UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KEMAL SHEHATA,	:	Case No. 1:14-cv-616
	:	
Petitioner,	:	Judge Timothy S. Black
	:	
vs.	:	
	:	
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,	:	
	:	
	:	
Respondents.	:	

ORDER DISMISSING PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS (Doc. 4)

This civil action is before the Court on Petitioner's Amended Petition for Writ of Habeas Corpus (Doc. 4) and Respondents' responsive memoranda (Docs. 10, 13).

I. STATEMENT OF THE CASE

Petitioner Kemal Sheheta[1] is an Egyptian national currently detained by the U.S. Immigration and Customs Enforcement ("ICE") at the Butler County Jail. Respondents include ICE, Butler County Sheriff Richard K. Jones, Attorney General Eric Holder, Department of Homeland Security Secretary Jeh Johnson, Principal Deputy Assistant Secretary for ICE Thomas Winkowski, and the unnamed Assistant Field Office Director, Enforcement and Removal Operations for the Columbus ICE office. Petitioner alleges that he is detained pending removal proceedings without the possibility of a bond hearing in violation of his procedural due process rights.

[1] The attached exhibits reflect that Petitioner's first name is Kamal.

The facts of this case come primarily from the affidavit of John Matz, an Immigration Services Officer with the U.S. Citizenship and Immigration Services ("CIS"), a component of the Department of Homeland Security ("DHS"). (Doc. 13, Ex. A).[2] The record does not indicate when Petitioner first entered the United States or his immigration status. Petitioner married Donna Marie Bias, a U.S. citizen, on April 13, 2005 in Columbus, Ohio. (*Id.* at ¶ 4). On June 6, 2005, Petitioner filed a Form I-485, Application to Register Permanent Residence or Adjust Status and Ms. Bias filed a Form I-130, Petition for Alien Relative. (*Id.*)

Pursuant to a Form I-512L, Authorization for Parole of an Alien into the United States, Petitioner was given advance parole on January 23, 2006, which was subsequently extended on April 12, 2006 for a period of one year. (Doc. 4, Ex. A; Doc. 13, Ex. A at ¶ 5). Petitioner's parole was extended again on August 26, 2008 until August 25, 2009. (Doc. 4, Ex. A; Doc. 13, Ex. A at ¶ 5). Petitioner last entered the United States on August 28, 2008. (Doc. 4 at ¶ 13; Doc. 13, Ex. A at ¶ 3).

Petitioner resumed his application for adjustment of status upon his return and CIS officials conducted an interview of Petitioner and Bias in early June 2009. (Doc. 13, Ex. A at ¶ 6). CIS issued Bias a Notice of Intent to Deny ("NOID") her Form I-130 on June 19, 2009. (*Id.*) The NOID described discrepancies between their testimonies, cited evidence that Bias had recently given birth to a child fathered by another man, and noted that Petitioner's ex-wife listed her address as the same one on file for Petitioner. (*Id.*)

[2] CIS was formerly known as the Immigration and Naturalization Services.

CIS ultimately denied Bias's Form I-130 on July 24, 2009 because it concluded that she and Petitioner married solely for immigration purposes. (*Id.*) Bias filed an untimely appeal, which was dismissed on March 30, 2010. (*Id.* at ¶¶ 7, 9).

Petitioner's parole was not extended and it expired on August 25, 2009. (Doc. 13, Ex. A at ¶ 5). Petitioner was placed in removal proceedings on December 9, 2009 when DHS issued a Notice to Appear ("NTA"). (Doc. 4, Ex. B; Doc. 13, Ex. A at ¶ 8). The NTA indicated that Petitioner was subject to removal as an arriving alien not in possession of valid unexpired entry documents. (Doc. 4, Ex. B at 3).

Petitioner and Bias divorced on November 1, 2010. (Doc. 13, Ex. A at ¶ 10). He then married Fatima Zahra Laassadi on November 18, 2011 in Columbus. (*Id.* at ¶ 11). Laassadi submitted a Form I-130, Petition for Alien Relative on December 19, 2011, followed by a written notice of withdrawal on December 6, 2013. (*Id.*) In her notice of withdrawal, Laassadi wrote that she discovered Petitioner had only married her so that he could become a permanent resident. (*Id.* at ¶¶ 12, 14).

Laassadi later submitted a second Form I-130 on May 27, 2014. (Doc. 4, Ex. C; Doc. 13, Ex. A at ¶ 16). Petitioner and Laassadi appeared for an interview on August 25, 2014 in connection with Laassadi's second Form I-130. (Doc. 13, Ex. A at ¶ 17). Laassadi's petition was denied on October 30, 2014 because she failed to demonstrate the bona fide nature of her marriage by clear and convincing evidence and because applicable law prohibited approval of the petition based on the prior finding that Petitioner married Bias solely for immigration purposes. (*Id.* at ¶ 19).

Petitioner filed his Petition on July 29 and his Amended Petition on August 4, 2014. (Docs. 1, 4). Petitioner is currently detained by ICE at the Butler County Jail, but the record does not reflect the date he was first detained. (Doc. 10, Ex. A).[3]

II. RELEVANT LAW

The Immigration and Naturalization Act ("INA") and corresponding regulations govern the admission of aliens into the United States. An "alien" is "any person not a citizen of the United States," while the terms "admission" and "admitted" mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(3), (a)(13)(A). An "applicant for admission" includes any "alien present in the United States who has not been admitted." 8 U.S.C. § 1225(a)(1).

An alien can be present in the United States without having been "admitted" pursuant to the Secretary of DHS's discretion to temporarily "parole" an alien into the United States. 8 U.S.C. § 1182(d)(5)(A). Parole permits an alien applying for admission to be physically present in the United States for a limited period of time, but such aliens "have not 'entered' the country for the purposes of immigration law." *Rosales-Garcia v. Holland*, 322 F.3d 386, 391 & n.2 (6th Cir. 2003) (en banc). Rather, the law is clear that

[3] Respondent Jones attached the DHS Order to Detain, but the information is inconclusive. (Doc. 10, Ex. A). The date of issuance is not legible and the order is addressed to another correctional facility. (*Id.*) Handwritten notes appear to indicate that Petitioner was transferred three times between June and August 2014, and several crimes and the words "no bond" appear under the section labeled remarks. (*Id.*)

parole "shall not be regarded as an admission of the alien." 8 U.S.C. § 1182(d)(5)(A).[4] Advance parole is merely "permission for certain aliens—including those with a pending application for adjustment of nonimmigrant status and who do not have a valid immigrant visa—to be readmitted to the United States after traveling abroad." *Tapia v. Gonzales*, 192 F. App'x 436, 438 (6th Cir. 2006); 8 C.F.R. § 212.5(f). Parole automatically terminates at the expiration of the authorized term and the alien is then "restored to the status that he or she had at the time of parole." 8 C.F.R. § 212.5(e)(2); *see* 8 U.S.C. § 1182(d)(5)(A).

An "arriving alien" is an "applicant for admission coming or attempting to come into the United States at a port-of-entry." 8 C.F.R. § 1001.1(q). "An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked." *Id.*

The INA establishes ten broad categories of aliens deemed "inadmissible." 8 U.S.C. § 1182(a). Among the categories of inadmissibility are aliens who attempt to procure an immigration benefit "by fraud or willfully misrepresenting a material fact," § 1182(a)(6)(C)(i), and aliens not in possession of valid unexpired entry documents. § 1182(a)(7)(A)(i)(I). Immigration officers must inspect all aliens who are applicants for admission to determine whether they are admissible. 8 U.S.C. § 1225(a)(3). The relevant subsection provides that "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking

[4] *See also* 8 U.S.C. § 1101(a)(13)(B) ("An alien who is paroled under section 1182(d)(5) of this title . . . shall not be considered to have been admitted.").

admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A).

Section 1229a governs removal proceedings, which determines whether the alien is removable based on inadmissibility. 8 U.S.C. § 1229a. ICE is permitted to arrest and detain an alien pending the conclusion of removal proceedings. 8 U.S.C. § 1226(a). A designated official has discretion to detain or release the alien on "conditional parole." *Id.* An immigration judge generally has jurisdiction to review these custody and bond determinations. 8 C.F.R. § 1236.1(d)(1). However, "an immigration judge may not redetermine conditions of custody" of "arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act." 8 C.F.R. § 1003.19(h)(2)(i)(B).

III. ANALYSIS

Petitioner argues that his current detention without the possibility of a bond hearing violates his procedural due process rights because the Form I-512L advance parole document did not provide sufficient notice of the adverse consequences of departing the United States. Specifically, Petitioner contends that the form failed to provide notice that traveling on advance parole would make him an arriving alien subject to mandatory detention without a bond hearing if CIS denied his application for adjustment of status and initiated removal proceedings.[5] But for his departure on

[5] The Form provides, in relevant part: "Presentation of this authorization will permit you to resume your application for adjustment of status upon your return to the United States. If your adjustment is denied, you will be subject to removal proceeding under section 235(b)(1) or 240 of the Act." (Doc. 4, Ex. A).

advance parole, Petitioner asserts that 8 C.F.R. § 1003.19(h)(2)(i)(B) would not apply and he would have been eligible for a bond hearing before an immigration judge.

Respondents argue that Petitioner was not constitutionally entitled to this warning and that he is lawfully detained without a bond hearing as an arriving alien in removal proceedings. 8 U.S.C. §§ 1182(d)(5)(A), 1225(b)(2)(A); 8 C.F.R. 1003.19(h)(2)(i)(B). Further, Respondents note that Petitioner's travel on parole did not forfeit his right to a determination of adjustment status or his right to a removal proceeding, and he had substantial time to voluntarily leave country between the denial of his application for adjustment of status and the initiation of removal proceedings.

The Court begins with the Supreme Court's pronouncement of its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings" and the rule that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Demore v. Kim*, 538 U.S. 510, 526, 531 (2003). This authority is not without limits, however, as the Constitution does not permit "indefinite" or "potentially permanent" detention. *Id.* at 529. The Court of Appeals has held that "the INS [now ICE] may detain *prima facie* removable criminal aliens, without bond, for a reasonable period of time required to initiate and conclude removal proceedings promptly." *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003).[6] Although *Ly* involved mandatory pre-removal detention under

[6] The Court of Appeals declined to apply a bright-line time limitation for pre-removal detention, unlike the six-month presumption for post-removal detention established in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

8 U.S.C. § 1226(c) based on a criminal conviction, *id.* at 267, a district court in the Sixth Circuit has expanded the holding in *Ly* to mandatory detention under 8 U.S.C. § 1225(b)(2)(A). *Kasneci v. Dir., Bur. of Immigration & Customs Enforcement*, No. 12-12349, 2012 WL 3639112 (E.D. Mich. Aug. 23, 2012).

Petitioner cites *Shahwan v. Chertoff*, No. C-05-4218, 2005 WL 3369991 (N.D. Cal. Dec. 12, 2005), for the proposition that the Form I-512L provides insufficient notice to an alien traveling on advance parole of the possibility of detention without the possibility of a bond hearing. Crucial to the holding in *Shahwan* that 8 C.F.R. § 1003.19(h)(2)(i)(B) violated the alien's procedural due process rights was the fact that the alien was legally admitted to the United States on a student visa on his first arrival. *Id.* at 3. Because he was legally admitted, he was entitled to due process rights. *Id.* Under a Ninth Circuit rule discussed in *Navarro-Aispura v. INS*, 53 F.3d 233 (9th Cir. 1995), the government must provide an alien with sufficient notice of the adverse consequences of accepting advance parole if leaving the country will deprive that alien of substantive and procedural rights that were otherwise available prior to leaving the country. *Id.* at 236.

Petitioner has not established that this rule governs here. First, Petitioner has not presented evidence of his immigration status before his grant of advance parole on January 23, 2006. Accordingly, Petitioner has not established that traveling on advance parole deprived him of a right previously available to him.

Second, the Court of Appeals for the Sixth Circuit has not adopted the notice requirement from *Navarro-Aispura*. The Court of Appeals for the Seventh and Eleventh

Circuits have expressly rejected the *Navarro-Aispura* rule on the basis that CIS is not required to provide legal advice to aliens and the courts also noted the lack analytical support for the holding. *Balogun v. U.S. Att'y Gen.*, 304 F.3d 1303, 1312 (11th Cir. 2002); *Dimemski v. INS*, 275 F.3d 574, 578-79 (7th Cir. 2001). The Court of Appeals for the Sixth Circuit came closest to addressing the issue in *Tapia v. Gonzales*, 192 F. App'x 436 (6th Cir. 2006). In *Tapia*, the Court of Appeals quoted the notice to applicant printed on advance parole form that Petitioner raises here. *Id.* at 438. However, the issue in *Tapia* involved the third sentence, which warns aliens that they may be found inadmissible if they were unlawfully present in the United States for more than 180 days before applying for adjustment of status. *Id.* The court rejected the alien's argument that DHS violated his due process rights because DHS "has no duty, constitutional or otherwise, to provide legal advice to aliens who petition the agency for a grant of advance parole." *Id.* at 440 (quoting *Balogun*, 304 F.3d at 1312). Further, the Court noted that it was "only after he left the country without regard for the negative consequences that were specified on the second page of the advance parole authorization that he was harmed." *Id.*

Here, Petitioner has not met of his burden of demonstrating that Respondents are violating his procedural due process rights by applying 8 C.F.R. § 1003.19(h)(2)(i)(B). The Court agrees that DHS "has no duty, constitutional or otherwise, to provide legal advice to aliens who petition the agency for a grant of advance parole." *Tapia*, 192 F. App'x at 440. Petitioner's detention pursuant to the INA and regulations promulgated thereto does not violate his procedural due process rights. Additionally, the INA provides

the Secretary of DHS and his designated officials with discretion to release an alien in removal proceedings on conditional parole. 8 U.S.C. § 1226(a)(2)(B). This Court lacks jurisdiction to review an exercise of this discretionary act. 8 U.S.C. § 1226(e). Finally, Petitioner also has not provided any basis for the Court to conclude that his detention has lasted for an unreasonable period of time. *Ly*, 351 F.3d at 273.

Accordingly, Petitioner is not entitled to a writ of habeas corpus.[7]

IV. CONCLUSION

For these reasons, Petitioner's Amended Petition (Doc. 4) is **DISMISSED** without prejudice. The Clerk shall enter judgment accordingly, whereupon this case shall be **CLOSED** in this Court.

IT IS SO ORDERED.

Date: 1/12/2015

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

[7] To the extent the Petitioner's removal proceedings are final, his petition is moot.