

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK**

ELHAM AZIMI and SARVENAZ
ENTEZARIAN,

Petitioners,

Case No. _____

v.

DONALD TRUMP, President of the United
States; U.S. DEPARTMENT OF
HOMELAND SECURITY (“DHS”); U.S.
CUSTOMS AND BORDER PROTECTION
(“CBP”); JOHN KELLY, Secretary of DHS;
KEVIN K. MCALEENAN, Acting
Commissioner of CBP; and AARON
DELMONTE, Buffalo Field Director, CBP,

Date: February 1, 2017

Respondents.

**PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

Petitioners, Ms. Elham Azimi and Sarvenaz Entezarian (“Petitioners”), are F1 student visa holders who attend the New York University Tandon School of Engineering and who are currently being held at the at the Customs and Border Patrol Port of Entry in Buffalo, NY, at the direction of the Respondents. Petitioners have valid F1 immigration status and have multiple entry visas permitting their entry into the United States. Despite their valid entry documents, U.S. Customs and Border Protection (“CBP”) blocked Petitioners from entering the United States upon their arrival at the Buffalo Port of Entry on the evening of January 31, 2017, and detained Petitioners therein. No magistrate has determined that there is sufficient justification for the continued detention of Petitioners or their denial of entry into the United States. Instead, CBP is holding Petitioners at the Buffalo Port of Entry solely pursuant to an executive order issued on January 27, 2017, and contrary to nationwide federal court stays, including the ones issued in *Darweesh v. Trump*, 17-cv-480 (E.D.N.Y. order Jan. 29, 2017) and portions of *Tootkaboni v. Trump*, No. 17-cv-10154 (D.Mass. Jan. 29, 2017).

Because the executive order is unlawful as applied to Petitioners, their continued detention and bar to entry based solely on the executive order violates their Fifth Amendment procedural and substantive due process rights, violates the First Amendment Establishment Clause, is ultra vires under the immigration statutes, and violates the Administrative Procedure Act and Religious Freedom Restoration Act. Further, Petitioners’ continued unlawful detention and bar to entry are part of a widespread policy, pattern, and practice applied to many refugees, visa holders, and others detained after the issuance of the January 27, 2017 executive order. Therefore, Petitioners respectfully apply to this Court for a writ of habeas corpus to remedy their unlawful detention and bar to entry by Respondents, and for declaratory and injunctive relief to

prevent such harms from recurring, in light of their future entries pursuant to their lawful immigration status.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1361, 2241, 2243, and the Habeas Corpus Suspension Clause of the U.S. Constitution. This court has further remedial authority pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

2. The requested relief is properly styled as a petition for habeas corpus because the Supreme Court “has repeatedly held that habeas corpus is available to an alien seeking entry into the United States.” *Jones v. Cunningham*, 371 U.S. 236, 239 (1963).

3. The Supreme Court has held that “besides physical imprisonment, there are other restraints on a man’s liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.” *Jones v. Cunningham*, 371 U.S. 236, 240 (1963); *see also Chattley v. Benson*, 2007 WL 4377686, at *1 (W.D.N.Y. Dec. 12 2007) (“physical confinement is not necessary” for purposes of the custody requirement). Respondent’s unconstitutional application of the Executive Order to Petitioners constitutes a “significant restraint on [Petitioners’] liberty.” *See Lesbian/Gay Freedom Day Committee, Inc. v. U.S.I.N.S.*, 541 F. Supp. 569, 576 (N.D. Cal. 1982). Indeed, “[a]liens excluded from entry into the United States have been allowed habeas corpus relief [even] though [they are] free to go anywhere else in the world.” *Varga v. Rosenberg*, 237 F. Supp. 282, 286 (S.D. Cal. 1964), superseded by statute on other grounds, *Flores-Arellano v. I.N.S.*, 5 F.3d 360, 362 (9th Cir. 1993); *see also Brownell v. We Shung*, 352 U.S. 180, 180 (1956).

4. The executive order entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States,” which is attached hereto as Exhibit A and is hereinafter referred to as the “EO,” commands CBP to deny entry to Iranian nationals until it is lifted by President Trump. It will thus continue to restrain Petitioners’ movement indefinitely. The Petitioners cannot alter their status as Iranian nationals and therefore the EO will continue to prevent them from entering the country on their valid F1 visas. Thus, Petitioners remains “in custody” for the purpose of habeas corpus review. *See Lesbian/Gay Freedom Day Committee, Inc.* 541 F. Supp. at 576.

5. In a recent case where an Iranian visa holder was denied entry under the EO, the Central District of California ordered government officials to transport the Petitioners *back* to the United States and admit him under the terms of his previously approved visa. *Vayeghan v. Kelly*, Case No. 17-cv-0702, Order, Doc. No. 5, at 3-4 (January 29, 2017).

6. Venue properly lies within the Western District of New York because a substantial part of the events or omissions giving rise to this action occurred in the District. 28 U.S.C. § 1391(b).

7. No petition for habeas corpus has previously been filed in any court to review Petitioners’ case.

PARTIES

8. Petitioners are engineering students at New York University Tandon School of Engineering. They have valid F1 immigration status and visas to permit their entry to the United States.¹ They are Muslim and citizens of Iran. They are being held at the direction of the

¹ Ms. Azimi’s SEVIS number is N0009871391 and her visa number is L3900429. Ms. Entezarian’s SEVIS number is N0013714891 and her visa number is K4388087.

Respondents at the CBP Port of Entry in Buffalo, NY. Upon information and belief, they are being subjected to the entry bar by CBP officers at the CBP Port of Entry in Buffalo, NY this evening.

9. Respondent Donald Trump is named in his official capacity as the President of the United States. He issued the Executive Order at issue in this case and directs the Respondents as to their actions.

10. Respondent John Kelly is named in his official capacity as the Secretary of DHS. Secretary Kelly has immediate custody of Petitioners.

11. Respondent Aaron Delmonte is named in his official capacity as the Director of the Buffalo Field Office of Customs and Border Protection (CBO), which has immediate custody of Petitioners and as such is a legal custodian of Petitioners.

12. Respondent Kevin K. McAleenan is named in his official capacity as the Acting Commissioner of CBP. Acting Commissioner McAleenan has immediate custody of Petitioners.

13. Respondent U.S. Customs and Border Protection (“CBP”) is an agency within the U.S. Department of Homeland Security with the primary mission of detecting and preventing the unlawful entry of persons and goods into the United States.

14. Respondent Department of Homeland Security (DHS) is the federal agency responsible for enforcing Petitioners’ continued detention pending their removal proceedings.

STATEMENT OF FACTS

President Trump’s January 27, 2017 Executive Order

15. On January 20, 2017, Donald Trump was inaugurated as the forty-fifth President of the United States. During his 2016 campaign he had repeatedly stated that he would ban Muslims from entering the United States. *See, e.g., Donald J. Trump, Donald J. Trump Statement*

On Preventing Muslim Immigration, (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (“Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”); Abby Phillip and Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: ‘You know my plans’*, Wash. Post (Dec. 22, 2016).

16. On January 27, one week after his inauguration, President Trump signed the EO.

17. In statements to the press in connection with his issuance of the EO, President Trump stated that his order would help Christian refugees to enter the United States by prioritizing their claims over those of Muslims. See Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. Times (Jan. 27, 2017), (“[President Trump] ordered that Christians and others from minority religions be granted priority over Muslims.”); Carol Morello, *Trump Signs Order Temporarily Halting Admission of Refugees, Promises Priority for Christians*, Wash. Post (Jan. 27, 2017).

18. Citing the threat of terrorism committed by foreign nationals, the EO directs a variety of changes to the manner and extent to which non-citizens may seek and obtain admission to the United States, particularly (although not exclusively) as refugees. Among other things, the EO imposes a 120-day moratorium on the refugee resettlement program as a whole; proclaims that “that the entry of nationals of Syria as refugees is detrimental to the interests of the United States,” and therefore “suspend[s]” indefinitely their entry to the country; and similarly proclaims that “the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests” of the country.

19. Most relevant to the instant action is Section 3(c) of the EO, in which President Trump proclaims “that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States,” and that he is therefore “suspend[ing] entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order,” with narrow exceptions not relevant here.

20. There are seven countries that fit the criteria in 8 U.S.C. § 1187(a)(12): Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. According to the terms of the EO, therefore, the “entry into the United States” of non-citizens from those countries is “suspended” from 90 days from the date of the EO.

21. Since the issuance of the EO, several federal courts have blocked aspects of the EO relating to removal, return, and/or detention. *See, e.g., Darweesh v. Trump*, 17-cv-480 (E.D.N.Y. order Jan. 29, 2017); *Tootkaboni v. Trump*, No. 17-cv-10154 (D.Mass. Jan. 29, 2017).

Petitioners’ Attempts to Enter

22. On Tuesday, January 31, 2017, at approximately 11:45pm, Petitioners arrived at the U.S.-Canadian border crossing at Buffalo from brief trips to Iran, with their visas and appropriate paperwork for arrival. Instead of admitting Petitioners to the country, CBP detained them.

23. Upon knowledge and belief, Petitioners are being denied the ability to re-enter the United States to continue their lives and their studies, despite their enrollment at New York University and valid immigration status.

CAUSES OF ACTION

COUNT ONE

**FIFTH AMENDMENT – PROCEDURAL DUE PROCESS –
DENIAL OF RIGHT TO SEEK ENTRY OR APPLY FOR DEFERRED INSPECTION**

24. Petitioners repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

25. Procedural due process requires that the government be constrained before it acts in a way that deprives individuals of liberty interests protected under the Due Process Clause of the Fifth Amendment. Additionally, due process requires that arriving immigrants be afforded those statutory rights granted by Congress and the principle that “[m]inimum due process rights attach to statutory rights.” *Dia v. Ashcroft*, 353 F.3d 228, 239 (3d Cir. 2003) (alteration in original) (quoting *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996)).

26. Having presented themselves at a United States port of entry, Petitioners are entitled to be considered for entry and deferred inspection and other mechanisms that would allow them to remain in the U.S.

27. Respondents’ actions in denying Petitioners the opportunity to apply for entry and deferred inspection, and coercing them to withdraw their applications for admission, violate their rights.

28. These actions were taken in violation of the federal court ordered stays in cases including *Darweesh v. Trump*, 17-cv-480 (E.D.N.Y. order Jan. 29, 2017) and portions of *Tootkaboni v. Trump*, No. 17-cv-10154 (D.Mass. Jan. 29, 2017).

COUNT TWO
FIRST AMENDMENT – ESTABLISHMENT CLAUSE

29. Petitioners repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

30. The EO exhibits hostility to a specific religious faith, Islam, and gives preference to other religious faiths, principally Christianity. The EO therefore violates the Establishment Clause of the First Amendment by not pursuing a course of neutrality with regard to different religious faiths. President Trump confirmed that the EO is intended to establish a preference for Christians to the detriment of Muslims in his comments explaining the order. See Paragraph 29, *infra*.

COUNT THREE
FIFTH AMENDMENT – EQUAL PROTECTION

31. Petitioners repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

32. The EO discriminates against Petitioners on the basis of their country of origin and religion, without sufficient justification, and therefore violates the equal protection component of the Due Process Clause of the Fifth Amendment.

33. Additionally, the EO was substantially motivated by animus toward—and has a disparate effect on—Muslims, which also violates the equal protection component of the Due Process Clause of the Fifth Amendment. *Jana-Rock Const., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006); *Hunter v. Underwood*, 471 U.S. 222 (1985).

34. As described above, Respondents have demonstrated an intent to discriminate against Petitioners on the basis of religion through repeated public statements that make clear the EO was designed to prohibit the entry of Muslims to the United States.

35. Applying a general law in a fashion that discriminates on the basis of religion in this way violates Petitioners' rights to equal protection under the Fifth Amendment Due Process Clause. *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Petitioners satisfy the Supreme Court's test to determine whether a facially neutral law – in the case, the EO and federal immigration law – has been applied in a discriminatory fashion. The Supreme Court requires an individual bringing suit to challenge the application of a law to bear the burden of demonstrating a “prima facie case of discriminatory purpose.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-7 (1977). This test examines the impact of the official action, whether there has been a clear pattern unexplainable on other grounds besides discrimination, the historical background of the decision, the specific sequence of events leading up to the challenged decision, and departures from the normal procedural sequence. *Id.*

36. Here, President Donald Trump and senior staff have made clear that EO will be applied primarily to exclude individuals on the basis of their national origin and being Muslim. Further, as described above, the President has promised that preferential treatment will be given to Christians, unequivocally demonstrating the special preferences and discriminatory impact that the EO has upon Petitioners.

37. Thus, Respondents have applied the EO with forbidden animus and discriminatory intent in violation of the equal protection of the Fifth Amendment and violated Petitioners' equal protection rights.

**COUNT FOUR
ADMINISTRATIVE PROCEDURE ACT**

38. Petitioners repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

39. Respondents detained Petitioners solely pursuant to an executive order issued on January 27, 2017, which expressly discriminates against Petitioners on the basis of their country of origin and was substantially motivated by animus toward Muslims. *See supra* Count Five.

40. The EO exhibits hostility to a specific religious faith, Islam, and gives preference to other religious faiths, principally Christianity.

41. The INA forbids discrimination in issuance of visas based on a person's race, nationality, place of birth, or place of residence. 8 U.S.C. § 1152(a)(1)(A).

42. Respondents' actions in detaining and mistreating Petitioners were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of APA § 706(2)(A); contrary to constitutional right, power, privilege, or immunity, in violation of APA § 706(2)(B); in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, in violation of APA § 706(2)(C); and without observance of procedure required by law, in violation of § 706(2)(D).

43. Under Section 3(g) of the Executive Order, the secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other

immigration benefits to nationals of countries for which visas and benefits are otherwise blocked. Following a January 29, 2017 announcement by DHS Secretary Kelly that the entry of lawful permanent residents is in the national interest, hundreds of legal permanent residents received waivers under 3(g). Additionally, dozens of visa holders have been granted waivers under Section 3(g). See Customs and Border Patrol, Protecting the Nation from Foreign Terrorist Entry into the United States, <https://www.cbp.gov/border-security/protecting-nation-foreign-terrorist-entry-united-states>. For the Secretary to deny entry to these Petitioners, engineering students with no criminal record, while granting waivers to hundreds of LPRs and dozens of visa holders, would be arbitrary and capricious under the Administrative Procedure Act.

COUNT FIVE
RELIGIOUS FREEDOM RESTORATION ACT

44. Petitioners repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

45. The Religious Freedom Restoration Act (RFRA) prohibits the government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, unless the burden is in furtherance of a compelling government interest and it is the least restrictive means of furthering that compelling government interest. 42 U.S.C. § 2000bb-1.

46. RFRA applies to all Federal law, and the implementation of that law, whether statutory or otherwise. 41 U.S.C. 2000bb-1. RFRA's sweeping coverage "ensures its intrusion into every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and

official of the Federal, State and local governments. RFRA applies to all federal and state law, statutory or otherwise...” *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). By its text, RFRA applies to all federal officers, including immigration officers.

47. The EO will have the effect of imposing a special disability on the basis of religious views or religious status, by withdrawing an important immigration benefit principally from Muslims on account of their religion. In doing so, the EO places a substantial burden on Petitioners’ exercise of religion in a way that is not the least restrictive means of furthering a compelling governmental interest.

48. An obvious less-restrictive means would be the previous policy regarding admission of Iranian nationals on student visas. The government has not demonstrated that Iranians on validly issued visas have committed any acts of terror, or that the Iranian population of the United States poses any significant threat whatsoever.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that this Court grant the following relief:

- (1) Issue a Writ of Habeas Corpus requiring Respondents to release and admit Petitioners into the United States pursuant to their validly issued visas;
- (2) Enter a judgment declaring that Respondents’ detention and bar to entry of Petitioners is and will be unauthorized by statute and contrary to law;
- (3) Award Petitioners reasonable costs and attorney’s fees; and

(4) Grant any other and further relief that this Court may deem fit and proper.

DATED: February 1, 2017
Buffalo, New York

Respectfully submitted,

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