

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

FABIAN LAYTON VARGAS,

Petitioner,

v.

Case No. 25-3155-JWL

KRISTI NOEM, Secretary, Department of
Homeland Security; PETE FLORES,
Commissioner, Customs and Border
Protection; RICARDO WONG, Field
Office Director, ICE ERO Chicago; and
C. CARTER, Warden, FCI-Leavenworth,

Respondents.

RESPONSE TO § 2241 HABEAS PETITION AND ORDER TO SHOW CAUSE

This matter is before the Court on the petition of Fabian Layton Vargas (“Petitioner”) for a writ of habeas corpus under 28 U.S.C. § 2241. Petitioner, an alien subject to an order of removal, asks the Court to release him from detention at the Federal Correctional Institution in Leavenworth, Kansas (“Leavenworth FCI”). Petitioner asserts he has been in custody since January 2024 and there is no significant likelihood of removal to his home country of Colombia in the reasonably foreseeable future. ECF 1 at 1-2. Citing *Zadvydas v. Davis*, 533 U.S. 678 (2001), he contends his detention violates the Due Process Clause of the Fifth Amendment to the Constitution and 8 U.S.C. § 1231(a)(6). *Id.* at 6-8. The Court directed Respondents to show cause why the habeas petition should not be granted. ECF 2.

The habeas petition should be denied. Petitioner has not shown removal is unlikely. He focuses on Colombia without demonstrating that removal to a third country is infeasible. His assertion that he sees little visible progress in the removal process is insufficient to discharge his burden under *Zadvydas*. Neither a delay in the removal process nor uncertainty as to when removal

will occur warrants habeas relief. Even if Petitioner had made the required initial showing under *Zadvydas*, Respondents have now rebutted it. Respondents have acted diligently by attempting to remove Petitioner to countries other than Colombia; those efforts have not met with success, but Respondents continue to inquire about possible third countries. Given the nature of his offenses and his participation in the custody review process, Petitioner is not entitled to a bond hearing or further procedures.

STATEMENT OF FACTS

The following facts are part of the Declaration of Gerardo Aguayo, a Deportation Officer for Enforcement and Removal Operations (“ERO”) at United States Immigration and Customs Enforcement (“ICE”). Exhibit (“Ex.”) 1, Declaration of Gerardo Aguayo ¶¶ 1-3. Some facts alleged in the petition (ECF 1) are included as well.

Petitioner is a native and citizen of Colombia. *Id.* ¶ 4; *see also* ECF 1 ¶¶ 1, 13, 18. In May 2019, he was paroled into the United States at Washington, DC for criminal prosecution pursuant to section 212(d)(5)(A) of the Immigration and Nationality Act (“INA”). Ex. 1 ¶ 5 (citing 8 U.S.C. § 1182(d)(5)(A)); *see also* ECF 1 ¶¶ 1, 20. In November 2019, he was convicted in the United States District Court for the Eastern District of Virginia of violating 21 U.S.C. §§ 959(a), 960, and 963 by conspiring to distribute five kilograms or more of cocaine knowing, intending, and having reasonable cause to believe that it would be unlawfully imported into the United States. Ex. 1 ¶ 6; *see also* ECF 1 ¶ 20 (alleging that Petitioner pleaded guilty to this offense). He was sentenced 144 months of imprisonment. Ex. 1 ¶ 6; *see also* ECF 1 ¶ 21.

On January 31, 2024, Petitioner was taken into ICE custody after his release from federal custody. Ex. 1 ¶ 7; *see also* ECF 1 ¶¶ 1, 23. The same day, the Department of Homeland Security (“DHS”) issued a Notice to Appear (“NTA”) charging him as inadmissible pursuant to 8 U.S.C.

§§ 1182(a)(7)(A)(i)(II), (a)(2)(A)(i)(I), and (a)(2)(A)(i)(II). Ex. 1 ¶ 8; *see also* ECF 1 ¶ 23. The NTA was later amended to substitute the charge under § 1182(a)(7)(A)(i)(II) with a charge under § 1182(a)(7)(B)(i)(II). Ex. 1 ¶ 8 & n.1.

In April 2024, Petitioner filed an application for relief from removal with the Immigration Court. *Id.* ¶ 9; *see also* ECF 1 ¶¶ 1, 24. The habeas petition alleges Petitioner applied for a deferral of removal to Colombia under the Convention Against Torture. ECF 1 ¶¶ 1, 24. In December 2024, the Immigration Court ordered Petitioner's removal but granted his application for relief. Ex. 1 ¶ 10. The habeas petition alleges the Immigration Court deferred removal to Colombia based on a risk of torture. ECF 1 ¶¶ 2, 24. The order of the Immigration Court was not appealed by either party and became final. Ex. 1 ¶¶ 10-12. The habeas petition alleges Petitioner is currently detained at the Leavenworth FCI. ECF 1 ¶¶ 13-14, 18.

Pursuant to 8 U.S.C. § 1231(a)(1)(A), an alien who has been ordered removed shall be removed from the United States within 90 days. Ex. 1 ¶ 13. If an alien has not been removed at or near 90 days after a removal order, ERO conducts a File Custody Review, also known as a Post-Order Custody Review ("POCR"), to determine the necessity of continued custody. *Id.* When conducting a 90-day POCR, factors to be considered include a detained individual's flight risk, any danger the individual may pose to the community, any threat to national security, and whether there is a significant likelihood of removal in the reasonably foreseeable future. *Id.*

If an alien has been detained pursuant to a final removal order for 180 days, a Transfer Checklist generally is completed with information related to follow-up actions taken to obtain a travel document after the initial 90-day POCR and every 90 days thereafter. *Id.* ¶ 14. The Transfer Checklist is transferred to the ICE/ERO Headquarters POCR Unit, which makes the ultimate decision on the individual's continued detention beyond 180 days, or every 90 days thereafter. *Id.*

This decision is based on whether there is a significant likelihood of removal in the reasonably foreseeable future. *Id.*

Since the order of the Immigration Court became final, DHS has attempted to remove Petitioner to alternative countries with no success. *Id.* ¶ 15. In April 2025, a File Custody Review for Petitioner was conducted. *Id.* ¶ 16; *see also* ECF 1 ¶ 26. ERO served Petitioner with a Decision to Continue Detention following this custody review. Ex. 1 ¶ 16. In July 2025, ERO reached out to ICE’s Removal and International Operations (“RIO”) Headquarters to inquire about other potential countries to which Petitioner could be removed. *Id.* ¶ 17. ICE will continue its effort to identify alternative countries. *Id.* ¶ 18.

ARGUMENT

28 U.S.C. § 2241(a) vests each district court with the power to grant a writ of habeas corpus. Such a writ “shall not extend to a prisoner” unless “[h]e is in custody in violation of the Constitution or laws or treaties of the United States[.]” 28 U.S.C. § 2241(c)(3). The Court of Appeals reviews legal issues in connection with a § 2241 habeas petition *de novo*, while factual findings are reviewed for clear error. *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012).

I. Counts I and II fail because Petitioner has not shown removal is unlikely, or alternatively, Respondents can rebut any such showing

Upon the entry of a final removal order, “the Government ordinarily secures the alien’s removal during a subsequent 90-day statutory ‘removal period,’ during which time the alien normally is held in custody.” *Zadvydas*, 533 U.S. at 682. If the alien is not removed during this 90-day period, 8 U.S.C. § 1231(a)(6) “authorizes further detention.” *Id.* In *Zadvydas*, the Supreme Court held a 6-month period of detention is presumptively reasonable. *Id.* at 701. “After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood

of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.” *Id.* The presumption does not mean that “every alien not removed must be released after six months,” but instead that the alien may be held in confinement until “it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.” *Id.*

Here, Petitioner has not demonstrated “good reason to believe” there is no significant likelihood of removal in the reasonably foreseeable future. He mainly focuses on the Immigration Court order deferring removal to Colombia based on an alleged threat of persecution there. “But because withholding of removal is a form of country specific relief, nothing prevents DHS from removing the alien to a third country other than the country to which removal has been withheld or deferred.” *Johnson v. Guzman Chavez*, 594 U.S. 523, 531-32 (2021) (citation modified). ICE has been attempting to remove Petitioner to countries other than Colombia. *See supra* Statement of Facts (“SOF”). Attempts to remove Petitioner to third countries have not yet borne fruit, but ICE is continuing to identify such countries. *Id.* The habeas petition does not even attempt to show that there are no countries outside of Colombia to which Petitioner could be removed.

In effect, Petitioner is arguing that removal to a third country is unlikely because it hasn’t happened yet. That is not enough to shift the burden under *Zadvydas*. *See Masih v. Lowe*, No. 4:24-CV-01209, 2024 WL 4374972, *3 & n.32 (M.D. Pa. Oct. 2, 2024) (“[T]he fundamental basis of [petitioner’s] argument appears to be that his removal is unlikely simply because it has not occurred to this point[.]”) (citation modified). Stated differently, “[s]peculation and conjecture are not sufficient to carry this burden, nor is a lack of visible progress” in Petitioner’s removal “sufficient, in and of itself, to show that no significant likelihood of removal exists in the reasonably foreseeable future.” *Tawfik v. Garland*, No. H-24-2823, 2024 WL 4534747, *3 (S.D.

Tex. Oct. 21, 2024) (citation modified). “Because ICE is still actively pursuing” Petitioner’s removal “and his detention furthers Congress’s goal of ensuring his presence for removal,” Petitioner “is, therefore, not entitled to release under *Zadvydas*.” *Bains v. Garland*, No. 2:23-cv-00369-RJB-BAT, 2023 WL 3824104, *4 (W.D. Wash. May 16, 2023).

In the same vein, a “mere delay” in obtaining travel documents “does not trigger the inference that an [individual] will not be removed in the reasonably foreseeable future because the reasonableness of detentions pending deportation cannot be divorced from the reality of the bureaucratic delays that almost always attend such removals.” *Dusabe v. Jones*, No. CIV-24-464-SLP, 2024 WL 5465749, *4 (W.D. Okla. Aug. 27, 2024) (citation modified), *adopted*, 2025 WL 486679, *1-4 (W.D. Okla. Feb. 13, 2025). Indeed, part of the delay in this case is associated with Petitioner’s efforts to secure “withholding or asylum,” which efforts “do not normally trigger the concerns raised by *Zadvydas*.” *Roman v. Garcia*, No. 6:24-CV-01006, *3 (W.D. La. Jan. 29, 2025). And even when the Government “has not identified a specific date by which it expects a travel document to issue,” it remains true that “uncertainty as to when removal will occur does not establish that detention is indefinite.” *Atikurraheman v. Garland*, No. C24-262-JHC-SKV, 2024 WL 2819242, *4 (W.D. Wash. May 10, 2024).

In sum, Petitioner has not provided competent evidence to show that removal to a country other than Colombia is unlikely. An assertion that he is personally unaware of a third country candidate is insufficient. *See, e.g., Soudom v. Warden*, No. 25-3063-JWL, 2025 WL 1594822, *2 (D. Kan. May 23, 2025) (denying relief where the petitioner did not carry his initial burden, in part because “[t]he letter on which petitioner relies does not foreclose the possibility of his removal”); *Ogole v. Garland*, No. 24-3198-JWL, 2025 WL 548452, *2 (D. Kan. Feb. 19, 2025) (denying relief where the petitioner did not carry his initial burden by asserting “his country has a freeze on

deportation,” as this argument was “made without supporting evidence” and belied by other facts in the record). As discussed in the next section, this is especially true given ICE’s participation in the POCR process.

Even if Petitioner had made an initial showing removal is unlikely, Respondents have now rebutted it. ICE has acted diligently by attempting to remove Petitioner to countries other than Colombia. *See supra* SOF. Those efforts have not succeeded but ICE is continuing to look for alternative countries. *Id.* To that end, ICE reached out to its RIO Headquarters as recently as July 2025 to inquire about potential removal locations for Petitioner. *Id.* If it believes all regulatory requirements can be met, ICE also has the option of asking the Immigration Court to lift the deferral order with respect to Colombia. *Id.*¹ All of this defeats any assertion there is no significant likelihood of removal. *See, e.g., Soudom*, 2025 WL 1594822, at *2 (finding the respondents “sufficiently rebutted” any initial showing, in part because “[i]mmigration officials have diligently sought the necessary travel documents for petitioner from South Africa since his detention”); *Drame v. Gonzales*, No. 16-3257-JWL, 2017 WL 978120, *3 (D. Kan. Mar. 14, 2017) (finding the respondents met their burden “by showing that the Senegal Embassy now has issued the necessary travel document and that a tentative travel plan is in place to remove petitioner within this month”).

The habeas petition does not cite *Liu v. Carter*, No. 25-3036-JWL, 2025 WL 1696526 (D. Kan. June 17, 2025), presumably because that case is distinguishable. *Liu* granted habeas relief where ICE did not follow the procedures set forth in 8 C.F.R. § 241.13, but the respondents “[did] not dispute that this regulation applies in this case; nor [did] they argue that compliance with this

¹ Deferral of removal can be terminated if the Government files a motion with and makes an appropriate showing before the Immigration Court. 8 C.F.R. §§ 1208.17(d)(1), (4). Deferral of removal also can be terminated “based on diplomatic assurances forwarded by the Secretary of State.” *Id.* §§ 1208.17(f), 1208.18(c).

regulation is not required or that its violation cannot justify overturning a revocation of release.” *Id.* at *2 (citation modified). *Liu* found that the petitioner’s release was not revoked in compliance with § 241.13 because ICE (1) had not provided an informal interview after almost five months of custody; and (2) could not identify “changed circumstances” indicating a significant likelihood of removal to China in the reasonably foreseeable future. *Id.* at *1-3. The facts and arguments are different here. Further, Respondents did not ask the *Liu* Court to decide for purposes of § 241.13 whether a regulatory violation could be harmless or remedied through substitute process. *Id.*

II. Count I additionally fails because Petitioner has not established an entitlement to a bond hearing or other cumulative process

The Court should reject Petitioner’s cursory request for “a bond hearing or other meaningful process” to assess whether continued confinement is justified. ECF 1 ¶ 34. Although Count I is styled as a Fifth Amendment due process claim and Count II is styled as a claim under 8 U.S.C. § 1231(a)(6), the reality is that both claims are covered by *Zadvydas*. *See Al-Shewaily v. Mukasey*, No. CIV-07-0946-HE, 2007 WL 4480773, *6 (W.D. Okla. Dec. 18, 2007) (“Petitioner fails to elaborate on the details of any procedural due process claim; rather, he appears to base such claim on an entitlement to release pursuant to *Zadvydas*, which has already been rejected in addressing his statutory claim.”); *see also Nasr v. Larocca*, No. CV 16-1673-VBF(E), 2016 WL 2710200, *5 (C.D. Cal. June 1, 2016) (“[W]here Petitioner has failed to meet his burden to show there is no significant likelihood of removal in the reasonably foreseeable future under *Zadvydas*, Petitioner also has failed to prove that his continued detention violates due process.”) (citation modified).² In addition to the points set forth *supra* in Argument § I, Count I fails for two more independent reasons.

² To the extent Petitioner is asserting a substantive due process claim, the same analysis applies. *See, e.g., Dusabe*, 2024 WL 5465749, at *5-6 (“Courts, including this one, have held that a

First, Petitioner is not entitled to further process because he has been and will continue to be eligible for POCRs. As summarized in the Statement of Facts, an initial 90-day custody determination is conducted by the relevant district director or the Director of Detention and Removal Field Office (collectively “Director”). 8 C.F.R. §§ 241.4(c)(1), 241.4(f)(1)-(8), 241.4(h)(1), 241.4(k)(1)(i). During the next 90-day period, the Director may “conduct such additional review of the case as he or she deems appropriate,” “release the alien,” or refer the alien to the Headquarters Post-Order Detention Unit for “further custody review.” *Id.* §§ 241.4(c)(2), 241.4(k)(1)(ii), 241.4(k)(2)(i)-(ii). Petitioner’s latest File Custody Review occurred in April 2025 and resulted in a Decision to Continue Detention. *See supra* SOF. POCRs under § 241.4 “alleviate any due process concerns in this case.” *Masih*, 2024 WL 4374972, at *4; *see also Dusabe*, 2024 WL 5465749, at *5 (finding no “deprivation of procedural due process” where ICE performed periodic custody reviews and “issued a Decision to Continue Detention”).

Second, “Congress has required detention (without a bond hearing) for some categories of aliens[.]” *Olmos v. Holder*, 780 F.3d 1313, 1315 (10th Cir. 2015). 8 U.S.C. § 1226(c)(1)(B) states that the Attorney General “shall” take into custody any alien who “is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title.” This means “[t]he Attorney General must detain aliens in Paragraphs ‘A’ through ‘D’ without a bond hearing.” *Olmos*, 780 F.3d at 1325; *see also Johnson*, 594 U.S. at 527 n.2 (explaining that aliens “may generally apply for release on bond,” but there is an “exception” for

petitioner’s failure to establish that his detention violates *Zadvydas* negates a substantive due process claim.”); *Singh v. Barr*, No. 19-CV-732, 2019 WL 4415152, *3 (W.D.N.Y. Sept. 16, 2019) (“Conversely, if detention is valid under *Zadvydas*, it cannot violate substantive due process.”); *Jovel-Jovel v. Contreras*, No. H-18-1833, 2018 WL 11473467, *4 (S.D. Tex. Oct. 30, 2018) (“[I]f detention is no longer than reasonably necessary to effectuate removal, it will comport with § 1231(a)(6), *Zadvydas*[,] as well as substantive due process protections.”) (citation modified).

“certain criminal aliens” under § 1226(c)). Petitioner fits this description, as he was found guilty of “a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance” under § 1227(a)(2)(B)(i). *See supra* SOF; *see also* *Ogole*, 2025 WL 548452, at *3 (rejecting “any claim that petitioner is entitled to a bond hearing,” in part because his “drug conviction” made his detention “mandatory”).

CONCLUSION

For the foregoing reasons, the habeas petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 5, 2025, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will provide notice to all registered parties, including:

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