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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
EX PARTE APPLICATION FOR
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.¹ 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

A. 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*

¹ 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 *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (citing *Winter v. Natural Res. Def. Council,*
2 *Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)).

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

8 B. Irreparable Harm and Balance of Hardships

9 Mr. Salazar claims irreparable injury because, if he is detained while removal proceedings
10 are ongoing,² then he will not be present to bond with his soon-to-be-born child and co-parent his
11 other children (both biological and nonbiological). *Cf. Andreiu v. Ashcroft*, 253 F.3d 477, 484
12 (9th Cir. 2001) (en banc) (where asylum applicant moved for a stay of removal pending review of
13 his asylum application, stating that “[o]ther important factors include separation from family
14 members”).

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

19 The Court finds that Mr. Salazar has adequately established irreparable harm in the
20 absence of a TRO and that the balance of hardships weighs in his favor. Whether Mr. Salazar is in
21 fact a danger to the community is the underlying question; the immigration judge (“IJ”) found that
22 he was not, but the BIA disagreed so at the very least that proposition is debatable. Moreover,
23 there is nothing to indicate that Mr. Salazar is a flight risk should he be released from custody
24 temporarily. The IJ found he was not and the government does not contend otherwise. Mr.
25 Salazar has been in the United States since 1989, is raising several children, and is due to become
26 a father again soon. In addition, there is no indication that, while Mr. Salazar was free from
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28 ² At the hearing, Mr. Salazar represented that his next removal hearing is not until October 2018.

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

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

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

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

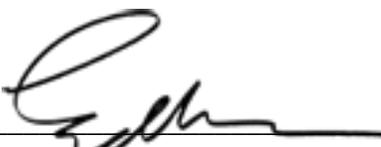
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3. Unless otherwise ordered, the TRO shall expire at the conclusion of the preliminary injunction hearing, which is currently set for August 31, 2017, at 1:30 p.m.³

This order disposes of Docket No. 2.

IT IS SO ORDERED.

Dated: July 28, 2017


EDWARD M. CHEN
United States District Judge

³ 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.