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VIA ELECTRONIC FILING

Judge Brian R. Martinotti

United States District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street, Room 4015
Newark, NJ 07101

**Re: *Xu v. Bondi*, No. 2:25-cv-16274
Answer to Habeas Petition**

Dear Judge Martinotti:

This Office represents the Respondents in this habeas matter filed by Petitioner Chun Biao Xu, a noncitizen challenging the legality of his detention by U.S. Immigration and Customs Enforcement (ICE). We write in response to the petition, ECF No. 1, which the Court should deny for the reasons below.

I. Factual Background

Xu is a native and citizen of the People's Republic of China who is currently in ICE custody awaiting removal under a final order of removal. ECF No. 1 at 3. Xu entered the United States in January 2002 from China using fraudulent Taiwanese and Chinese passports. ECF No. 1 at 4; see also Form I-213, attached as Ex. 1. On February 22, 2011, the District Court for the Northern District of Georgia sentenced Xu to nine months of imprisonment followed by three years of supervised release after he pled guilty to conspiracy to harbor illegal aliens for commercial and financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(v)(I). Judgment, attached as Ex. 2. In addition, the judgment required that Xu "be turned over to a duly-authorized immigration official for appropriate removal proceedings from the United States" under the Immigration and Nationality Act (INA). *Ibid.*

Upon his release, Xu was placed in removal proceedings. ECF No. 1 at 5; see also Notice to Appear, attached as Ex. 3. Before the immigration court, Xu stated that he “wished to return to China,” twice declined the opportunity to find legal counsel, and declined to have his wife, an American citizen, file a petition on his behalf. Order of Immigration Judge at 3 (June 18, 2025), attached as Ex. 4. Xu also indicated to the immigration court that he did not fear returning to China. *Ibid.* The immigration court then explained “asylum, the process, and the legal requirements.” *Id.* at 2. In response, Xu reiterated his request to return to China. *Ibid.* On March 22, 2011, the immigration court ordered Xu’s removal. ECF No. 1 at 5; see also Order of the Immigration Judge at 1 (June 18, 2025), attached as Ex. 4. Xu waived his right to appeal, and the order became administratively final. ECF No. 1 at 5.

ICE released Xu under an Order of Supervision (OSUP) on June 20, 2011. ECF No. 1 at 5; Order of Supervision, attached as Ex. 5. The OSUP required Xu to routinely check-in with ICE and obtain “any necessary travel documents” to assist ICE with his removal. ECF No. 1 at 5; see also Order of Supervision, attached as Ex. 5; 8 C.F.R. 241.5(a)(2) (noting that ICE may impose a requirement that an “alien continue efforts to obtain a travel document and assist [it] in obtaining a travel document”). The OSUP also required Xu to inform ICE of his efforts to obtain a travel document by providing documentation of his correspondence with the Chinese Embassy or Consulate. Order of Supervision, attached as Ex. 5. For the next 14 years, Xu complied with the OSUP’s reporting requirements, but did not seek the required travel documents from China to assist ICE with his removal, despite reminders from ICE. Cf. ECF No. 1 at 5, 10; see also Warning for Failure to Depart (Form I-229(a) (Jan. 7, 2015)), attached as Ex. 6.

On March 28, 2025, ICE arrested Xu when he appeared for his routine check-in, ECF No. 1 at 5, and provided him with a “Warning for Failure to Depart,” Form I-229(a). Warning for Failure to Depart (Form I-229(a) (Mar. 28, 2025)), attached as Ex. 7. According to the Form, Xu had “mandatory requirements” to “[a]pply for a travel document/passport from [his] embassy or consulate,” and to “take any * * * action that * * * ensure[d] the issuance of a travel document and [his] removal from the United States.” *Ibid.* The Form stated that “[f]ailure to comply or provide sufficient evidence of [his] inability to comply [could] result in the extension of the removal period and subject [him] to further detention.” *Ibid.* ICE also provided Xu a “Notice of Revocation of Release” indicating that it was making reasonable efforts to obtain a travel document to effectuate his removal from the United States. See ECF No. 1 at 6.

The same day, Xu sought a custody determination by ICE. Notice of Custody Determination (Form I-286), attached as Ex. 8. ICE denied Xu’s request on June 19, 2025, finding that he did not meet his burden of showing that, if released, he was not a flight risk or danger to the community. Decision to Continue Detention, attached as Ex. 9; see also ECF No. 1 at 6. Xu sought review of ICE’s determination by an

immigration judge, and apparently did not prevail. See Decision to Continue Detention, attached as Ex. 9.

On June 11, 2025, Xu moved the immigration court to reopen his removal proceedings. Order of Immigration Judge at 1 (June 18, 2025), attached as Ex. 4. The immigration court refused. It observed that while Xu now sought political asylum because he feared “mistreatment by the Chinese government,” he explicitly declined to seek asylum during his removal proceedings in 2011, despite having the opportunity to do so. *Id.* at 2. The immigration court also observed that since Xu entered the United States in February 2002, an asylum petition would have been untimely in 2011. *Ibid.* The immigration court noted that Xu did not pursue asylum during the nine years he was present in the United States before his removal proceedings, and that he waited another 14 years to move to reopen his removal proceedings to seek asylum. *Ibid.* In addition, the immigration court rejected Xu’s argument to reopen his removal proceedings to allow him to apply for asylum due to his conversion to Christianity and the alleged mistreatment of Christians in China. *Id.* at 2-3. The immigration court explained that Xu failed to meet his evidentiary burden to show there was “a marked increase in the mistreatment of Christians” in China, and that his conversion was “a change in personal circumstances rather than a change in country conditions.” *Id.* at 3.

Xu has been detained 238 days as of the date of this filing. He has received periodic reviews of his custody status, with the last review occurring on October 9, 2025. See 8 C.F.R. 241.4; see also Notice to Alien of Interview for Review of Custody Status, attached as Ex. 10.

II. Argument

Xu filed a habeas petition under 28 U.S.C. 2241, challenging his continued detention by ICE. ECF No. 1 at 3. As relief, Xu seeks immediate release from custody and a permanent injunction preventing his rearrest unless the United States shows that “removal to China has become imminently feasible.” *Id.* at 15. In the alternative, he seeks an immediate bond hearing. *Ibid.* He also seeks attorneys’ fees and costs. *Ibid.*

The Court should deny the petition.

Under 8 U.S.C. 1231(a)(1)(A), when an alien is subject to a final order of removal, there is a 90-day “removal period,” during which the government “shall” remove the alien. Detention during the removal period is mandatory. 8 U.S.C. 1231(a)(2). After the 90-day removal period, an alien “‘may be detained’ or may be released under terms of supervision.” *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 575 (2022) (quoting 8 U.S.C. 1231(a)(6)). The government may extend an alien’s detention in at least three circumstances. First, is where “the alien fails to make a

timely application for travel documents or acts to prevent his removal.” *Johnson v. Guzman Chavez*, 594 U.S. 523, 528 (2021); 8 U.S.C. 1231(a)(1)(C). Second, is where ICE decides to stay the alien’s removal because it “is not practicable or proper, or * * * the alien is needed to testify in a pending prosecution.” *Guzman Chavez*, 594 U.S. at 528. And third, is where the alien committed a crime listed in 8 U.S.C. 1182. See *id.* at 529; 8 U.S.C. 1231(a)(6). Extended detention under the latter circumstance is often referred to as the “post-removal-period.” *Guzman Chavez*, 594 U.S. at 529.

The INA does not set a limit on how long detention in the post-removal-period may last. See *id.* But in *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), the Supreme Court ruled that the government may only detain aliens in the post-removal-period for the time “reasonably necessary to bring about that alien’s removal from the United States.” The Supreme Court concluded that a six-month post-removal-period of detention is “presumptively reasonable.” *Id.* at 701. After the six-month period ends, “once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the [g]overnment must respond with evidence sufficient to rebut that showing.” *Ibid.*

Xu argues that once the government failed to remove him during the initial 90-day removal period in 2011, it was required to grant him supervised release under 8 U.S.C. 1231(a)(3). ECF No. 1 at 7-8. He further argues that 8 U.S.C. 1231(a)(3) requires the government to grant him supervised release from his current detention because the statute states that if the government fails to remove an alien during the removal period, then the alien “shall be subject to supervision under regulations prescribed by the Attorney General.” *Id.* at 7 (quoting 8 U.S.C. 1231(a)(3)).

Although Xu has been on supervised release for the last 14 years, it was not because of 8 U.S.C. 1231(a)(3). As noted above, in 2011, Xu pled guilty to conspiracy to harbor illegal aliens in violation of federal law. Judgment, attached as Ex. 2. He concedes that fact in his petition. ECF No. 1 at 5. 8 U.S.C. 1182(a)(2)(H)(i) provides that an alien “who commits or conspires to commit human trafficking offenses in the United States” is an inadmissible alien. And 8 U.S.C. 1231(a)(6) through its use of “may be detained” subjects criminal aliens, such as Xu, to either supervised release or extended detention at the government’s discretion. *Arteaga-Martinez*, 596 U.S. at 575; see also *Volynsky v. Clinton*, 778 F. Supp. 2d 545, 554 (E.D. Pa. 2011) (collecting cases and noting that “[a]s a general matter, the word ‘may’ confers discretion, while the word ‘shall’ imposes a non-discretionary duty”).

The government exercised its discretion under 8 U.S.C. 1231(a)(6) to grant Xu supervised release subject to conditions in 2011. Supervised release under Section 1231(a)(6) did not nullify the order of removal. As noted above, under the OSUP, Xu was responsible for obtaining a travel document from the Chinese Embassy or Consulate to effectuate his removal. Order of Supervision, attached as Ex. 5. The

OSUP required Xu to apply for a travel document and to assist the government's efforts to obtain one on his behalf. *Ibid.*; Warning for Failure to Depart (Form I-229(a)) (March 28, 2025)), attached as Ex. 7; Warning for Failure to Depart (Form I-229(a)) (Jan. 7, 2015)), attached as Ex. 6. The fact that it has taken 14 years to remove Xu is hardly evidence of "strategic delay." ECF No. 1 at 8. Instead, it is evidence that Xu was aware of his obligations, and that he has delayed his removal by failing to timely obtain a travel document, despite the OSUP's requirements and reminders from ICE. See ECF No. 1 at 5-6.

These facts distinguish this case from the ones cited in Xu's petition. See ECF No. 1 at 8. Unlike Xu, the habeas petitioner in *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 502-503 (S.D.N.Y. 2009), did not have a history of criminal conduct or convictions. The petitioner in that case also did not have notice of her removal order, so there was no evidence suggesting that "she refuse[d] to cooperate with the removal order," or any possibility that she could "have acted affirmatively to thwart the [g]overnment's attempts to enforce the order." *Id.* at 502. In *Ulysse v. Department of Homeland Security*, 291 F. Supp. 2d 1318, 1321-1326 (M.D. Fla. 2003), the petitioner there did not have a criminal history, and she also had no notice of the final removal order entered against her.

Xu next says that his detention violates his due process rights under *Zadvydas* because he has been detained for more than six months. ECF No. 1 at 9. He argues that because he has been detained for longer than that period, it is the government's burden to show that his removal is reasonably foreseeable. *Id.* at 9-10.

That is incorrect. First, it ignores that Xu receives periodic reviews of his custody status while in detention. *E.g.*, Notice to Alien of Interview for Review of Custody Status, attached as Ex. 10. And second, the Supreme Court observed in *Zadvydas* that the six-month presumption "does not mean that every alien not removed must be released after six months." 533 U.S. at 701. Under *Zadvydas*, Xu has the initial burden of proof to show that he is entitled to relief. See *Resil v. Hendricks*, No. 11-2051 (JLL), 2011 WL 2489930, at *5 (D.N.J. June 21, 2011). To state a *Zadvydas* claim, Xu "must provide evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Filmon v. Hendricks*, No. 13-6739 (DMC), 2013 WL 6154440, at *4 (D.N.J. Nov. 15, 2013) (quotation omitted). Only after Xu makes that showing does the government have the burden to show that his removal is reasonably foreseeable. *Resil*, 2011 WL 2489930, at *5.

Xu only points to the "sheer passage of time" to substantiate his claim that his removal is not reasonably foreseeable. ECF No. 1 at 10. He claims that if removal was possible, then it would have occurred within the 14 years since the immigration court issued the final order of removal. *Ibid.* But the "mere passage of time [is] insufficient" for Xu to meet "his initial burden to demonstrate [that there is] no

significant likelihood of removal under * * * *Zadvydas*.” *Beckford v. Lynch*, 168 F. Supp. 3d 533, 539 (W.D.N.Y. 2016). Xu instead must either show that he sought a travel document from the Chinese Embassy or Consulate, or explain why he could not obtain it. Cf. *Joseph v. United States*, 127 F. App’x 79, 81 (3d Cir. 2005) (rejecting a *Zadvydas* claim and noting that the habeas petitioner “produced no documentary evidence * * * from either the Antiguan Embassy or anyone connected with the Antiguan government to substantiate his contention that travel documents will not be issued in the reasonably foreseeable future”). Xu did not make such allegations in the petition, so he cannot satisfy the “heightened pleading requirements” for habeas relief here. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). Indeed, as this Court has made clear, “*Zadvydas* does not save an alien who fails to provide [the] requested documentation to effectuate his removal.” *Resil*, 2011 WL 2489930, at *5 (quotation omitted); accord *U.S. ex rel. Kovalev v. Ashcroft*, 71 F. App’x 919, 924 (3d Cir. 2003).

Xu makes two additional arguments regarding his detention. He first argues that his detention is unjustified because the government cannot show that he poses a flight risk or danger to the community. ECF No. 1 at 11-12. He next claims that the government’s decision to detain him 14 years after the issuance of his final order of removal violates the Administrative Procedures Act (APA), 5 U.S.C. 706. *Id.* at 13.

This Court should reject these arguments. ICE and apparently an immigration court have already deemed Xu to be a flight risk and danger to the community. See Notice of Custody Determination (Form I-286), attached as Ex. 8; Decision to Continue Detention, attached as Ex. 9. This Court does not have jurisdiction to second-guess those decisions. Congress exempted the “discretionary judgment[s]” regarding the detention of aliens from judicial review, and made clear that “[n]o court may set aside any action or decision by the [government] * * * regarding the detention of any alien or the revocation or denial of bond or parole.” 8 U.S.C. 1226(e). That also applies to Xu’s APA claim. The APA does not allow judicial review of a decision where another statute, like 8 U.S.C. 1226(e) here, “preclude[s] judicial review,” and “agency action is committed to agency discretion by law.” 5 U.S.C. 701(a)(1)-(2); see also *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (noting that refusals to enforce the law are presumptively not subject to judicial review, and that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion”); *Kovalev*, 71 F. App’x at 921 (noting that the scope of habeas review is more limited than APA review, and that “a federal habeas petition is not an ideal vehicle for challenging a discretionary decision” by the government).

Accordingly, this Court should dismiss the petition without prejudice. If Xu “develop[s] good reason to believe that removal is no longer reasonably foreseeable,” 127 F. App’x at 81, then he can file another petition seeking appropriate relief at that time.

Thank you for your attention in this matter.

Respectfully submitted,

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cc: Counsel of Record (via ECF)