogy could be made to the Bail Reform Act of 1984, see 18 U.S.C. § 3141 et seq. Under the Bail Reform Act, one factor for a court to consider in deciding whether a criminal defendant should be released or detained pending trial is the weight of the evidence against the defendant. See id. § 3142(g)(2). But this factor is generally "considered the lease important" because "the [c]ourt's function in examining the weight of the evidence [at that stage] is not to determine guilt or innocence." United States v. Parker, 65 F. Supp. 3d 358, 365 (W.D.N.Y. 2014); see also United States v. Hir, 517 F.3d 1081, 1090 (9th Cir. 2008) (stating that the "weight of the evidence" factor is the least important because "the statute neither requires nor permits a pretrial determination that a person is guilty"). An analogous argument could be made here: namely, it is not appropriate to give substantial weight at the bond determination stage to the fact that the alien is raising a meritsbased waiver argument under § 1227(a)(7)(A) and rendering a determination on that claim.

II. **CONCLUSION**

For the foregoing reasons, the Court concludes that Mr. Salazar has adequately established that he is entitled to a TRO. The terms of the TRO are as follows.

- 1. Respondents, including their employees and agents, and others acting in concert with them are hereby enjoined from detaining Mr. Salazar pursuant to the decision of the BIA dated June 2, 2017.
- 2. The decision of the IJ dated December 7, 2016, ordering Mr. Salazar released upon payment of a \$6,000 bond, remains in full force and effect, including all conditions contained therein.

United States District Court

For the Northern District of California

3. Unless otherwise ordered, the TRO shall expire at the conclusion of the preliminary injunction hearing, which is currently set for August 31, 2017, at 1:30 p.m.³

This order disposes of Docket No. 2.

IT IS SO ORDERED.

Dated: July 28, 2017

United States District Judge

Although a TRO typically lasts for only 14 days, there is good cause to extend the term of the TRO here -i.e., to enable full and complete briefing on the preliminary injunction motion. There is no apparent prejudice to the government because, as noted above, Mr. Salazar does not appear to be a flight risk and he has been released on bond without any problems for many months. Moreover, the government did not, at the hearing, object to the term of the TRO. Indeed, it was the government who asked for more time for briefing on the preliminary injunction motion.