THE HONORABLE JAMES L. ROBART
THE HONORABLE MARY ALICE THEILER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E[redacted] D[redacted] R[redacted],

Petitioner,

v.

CHAD WOLF, Acting Secretary of the Department of Homeland Security, *et al.*,

Respondents

CASE NO. 2:20-cv-00377-JLR-MAT

RESPONDENTS' REPLY TO PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS

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INTRODUCTION AND ADDITIONAL PROCEDURAL HISTORY

Petitioner's response to Respondents' motion to dismiss, filed with supporting documentation, is primarily focused on two of the eight factors the Court considers when determining whether Petitioner's mandatory detention has become prolonged, such that she should be afforded a bond hearing before an Immigration Judge. First, Petitioner makes new allegations regarding the conditions at her detention facility, asserts that she was not provided adequate medical care after she recently broke her ankle playing soccer, and argues that the potential for COVID-19 transmission among detainees at the facility presents a threat to her. Second, Petitioner indicates that the government's recent denial of her T visa application was erroneous, and complains that her administrative appeal of this denial is likely to considerably prolong her removal proceedings, and therefore her detention, because her removal proceedings have been stayed pending the resolution of her T visa application. As explained below, Petitioner's arguments do not establish that her mandatory detention has become unreasonably prolonged, such that a bond hearing is warranted.

ARGUMENT

I. The Eight-Factor Reasonableness Test is the Appropriate Test.

Petitioner asserts that two of the reasonableness factors – whether detention will exceed the time the petitioner spent in prison for the crime that subjects her to mandatory detention, and the nature of the crime the petitioner committed – are irrelevant because they are not explicitly stated in *Banda v. McAleenan*, 385 F.Supp.3d 1099 (W.D. Wash. 2019). *See* Pet'r's Response at 2-6. But *Banda* had no occasion to apply factors related to a petitioner's criminal conviction because it dealt with an alien detained under 8 U.S.C. § 1225(b). *See* Resp'ts' Mot. to Dismiss at 5 (discussing *Banda*, 385 F.Supp.3d at 1118). Such aliens are mandatorily detained under § 1225(b) because they recently arrived to the United States without proper documentation, are subject to expedited removal orders, and are pursuing asylum; a criminal history *in* the United States is rarely relevant to their

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circumstances. *See* 8 U.S.C. § 1225(b). On the other hand, aliens, like Petitioner, detained under 8 U.S.C. § 1226(c) are mandatorily detained as a result of their criminal history. *See* 8 U.S.C. § 1226(c).

The statute subjects criminal aliens, like Petitioner, to mandatory detention based on a presumption that their criminal conduct makes them dangerous. The nature and severity of the Petitioner's criminal conduct, therefore, are certainly relevant factors when considering whether she should be entitled to an extra-statutory custody hearing in which an Immigration Judge will assess her dangerousness and flight risk. This Court, and others, have recognized as much. *See Martinez v. Clark*, 2019 WL 5968089, at *7 (W.D. Wash. May 23, 2019) (applying the eight-factor reasonableness test in a case of mandatory detention under 8 U.S.C. § 1226(c)) (citing, *inter alia*, *Cabral v. Decker*, 331 F.Supp.3d 255, 261 (S.D.N.Y. 2018)). Here, Petitioner's lengthy criminal sentence; as well as the severity of her criminal conduct, which is not minimized by her alleged victimization; weigh against affording her a bond hearing. *See* Resp'ts' Mot. to Dismiss at 7.

II. Petitioner Has Not Demonstrated Adverse or Unsafe Conditions.

Petitioner alleges that adverse and unsafe detention conditions weigh in favor of affording her a bond hearing. *See* Pet'r's Response at 9-10; *see also Martinez*, 2019 WL 5968089, at *7 (listing "the conditions of detention" as a reasonableness factor). With her response, Petitioner submits a recently released report prepared by the University of Washington's Center for Human Rights criticizing conditions at Petitioner's detention facility. *See* Recinos Decl. Regarding T Visa at Ex. B. She also submits a declaration describing the conditions of her detention, and alleging that she received inadequate medical attention following a recent ankle injury. *See* Pet'r's Decl. Finally, she argues that "[t]he current COVID-19 pandemic only further underscores the dangerous conditions at the detention center." Pet'r's Response at 10.

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Addressing each of these contentions in turn, first, Petitioner offers no explanation for failing, in her initial habeas petition, to criticize certain general aspects of her detention that she now criticizes in her response. *See* Resp'ts' Mot. to Dismiss at 7-8 (discussing Pet'r's Habeas Pet. at 14-15 ¶¶ 60, 66); *compare with* Pet'r's Response at 9 (discussing communal living conditions and designated outdoor recreation time); Pet'r's Decl. at 1-2 ¶¶ 6, 9 (same). Moreover, these aspects of Petitioner's detention are not unjustified, and are often warranted and necessary to ensure safety and security in the facility. *See, e.g.*, Pet'r's Decl. at 1 ¶ 8 (discussing an inability to move freely around the facility because "males and females cannot cross paths in the hallway").

As to Petitioner's contentions regarding the medical care she received after she broke her ankle, Petitioner was provided with ice, medication, and crutches; was seen by an ICE doctor; had her ankle x-rayed; had surgery; was provided with a wheelchair and crutches after surgery; and has had numerous follow-up appointments with medical personnel following surgery. *See* Ex. A, Malakhova Decl., at 10-14 ¶¶ 41-57. Notably, Petitioner "appeared to have good early results from her . . . surgery." *Id.* at 14 ¶ 55. Petitioner also complains that she was isolated following her off-site x-ray and surgery, Pet'r's Decl. at 2-3 ¶¶ 10-14, but admits that these were precautions taken based on the COVID-19 pandemic and at the direction of her medical provider, *id.* at 2-3 ¶¶ 10-11, 13. Petitioner finally asserts obstacles related to being temporarily wheelchair-bound while she recovers from her injury, including mobility issues and a lack of access to toilets and telephones. *Id.* at 1 ¶¶ 5-8. Regarding mobility, "Petitioner has been medically advised to use crutches for ambulation." *See* Ex. A at 14 ¶ 57; Ex. B, Lippard Decl. at 21 ¶ 64. Regarding toilet and telephone access, grievances Petitioner did not raise to staff at the facility, i*d.* at 21 ¶ 63, on May 5, 2020, "the lower level toilets in Petitioner's housing unit" and "all the telephones in Petitioner's housing unit . . . were found to be in good working order," *id.* at 21 ¶¶ 61-62. Ultimately, Petitioner has not

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demonstrated that the general conditions of the detention facility, nor her circumstances following her injury, weigh in favor of ordering a bond hearing in her case.

Nor do Petitioner's COVID-19-related assertions establish that she should be entitled to a bond hearing. ICE and the contractor staffing Petitioner's detention facility have implemented numerous precautionary measures to protect the health and safety of detainees and staff in response to the pandemic, *see generally* Ex. A at 2-7 ¶¶ 3-25, 9-10 ¶¶ 36-38; Ex. B at 4-20 ¶¶ 11-57, including reducing the detainee population to significantly lower than capacity, *see id.* at 2-3 ¶ 6, 12 ¶ 29, 20 ¶ 59. Importantly, to date, only one alien detained at the facility has tested positive for the virus. Ex. A at 7 ¶ 26. As of May 8, 2020, it was determined that the alien had recovered from the virus and has not been infectious while at the facility. *Id.* at 8-9 ¶¶ 32. Nonetheless, the alien and the only other aliens he was in contact with at the facility – four aliens in total – remain medically segregated and have not been exposed to the general population. *Id.* at 8 ¶ 34; *see generally id.* at 7-8 ¶¶ 27-31. Also importantly, Petitioner does not assert that she falls into a high-risk category such that general COVID-19 transmission concerns justify her release or a bond hearing. *See generally* Pet'r's Response, Pet'r's Decl.; *see also* Ex. A at 10 ¶ 39; Ex. B at 19-21 ¶¶ 51-58; *compare with Pimentel-Estrada v. Barr, et al.*, -- F.Supp.3d --, 2020 WL 2092430, at *1, *2, *11, *15 (W.D. Wash. 2020) (ordering an alien's release based on COVID-19-related concerns, emphasizing that the alien's age and medical history created a high risk of serious illness and death from COVID-19).

III. Delay in Petitioner's Proceedings Has Been, and Will Be, Attributable to Petitioner.

Petitioner argues that her mandatory detention has been lengthy and that, because she intends to appeal the recent denial of her T visa, thereby perpetuating the stay of her Ninth Circuit proceedings, her mandatory detention will persist for much longer. *See* Pet'r's Response at 7-8. In response to the government's argument that she is responsible for the delay in her case, Petitioner argues that she "is entitled to raise legitimate defenses to removal . . . and such challenges to . . .

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removal cannot undermine [the] claim that detention has become unreasonable." Pet'r's Response at 10 (citations omitted). But Petitioner's pursuit of a T visa is not a challenge to the removal order issued by the Board of Immigration Appeals and currently subject to the Ninth Circuit's review. *See* 8 U.S.C. § 1252(a)(5); 8 C.F.R. § 214.11(d) ("USCIS has sole jurisdiction over all applications for T nonimmigrant status"). Accordingly, the government has repeatedly contended that there is no justification for staying Petitioner's Ninth Circuit proceedings while her T visa application is adjudicated. *See* Resp'ts' Mot to Dismiss at 8-9 (discussing the government's opposition to staying Ninth Circuit proceedings); *see also* 8 C.F.R. § 214.11(d)(1)(ii) (allowing an alien subject to a final order of removal to seek an administrative stay of removal from the DHS). Delay attributable to the Ninth Circuit abeyance is therefore entirely attributable to Petitioner, and consequently, does not weigh in favor of a finding that her detention has become unreasonably prolonged.

Compounding issues of delay is the fact that Petitioner intends to appeal her T visa denial, which she acknowledges will prolong Ninth Circuit proceedings and her continued mandatory detention. *See* Pet'r's Response at 8. Petitioner's argument that she is likely to succeed in her appeal is misleading. Petitioner's T visa was denied on two independent grounds: the government's determination that she was not physically present in the United States on account of trafficking, and the government's discretionary denial of an inadmissibility waiver. *See* Recinos Decl. Regarding T Visa, Ex. A at 1-3. Yet, Petitioner criticizes only the former denial ground, *see id.* at 3-4 ¶¶ 7-9; *see also* Pet'r's Response at 8, not acknowledging that even if she successfully challenged this denial basis, she would remain ineligible for a T visa based on the discretionary denial of an inadmissibility waiver, *see generally* Pet'r's Response; *cf.* Recinos Decl. Regarding T Visa at 4 ¶ 10 (indicating that, with an appeal of her T visa denial, Petitioner would again seek to have inadmisibilities waived). Notably, there is no right to appeal a discretionary denial of an inadmissibility waiver. *See* Ex. C, Waiver of Inadmissibility Denial (April 8, 2020), at 3; *see also* 8 C.F.R. § 212.16.

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Petitioner could only be successful in an appeal of her T visa application denial if she demonstrated that her inadmissibility waiver denial should be reopened or reconsidered. *See* Ex. C at 3. Obtaining reopening would require Petitioner to state new facts supported by evidence. *Id.* This is unlikely, given that in August 2019, she was given an opportunity to present additional evidence showing that a favorable exercise of discretion was warranted. *See id.* at 2; *see also* Pet'r's' Habeas Pet. at 8-9 ¶¶ 35-36. She failed to do so. *See* Ex. C at 2. Obtaining reconsideration would require Petitioner to show that the waiver denial was legally incorrect according to statute, regulation, and/or precedent decision. *Id.* at 3. This is unlikely, as Petitioner's waiver application was denied as a matter of discretion. *See id.* at 2; Recinos Decl. Regarding T Visa, Ex. A at 3.

Considering the foregoing, Petitioner has overstated her likelihood of success in appealing her T visa denial. *See* Recinos Decl. Regarding T Visa, Ex. A at 1-3; Pet'r's Response at 8. This is relevant not because the merits of Petitioner's T visa application are relevant to the merits of her removal order, which they are not, but because Petitioner's Ninth Circuit proceedings will remain in abeyance while she pursues an appeal of her T visa denial that is unlikely to be successful. The continued delay in Petitioner's proceedings related to a Ninth Circuit abeyance that the government has always opposed, and related to Petitioner's pursuit of a likely unsuccessful appeal of her T visa denial, is attributable to Petitioner. The government should not be faulted for continuing Petitioner's mandatory detention while she unnecessarily prolongs her removal proceedings in this manner. The delay she has created, and will continue to create, weighs against affording her a bond hearing.

CONCLUSION

For the foregoing reasons, and the reasons stated in Respondents' motion to dismiss, the Court should dismiss the habeas petition. As discussed in Respondents' motion to dismiss, should the Court decline to dismiss the habeas petition, the Court should order a bond hearing consistent with the procedures and burdens established under 8 U.S.C. § 1226(a).

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DATED this 8th day of May, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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