

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

CRISTOFER A. ORTEGA-VARELA,

Petitioner,

v.

CHRIS BRACKETT, in his official
capacity As Superintendent, Strafford
County Department of Corrections;

PATRICIA HYDE, in her official capacity
as Acting Field Office Director of the
Boston Field Office of U.S. Immigration
and Customs Enforcement, Enforcement
and Removal Operations;

TODD LYONS, in his official capacity as
Acting Director and Senior Official
Performing the Duties of the Director of
U.S. Immigration and Customs
Enforcement;

KRISTI NOEM, in her official capacity as
Secretary of the Department of Homeland
Security,

Respondents.

Case No. 1:25-cv-483-PB-TSM

Judge Paul J. Barbadoro

**PETITIONER'S REPLY TO FEDERAL RESPONDENT'S
OBJECTION TO MOTION FOR RELEASE OR A BOND HEARING**

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Petitioner Cristofer A. Ortega-Varela (“Cristofer”) has a petition for habeas corpus relief pending before this Court. Cristofer respectfully submits this Reply in response to Federal Respondents’ Objection to Motion for Release or a Bond Hearing (“Resp Obj”) at ECF 11.

ARGUMENT

I. ICE did not comply with its own procedures for custody determinations set forth at 8 C.F.R. § 241.4.

First, Respondents appear to misunderstand how the Supreme Court’s decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001) affected the relevant provisions of the Code of Federal Regulations governing detention of noncitizens subject to orders of removal. Respondents contend that *Zadvydas* “...focused the question of post-removal detention on the likelihood of removal. Subsequent revisions of the regulations at § 241.4 addressed *Zadvydas* by incorporating this focus.” Resp Obj at 6 (emphasis added). Respondents argue that Cristofer cannot demonstrate that ICE failed to comply with § 241.4 “especially where Petitioner has failed to offer affirmative evidence that ICE could meet § 214.4’s *threshold requirement for release* – evidence that removal is not reasonably foreseeable.” *Id.* at 7 (emphasis added).

This characterization of the custody review provided and governed by § 214.4 is completely incorrect. In actuality, the revisions of the regulations in response to the *Zadvydas* decision created a new, separate regulation: 8 CFR § 241.13 Determination of whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future.¹ That regulation establishes a separate, special review procedure for noncitizens who have provided

¹ Available at <https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-241/subpart-A/section-241.13>

reason to believe that there is no significant likelihood of removal in the reasonable foreseeable future. § 241.13(a). Section 241.4 makes the distinction between the two separate custody review procedures clear.

Service determination under 8 CFR 241.13. The custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

8 CFR § 214.4(b)(4) (emphasis added)

Under the custody review procedures at § 214.4, therefore, there is no “threshold” showing that removal is not reasonably foreseeable required for release. In fact, both sections 241.13 and 241.4 make it clear that if such a showing is made, the decision regarding the noncitizen’s release or continued detention would then be governed by section 241.13. Therefore, Cristofer did not need to make such a showing in order to be released pursuant to § 214.4.

Respondents contend that “the regulations guarantee that ICE will review the appropriate factors; they do not guarantee Petitioner a particular outcome of that review” and that Cristofer’s disagreement with the outcome of ICE’s custody review does not prove that ICE did not conduct the review properly. Resp Obj at 6. However, this is not a situation in which the factors that should have been considered, and which the Respondents concede are guaranteed to be considered by the regulations, could support ICE’s decision to continue detention. There is no evidence cited by ICE and Respondents do not argue that Cristofer is a danger to the community, a flight risk or that he is likely to violate conditions of release. ICE’s determination to continue detention and the Declaration submitted by Respondents at ECF 11-1 both omit Cristofer’s SIJ status from his

immigration history. It is not that ICE weighed the factors differently than Cristofer would have liked, but rather that there is no evidence that ICE weighed them at all. If the outcome of a review cannot be supported by the supposed criteria for that review, then the review process itself is not meaningful.

Respondents also argue that ICE's decision to continue Cristofer's detention makes it clear that ICE was unable to make the required determination for release that either travel documents were unavailable or that Cristofer's removal was not practicable or in the public interest. Resp Obj at 6. Since Respondents have not argued that Cristofer has impeded their efforts to obtain travel documents, it is fair to assume that ICE was unable to determine that Cristofer's removal was not in the public interest. Yet how can ICE, an agency of DHS, find a strong interest in removing Cristofer when USCIS, a different agency of DHS, has already concluded that Cristofer's removal to Honduras is not in his best interest as a recipient of SIJ status? At best, DHS has taken an internally inconsistent position; at worst, ICE seeks to ignore USCIS and Cristofer's SIJ status completely. How can it, even arguably, be in the public interest to seek removal of someone who has an approved petition which makes them eligible for permanent status and who Congress has so clearly sought to protect?

II. ICE's procedures under 8 CFR § 241.4 fail to meet the *Mathews* test for procedural due process

Respondents state that Cristofer's "analysis under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), fails to establish a procedural due process violation, because at base, it relies on his allegation that ICE failed to comply with its own regulations." Resp Obj at 8. However, what Cristofer argues is that even if ICE had fully complied with the requirements of § 241.4, the process itself does not meet the standard for procedural due process set forth in *Mathews*.

Here, Respondents seem to concede that the first prong of the *Mathews* test favors Cristofer. As to the second prong, Respondents again contend that foreseeability of removal is part of the § 241.4 analysis, however, as is made clear above, foreseeability of removal is not part of the § 241.4 analysis but rather the focus of a separate process under § 241.13. Regardless, it is unclear how the role of foreseeability of removal impacts the analysis of § 241.4 under the second prong of the *Mathews* test. The risk of erroneously depriving Cristofer of his strong liberty interest is severe because, no matter what factors ICE must consider in their review, ICE is still the decision-maker in a procedure that does not include a hearing before an independent adjudicator. Respondents believe that the third prong of the test weighs against Cristofer where “the government has a legitimate interest in effectuating removals” Resp Obj at 8. However, USCIS is also a government entity and its interest in granting SIJ status to Cristofer appears to be largely ignored, not to mention the government’s interest in upholding Congressional intent surrounding protections afforded to recipients of SIJ status.

III. Cristofer has established a violation of his substantive right to due process as a recipient of SIJ Status

Respondents’ arguments regarding Cristofer’s substantive due process rights wholly ignore Cristofer’s unique situation as a recipient of SIJ status and the rights that attach to that. Cristofer’s prolonged detention, two days short of six months as of the date of this filing, serves no legitimate government interest or purpose. Respondents do not argue that Cristofer is a danger to the community nor a flight risk. In fact, there is no justification offered for Cristofer’s detention other than the fact of the removal order and the insistence that his removal is likely in the reasonably foreseeable future. However, as a recipient of SIJ status, Cristofer must be afforded an opportunity to apply for adjustment of status before he can be removed

Respondents rely on *Cortez-Amador v. Att'y Gen.*, 66 F.4th 429 (3d Cir. 2023) but ignore *Osorio-Martinez v. Att'y Gen. U.S.*, 893 F.3d 153 (3d Cir. 2018). However, those cases must be taken together as *Cortez-Amador* did not overrule *Osorio-Martinez* but rather distinguished it. In *Cortez-Amador*, the court explained that “*Osorio-Martinez* [was] distinguishable because the Court [there] did not hold that SIJS recipients are exempt from removal due to inadmissibility, but only that Congress intended to provide SIJS recipients with an opportunity to pursue adjustment of status.” *Cortez-Amador* at 433. With the two cases taken together, “...two legal principles emerge relevant to individuals with SIJ Status. First, the Government must provide them an opportunity to pursue adjustment of status, and the way in which the Government seeks to remove them must adequately take stock of their SIJ Status...[s]econd, the Government may ultimately remove an individual with SIJ Status from the country, so long as it complies with the first principle.” *Del Cid, et al., v. Bondi*, No. 3:25-CV-00304, 2025 WL 2985150, at *4 (W.D. Pa. Oct. 23, 2025). “Pursuing Petitioner's removal before he is eligible to apply for an adjustment of status “summarily strip[s]” him of his right to do so, *Osorio-Martinez*. 893 F.3d at 178–79, and by extension, holding Petitioner in detention without regard to his rights as an SIJ beneficiary serves no legitimate purpose and thus fails to justify this extreme restriction on his liberty.” *Alfaro Herrera v. Baltazar, et al.*, No. 1:25-CV-04014-CNS, 2026 WL 91470, at *8 (D. Colo. Jan. 13, 2026)

IV. This Court’s ability to hear Cristofer’s arguments regarding de facto revocation of SIJ status are not barred by 8 U.S.C. § 1252(g)

Respondents also contend that Cristofer’s SIJ status has not been revoked and would not be revoked upon his removal. Resp Obj at 11. That argument is wholly unsupported by law or fact. An application for adjustment of status based upon SIJ status cannot be filed by someone who is not physically present in the United States. 8 U.S.C. § 1255(i); 8 C.F.R. § 245.1(a). Under the

INA, an SIJ beneficiary must be present, and remain present, in the United States to retain their SIJ status. 8 U.S.C. § 1101(a)(27)(J). Removing Cristofer would be a de facto revocation of SIJ status without the opportunity to contest such revocation. His removal would also unlawfully prevent him from accessing the application process for permanent residency that Congress created for him. Thus, his removal is not reasonably foreseeable unless and until he has had an opportunity to have an application for adjustment of status fully adjudicated.

Respondents contend that Cristofer's arguments that his SIJ status prevents his removal and his arguments regarding an opportunity to pursue adjustment of status are barred under 8 U.S.C. § 1252(g) because those claims arise from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders. However, Cristofer is not challenging those actions or decisions but rather his request for habeas relief challenges the fact and duration and manner of his immigration detention and seeks release or bond as a remedy for constitutional violations. Additionally, the fact that his removal would amount to a de facto revocation of his SIJ status is relevant to Cristofer's constitutional claims under the Fifth Amendment but it does not change the fact that Cristofer's petition is focused on his continuing detention and that he seeks release.

CONCLUSION

For the foregoing reasons, and the reasons contained in Petitioner's prior filings in this matter, this Court should order Cristofer's immediate release or order the government to provide Cristofer with a bond hearing.

Dated: January 14, 2026

Respectfully submitted,

/s/ Jessica Charniga
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CERTIFICATE OF SERVICE

I, Jessica Charniga, hereby certify that a true and correct copy of the foregoing was served this date via the Court's CM/ ECF system upon all parties and counsel of record.

Dated: 01/14/2026

By: /s/ Jessica Charniga
JESSICA CHARNIGA, ESQ.