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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

VIKTOR GRISHCHENKO,

Petitioner,

v.

KRISTI NOEM, Secretary of the Department of Homeland Security, *et al.*,

Respondents.

Case No. 25-cv-03514-JES-JLB

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Respondents hereby submit their return to Petitioner's habeas petition, and for the reasons set forth below, Respondents respectfully ask the Court to deny the petition.

II. BACKGROUND

Petitioner is a native and citizen of Russia, who unlawfully entered the United States on or about April 26, 2023. *See* Declaration of La'Shaniece Wilson ("Wilson Decl.") at ¶¶ 4–5. On December 23, 2024, Petitioner was taken into Immigration and Customs Enforcement (ICE) custody. *Id.* at ¶ 6. On that date, he was served with a Notice to Appear charging inadmissibility under INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). *Id.* On May 23, 2025, an immigration judge granted Petitioner's request for a change in custody. *Id.* at ¶ 7. Petitioner was ordered released under bond and Alternatives to Detention (ATD) at the discretion of DHS. *Id.* DHS reserved an appeal thereby invoking its regulatory auto-stay of the bond order. *Id.*

On June 10, 2025, Petitioner was denied asylum and ordered removed to Russia, but the immigration judge granted withholding of removal to Russia under INA § 241(b)(3) (8 U.S.C. § 1231(b)(3)). *Id.* at ¶ 8. Both Petitioner and DHS waived appeal and the order was final on this date. *Id.*

On September 8, 2025, ERO San Diego contacted ERO Removal and International Operations (RIO) to seek a third country for removal. *Id.* at ¶ 9. On September 23, 2025, October 7, 2025, October 28, 2025, November 19, 2025, and December 12, 2025, ERO requested updates on finding a third country. *Id.* at ¶ 10. ERO is pending further response from RIO on identifying a third country for removal. *Id.* at ¶ 11. Should ERO identify a third country for removal, Petitioner will be notified in writing of the third country at least 24 hours prior to removal. *Id.* at ¶ 12. If Petitioner claims a fear of removal to the identified country, he will be referred to an asylum officer for processing of the fear-based claim. *Id.*

When a third country is identified for resettlement, standard ICE guidance and procedures provide that an ICE officer will provide written notice to the removable alien

of the intended third country removal. *Id.* at ¶ 13. The written notice identifies the country to which ICE intends to remove the alien. *Id.* ICE will generally wait at least 24 hours following service of the Notice of Removal before effectuating removal. *Id.* In exigent circumstances, ERO may execute a removal order six or more hours after service of the Notice of Removal as long as the alien is provided reasonable means and opportunity to speak with an attorney prior to removal. *Id.*

ICE continues to diligently seek to identify a third country for Petitioner's removal and believes there is a "significant likelihood of removal to a third country in the reasonably foreseeable future." *Id.* at ¶ 14.

III. ARGUMENT

"Section 241(a) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1231(a), authorizes the detention of noncitizens who have been ordered removed from the United States." *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 575 (2022). The INA provides that an alien ordered removed must be detained for 90 days pending the government's efforts to secure the alien's removal through negotiations with foreign governments. *See* 8 U.S.C. § 1231(a)(2) (the Attorney General "shall detain" the alien during the 90-day removal period under subsection (a)(1)).

Section 1231(a)(6) "authorizes further detention if the Government fails to remove the alien during those 90 days." *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001). Detention authority under this statute, however, is limited to "a period reasonably necessary to bring about the alien's removal from the United States" and "does not permit indefinite detention." *Id.* at 689. The Supreme Court has held that a six-month period of post-removal detention constitutes a "presumptively reasonable period of detention." *Id.* at 701. Release is not mandated after the expiration of the six-month period unless "there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

If an individual ordered removed "is not removed to his or her country of choice or citizenship, he or she shall be removed to any of the . . . countries" listed in 8 U.S.C.

§ 1231(b)(2)(E). *Hadera v. Gonzales*, 494 F.3d 1154, 1156–57 (9th Cir. 2007). The enumerated countries are:

> (i) The country from which the alien was admitted to the United States
> (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
> (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
> (iv) The country in which the alien was born.
> (v) The country that had sovereignty over the alien's birthplace when the alien was born.
> (vi) The country in which the alien's birthplace is located when the alien is ordered removed.

Id. (quoting 8 U.S.C. § 1231(b)(2)(E)(i)–(vi)). "If removal to any of these countries is 'impracticable, inadvisable, or impossible,' the individual shall be removed to 'another country whose government will accept the alien into that country.'" *Id.* (quoting 8 U.S.C. § 1231(b)(2)(E)(vii)).

Here, Petitioner was granted withholding of removal to Russia—his country of birth and citizenship, as well as the country designated during his removal proceedings. Petitioner has not designated any other country for removal. Apart from Russia, there appears to be no other country that would meet the definitions under subsections (i) through (vi), and Petitioner has made no showing to the contrary. *See Rokhfirooz v. Larose*, No. 25-CV-2053-RSH-VET, 2025 WL 2646165, at *2 (S.D. Cal. Sept. 15, 2025) ("A prisoner bears the burden of demonstrating that 'he is in custody in violation of the Constitution or laws or treaties of the United States.'") (quoting 28 U.S.C. § 2241(c)(3), brackets omitted). Because removal to the above enumerated countries is "impracticable, inadvisable, or impossible," ICE may remove Petitioner to a third country that will accept Petitioner's removal. 8 U.S.C. § 1231(b)(2)(E)(vii).

Recent developments in international relations between the United States and several other countries have made probable ICE's removal of immigrants, like Petitioner, that it previously was unable to remove to third countries. Against this

backdrop and invoking its authority under 8 U.S.C. § 1231(b)(2)(E), ICE continues to detain Petitioner for purposes of enforcing his removal order to a third country. *See* Wilson Decl. at ¶¶ 7, 9–14.

Since Petitioner's order of removal, ICE has worked as expeditiously as possible to effectuate his resettlement in a third country. On September 8, 2025, ERO contacted RIO to seek a third country for removal. *Id.* at ¶ 9. On September 8, 2025, local ERO sent a request to RIO concerning third country removal in this case. *Id.* at ¶ 9. Local ERO has since been regularly seeking updates from RIO on whether it has identified a country where Petitioner may be removed. *Id.* at ¶ 10. Although RIO is still in the process of identifying countries that may be willing to accept Petitioner for removal, the record reflects that ICE is working diligently and "believes there is a significant likelihood of removal to a third country in the reasonably foreseeable future." *Id.* at ¶ 14. *See also Zadvydas*, 533 U.S. at 700 (instructing district courts "to listen with care when the Government's foreign policy judgments, including, for example, the status of repatriation negotiations, are at issue, and to grant the Government appropriate leeway when its judgments rest upon foreign policy expertise.").

As courts in this district have found, "evidence of progress, albeit slow progress, in negotiating a petitioner's repatriation will satisfy *Zadvydas* until the petitioner's detention grows unreasonably lengthy." Exhibit A, *Kim v. Ashcroft*, Case No. 02-cv-1524-J-LAB, ECF No. 25 at 8:8–10 (S.D. Cal. June 2, 2003) (finding that petitioner's one year and four-month detention does not violate *Zadvydas* given respondent's production of evidence showing governments' negotiations are in progress and there is reason to believe that removal is likely in the foreseeable future); *see also Marquez v. Wolf*, No. 20-cv-1769-WQHBLM, 2020 WL 6044080, at *3 (S.D. Cal. Oct. 13, 2020) (denying petition because "Respondents have set forth evidence that demonstrates progress and the reasons for the delay in Petitioner's removal"); Exhibit B, *Sereke v. DHS*, Case No. 19-cv-1250-WQH-AGS, ECF No. 5 at 5:4–6 (S.D. Cal. Aug. 15, 2019)

("[T]he record at this stage in the litigation does not support a finding that there is no significant likelihood of Petitioner's removal in the reasonably foreseeable future.").

Petitioner also suggests that once a third country is identified, ICE will immediately deport him there without being given adequate time to investigate whether he could be persecuted in that country. *See* ECF No. 1 at 13:27–14:1. ICE attests, however, that once a third country is identified, "Petitioner will be notified in writing of the third country at least 24 hours prior to removal. If Petitioner claims a fear of removal to the identified country, he will be referred to an asylum officer for processing of the fear-based claim." Wilson Decl. at ¶ 12. The evidence further shows that ICE will generally wait at least 24 hours following the notice of third country removal before executing it, and under no circumstances would removal be executed in less time than that without the noncitizen being provided "reasonable means and opportunity to speak with an attorney prior to removal." *Id.* at ¶ 13. Thus, Petitioner's concern that he will not receive adequate notice and an opportunity to be heard prior to his third country removal is not borne out by the evidence in this case.

IV. AN EVIDENTIARY HEARING IS NOT NEEDED

Because the record shows that Petitioner is not entitled to habeas relief, there is no need for an evidentiary hearing in this matter. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

IV. CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Court deny the habeas petition.

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Dated: December 16, 2025

Respectfully submitted,

ADAM GORDON
United States Attorney

s/ Matthew Riley
MATTHEW RILEY
Assistant United States Attorney
Attorneys for Respondents

EXHIBIT A








KAJ 6/3/03 9:27
3:02-CV-01524 KIM V. ASHCROFT
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O.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KININE KIM,

Petitioner,

v.

JOHN ASHCROFT, ET AL.

Respondents.

CASE NO. 02CV1524-J (LAB) [redacted]

ORDER GRANTING MOTION FOR RECONSIDERATION

On August 5, 2002, Petitioner Kinine Kim, represented by counsel, filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. He challenged his custody by the Immigration and Naturalization Services ("INS") alleging that he has been indefinitely detained in violation of 8 U.S.C. § 1231(a)(6) and sought release from custody under the conditions of supervision set out in 8 U.S.C. § 1231(a)(3). The Court initially denied the Petition without prejudice as to refiling and later granted the refiled Petition and ordered that Petitioner be released on bond. Respondent timely filed its Motion to Alter or Amend the Judgment pursuant to Rule 59(a), (e). For the reasons set forth below, the Motion is granted, the renewed Petition for Writ of Habeas Corpus is denied and Respondent may continue to detain Petitioner. The Court grants Petitioner leave to refile his petition in six months if he has not been removed at that time and is able to plead facts sufficient to satisfy *Zadvydas v. Davis*,

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533 U.S. 678 (2001).

Background[1]

Petitioner is a Cambodian national and refugee from Thailand who became a permanent resident on February 10, 1983. The state of California convicted him of assault with a firearm upon a person in violation of the California Penal Code § 245A(2); second degree burglary in violation of California Penal Code § 459; and driving with a suspended/revoked driver's license and failing to pay the $792 fine. When he filed his Petition on August 5, 2002, he had been in the custody of the Immigration and Naturalization Service ("INS") since November 19, 2001 and had been the subject of a final order of removal since January 17, 2002. Petitioner's January 22, 2002 request for a travel document from the Cambodian government was denied on January 25, 2002. The Cambodian government denied the application because it had no repatriation agreement with the United States. On March 22, 2002, the United States and the Cambodian government signed a "Memorandum Between the Government of the United States and the Royal Government of Cambodia for the Establishment and Operation of a United States-Cambodia Joint Commission on Repatriation," (hereinafter "Memorandum"), providing procedures for the repatriation of each other's nationals to their home state. After the Memorandum was signed, Petitioner filed a new application for travel documents on April 8, 2002. He was interviewed by Cambodian officials in early October 2002. At the time Petitioner filed, the Cambodian government had not decided whether to repatriate him.

In its Answer to the Petition, Respondent requested a stay of the proceedings pending the INS' review of Petitioner's circumstances to determine if there was a significant likelihood of removal in the reasonably foreseeable future pursuant to interim rules that have since been codified at 8 C.F.R. § 241.13. The Court found that although the six month period during which detention is presumptively reasonable had passed, that Petitioner had not met his burden of showing good reason why there is no significant likelihood of removal in the reasonably

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[1] These facts are set forth in the Court's Order Denying Petition Without Prejudice and are reiterated here for convenience.

foreseeable future. The Court denied the Petition without prejudice as to refiling if, within 45 days, the Government of Cambodia had not responded or had denied repatriation.

Petitioner renewed his Petition after the 45 days had passed. This time, the Court granted the Petition, stating that although the Untied States and Cambodian governments were cooperating to repatriate Cambodian nationals detained by the INS, that

> Respondent ha[d] not made a sufficiently strong showing that Petitioner's repatriation [was] likely in the foreseeable future given that Petitioner ha[d] been in INS custody since November 19, 2001 and that his order of removal ha[d] been final since January 17, 2002.

Order Granting Petition for Writ of Habeas Corpus (March 3, 2003) at 2.

Respondent raises two distinct but related issues, contending that the Court impermissibly shifted the burden of proof to the Respondent and that application of the correct standard requires that the Petition be denied because "the passage of time alone is not sufficient to require the release of an alien detainee." *Mem. of P & A.* at 2. According to Respondent, the burden remains with the alien to *prove* that his removal is not significantly likely in the foreseeable future." *Id.* (emphasis added). The Court acknowledges that its March 3, 2003 Order imprecisely recited the standard, but disagrees with Respondent's contentions that the alien must *prove* that removal is not significantly likely in the foreseeable future and that the length of detention alone is always insufficient to show that there is good reason to conclude that there is no significant likelihood of removal in the reasonably foreseeable future. The Court nonetheless agrees with Respondent that continued detention is authorized under *Zadvydas*.

Discussion

The Attorney General has the discretion to arrest and detain certain classes of aliens, including those who like Petitioner, who are removable because they have been convicted of specified crimes, pending a decision on whether the alien is to be removed from the United States. 8 U.S.C. § 1226(a)(2), (c). Generally, an alien must be removed within 90 days of an issuance of a final order of removal. 8 U.S.C. § 1231(a)(1). However, "under no circumstance during the removal period" shall the Attorney General release an alien who has been found

inadmissible because he has committed certain crimes specified and defined in sections 1182(a)(2), (3) or section 1227(a)(2), (a)(4)(B). 8 U.S.C. § 1231(a)(2). In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the United States Supreme Court rejected the Government's argument that section 1226(a)(2) authorized indefinite detention and read into the section as implicitly limiting an alien's post-removal period detention to a period reasonably necessary to bring about that alien's removal from the United States. *Id.* at 690.

Contrary to Respondent's argument, *Zadvydas* does not impose on the alien the burden of *proving* that his removal is not significantly likely in the foreseeable future. Rather, *Zadvydas* creates a burden-shifting procedure setting forth the burdens of proof for when removal is reasonably foreseeable. Once the presumptively reasonable six-month period of detention has expired, the alien must "provide [ ] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701; *Xi v. United States I.N.S.*, 298 F.3d 832, 840 (9th Cir. 2002). *Zadvydas* thus sets forth what the alien must plead and does not impose an evidentiary burden. *Fahim v. Ashcroft*, 227 F. Supp.2d 1359 (2002)(holding that petitioner did not allege a significant likelihood that his removal is unlikely in the foreseeable future). Once the alien has provided "good reason," the Respondent "must respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701; *Xi*, 298 F.3d at 840. The burden is therefore on Respondent to produce admissible, credible evidence concerning the likelihood of removal in the foreseeable future. While the Court did not specifically define "reasonably foreseeable future," it did set some parameters that guide our understanding of the phrase. The alien must allege something more than that there is no pending repatriation agreement and must consider the likelihood of successful future negotiations, but the alien does not have to show "the absence of *any* prospect of removal." *Id.* at 702 (emphasis in original).

The original Petition alleged that Petitioner had been in custody for longer than the presumptively reasonable six month period and that it was not certain that he would be removed in the reasonably foreseeable future because the Cambodian government had denied travel documents for Cambodian detainees in San Diego because they, like Petitioner, were

born in Thailand, and because Cambodian government officials had informed Petitioner during his interview that he was not likely to receive travel documents because he was born in Thailand. The Petitioner lodged documents showing that the other Cambodians were denied travel documents for reasons other than those alleged by Petitioner, and the Court found that the alleged statements by the Cambodian government officials were inadmissible hearsay. Respondent produced evidence showing that the United States and Cambodian governments were making progress in arranging for the repatriation of Cambodian nationals. Specifically, the two countries had entered into the Memorandum on March 22, 2002. Moreover, Petitioner had been interviewed by Cambodian government officials. The Memorandum had already resulted in the removal of a number of Cambodian nationals. Thus, there were no institutional barriers to repatriation.

The Court denied the original Petition subject to renewal because "Petitioner has not shown good reason why there is no significant likelihood of removal in the reasonably foreseeable future." *Order Denying Petition for Writ of Habeas Corpus* (Dec. 6, 2002) at 5. The amended Petition, filed on February 4, 2003, alleged that the Cambodian government had still not responded to Respondent's request for travel documents for the Petitioner and that Petitioner remained in custody. In other words, Petitioner argued that the passage of time alone demonstrated that Respondents were not able to effectuate his repatriation in the reasonably foreseeable future.

In response to Petitioner's allegations in the amended Petition, Respondent filed an amended Return and new evidence in the form of a declaration by an INS official stating that two additional groups of Cambodians had in fact been repatriated since the original Return was filed. Respondent argued that the renewed Petition should be denied because "the process is functioning and . . . there is [no] evidence that Petitioners in particular have been rejected by the Cambodian government." *Amended Return* at 4. In a footnote, Respondent stated that another flight had been scheduled to Cambodia, "demonstrating that the March 22, 2002 memorandum is producing significant results in terms of an established removal process." *Id.* n. 4.

In *Fahim v. Ashcroft*, 227 F. Supp.2d 1359 (2002), another district court held that the petitioner had not met his burden of alleging a significant likelihood that his removal is unlikely in the foreseeable future. The facts of that case are strikingly similar to those here. The petitioner "relie[d] on the bare fact that the Egyptian consulate ha[d] not yet issued any travel documents for him despite the efforts of the INS to secure them" and on his family's statement that the Egyptian consulate had not responded to their inquiries. *Id.* at 1365. The petitioner alleged "that it is unknown whether the Egyptian government will ever issue the requested travel documents." *Id.* The district court found that those bare allegations were speculative and insufficient because they did not include allegations of institutional or individual barriers to repatriation. Evidence showed that Egypt was in fact repatriating nationals and "the lack of visible progress since the INS requested travel documents from the Egyptian government" was not sufficient to show no significant likelihood of removal in the foreseeable future.

In reaching its conclusion, the *Fahim* court relied heavily on the rationale set forth in an opinion issued from this district. *See Khan v. Fasano*, 194 F. Supp.2d 1134 (S.D. Cal. 2001)(Keep, J.). *Khan* held that new information presented in support of a motion for reconsideration showed that progress was being made for the petitioner's deportation and that institutional barriers were therefore not present. *Id.* at 1136. The court rejected petitioner's argument that the lack of visible progress showed that there are individual barriers. In the court's view, the lack of visible progress "simply show[ed] that the bureaucratic gears of the INS are slowly grinding away. Progress, however slow, is being made on his individual case: travel documents have been requested and there is scheduled a meeting with the Pakistani Consulate to discuss [petitioner's] status." *Id.* at 1137. The court also noted that the newly-formed HQPDU, as a specialized unit within the INS, was entitled to significant deference from the judiciary." *Id.*

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Both the *Khan* and *Fahim* courts contrasted the facts of their cases with those of the petitioners in *Zadvydas*. In *Zadvydas*, the Supreme Court addressed a situation where the petitioners were nationals of countries with which the United States had no repatriation agreement and the petitioners "faced detention that appeared to be 'indefinite and potentially permanent.'" *Khan*, 194 F. Supp.2d at 1136; *Fahim*, 227 F. Supp.2d at 1366. There was, therefore, "virtually no hope of repatriating [them] back to [their] native land[s]." *Fahim*, 227 F. Supp.2d at 1366.

This Court agrees with the *Khan* and *Fahim* courts that evidence of progress, albeit slow progress, in negotiating a petitioner's repatriation will satisfy *Zadvydas* until the petitioner's detention grows unreasonably lengthy.[2] At some point in time, however, lengthy detention demands almost immediate repatriation or release on bond. What "counts as the 'reasonably foreseeable future'" shrinks as the period of prior postremoval confinement grows. *Zadvydas*, 533 U.S. at 401. While the Court is unable to say precisely when detention becomes unreasonably lengthy given the degree of certainty regarding removal, the Court is confident that Petitioner's detention has not yet reached that point. Petitioner has been in custody following his state prison sentence since November 19, 2001, or approximately one year and four months at the time the Court granted the Petition. Petitioner's one year and four month detention does not violate *Zadvydas* given Respondent's production of evidence showing that the United States and Cambodian governments' negotiations are in progress and there is, therefore, reason to believe that removal is likely in the foreseeable future.

Conclusion

For the reasons set forth below, the Motion for Reconsideration is GRANTED, the renewed Petition for Writ of Habeas Corpus is DENIED and Respondent may continue to detain Petitioner. The Court grants Petitioner leave to refile his petition six months from the

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[2] The Court notes that the *Khan* court concluded that the petitioner had failed to meet his burden of providing good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *Khan*, 194 F. Supp.2d at 1137. This Court believes that conclusion misstates the petitioner's burden, which is one of pleading not of proving.

date stamped "Filed" on this Order if he has not been removed at that time and is able to plead facts sufficient to satisfy *Zadvydas v. Davis*, 533 U.S. 678 (2001).

IT IS SO ORDERED.

DATED: June 2, 2003

NAPOLEON A. JONES, JR.
United States District Judge

cc: All Parties

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EXHIBIT B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AMAN HABTAI SEREKE,

Petitioner,

v.

DHS,

Respondent.

Case No.: 19-cv-1250-WQH-AGS

ORDER

HAYES, Judge:

The matter before the Court is the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 filed by Petitioner Aman Habtai Sereke. (ECF No. 1).

I. BACKGROUND

Petitioner is a native and citizen of Eritrea who is currently detained at the Otay Mesa Detention Center. (Ex. A, ECF No. 3-1 at 4). On January 10, 2018, Petitioner applied for asylum at the San Ysidro port of entry. (Ex. A, ECF No. 3-1 at 4). On January 11, 2018, Immigration and Customs Enforcement (ICE) took Petitioner into custody. (Wu Decl. ¶ 4, ECF No. 3-1). On September 12, 2018, an immigration judge ordered Petitioner removed, and appeal was waived. (Ex. C, ECF No. 3-1 at 11).

On July 5, 2019, Petitioner filed the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, naming the Department of Homeland Security (DHS) as Respondent. (ECF No. 1). Petitioner seeks release from custody on the grounds that his detention has been unlawfully prolonged because immigration authorities have failed to remove him.

On July 11, 2019, the Court issued an Order to Show Cause why the Petition should not be granted. (ECF No. 2). The Court ordered that a return be filed by July 23, 2019, and that any traverse be filed by July 30, 2019. *Id.*

On July 22, 2019, Respondent filed a return. (ECF No. 3).

On July 22, 2019, Petitioner filed exhibits to the Petition. (ECF No. 4).

The record reflects no additional filings.

II. DISCUSSION

Petitioner alleges that immigration authorities have been unable to remove him to Eritrea because of difficult diplomatic relations with the Eritrean government and the Eritrean consulate's failure to issue travel documents. (ECF No. 1 ¶ 6). Petitioner alleges that on June 24, 2019, a deportation officer brought Petitioner a document stating that Petitioner would be released. *Id.* ¶ 8. Petitioner alleges that on June 26, 2019, the deportation officer brought Petitioner a document stating that Petitioner's detention would continue. *Id.* Petitioner alleges that he was served a document containing errors regarding Petitioner's immigration history. *Id.* Petitioner claims that his indefinite detention is unjustified and violates the Due Process Clause of the Fifth Amendment. *Id.* ¶ 9. Petitioner requests that he be released from immigration custody and alleges that "[u]pon his release, [P]etitioner will reside to . . . Austin, TX." *Id.* ¶¶ 1, 10.

Respondent contends that habeas relief is not warranted. Respondent contends that Petitioner's removal is significantly likely in the reasonably foreseeable future, because Petitioner's removal will occur in the coming months when Petitioner's travel documents are renewed and Petitioner's travel arrangements are finalized. Respondent asserts that on June 24, 2019, ICE issued Petitioner a Release Notification before becoming aware that previous issues with immigration removals to Eritrea had been resolved. (ECF No. 3 at 3 n.2). Respondent asserts that on June 24, 2019, ICE issued Petitioner a Decision to Continue Detention containing an erroneous reference to an appeal. *Id.* at 3 n.1.

A federal court may grant a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 if a petitioner can demonstrate that he "is in custody in violation of the Constitution

or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3). "Ordinarily, when an alien is ordered removed from the United States, the Attorney General is obliged to facilitate that individual's actual removal within 90 days, a period called the 'removal period.'" *Xi v. U.S. Immigration & Naturalization Serv.*, 298 F.3d 832, 834 (9th Cir. 2002) (quoting 8 U.S.C. § 1231(a)(1)). The statute requires the Attorney General "to detain an individual who has been ordered removed on certain specified grounds" and "authorizes detention beyond the removal period." *Id.* at 835 (citing §§ 1231(a)(2), (6)). However, "the statute 'does not permit indefinite detention.'" *Id.* at 836 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)). In *Zadvydas*, the Supreme Court stated, "In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. at 689.

In *Xi*, the Court of Appeals stated that "under the parameters established in *Zadvydas*, [a petitioner's] continued detention is permissible if his removal is reasonably foreseeable." 298 F.3d at 839 (citation omitted). The petitioner "has the burden to provide 'good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future'" and "the government must then 'respond with evidence sufficient to rebut the detainee's showing.'" *Id.* at 839–840 (quoting *Zadvydas*, 533 U.S. at 701 (alteration omitted)). The petitioner's allegations must go beyond "the absence of an extant or pending repatriation agreement" and give "due weight to the likelihood of successful future negotiations"; however, the allegations need not demonstrate "the absence of any prospect of removal." *Zadvydas*, 533 U.S. at 702; *see also Fahim v. Ashcroft*, 227 F. Supp. 2d 1359, 1365 (N.D. Ga. 2002) ("[B]are allegations are insufficient to demonstrate a significant unlikelihood of . . . removal in the reasonably foreseeable future."). Courts have determined that alleging a "lack of visible progress since the request of travel documents" does not show a "significant likelihood of removal; it simply shows that the bureaucratic gears of the INS are slowly grinding away." *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1137 (S.D. Cal. 2001); *see also Fahim*, 227 F. Supp. 2d at 1366; *Novikov v. Gartland*, No. 5:17-

CV-164, 2018 WL 4100694, at *2–3, *adopted*, No. 5:17-CV-164, 2018 WL 4688733 (S.D. Ga. Sept. 28, 2018). The government may rebut the detainee's showing with "evidence of progress . . . in negotiating a petitioner's repatriation." *Kim v. Ashcroft*, 02cv1524-J(LAB), at 8 (S.D. Cal. June 2, 2003) (citing *Khan*, 194 F. Supp. 2d at 1134; *Fahim*, 227 F. Supp. 2d at 1359). In such cases, it may be appropriate to deny the petition for habeas corpus without prejudice and with leave to refile at a later date if the petitioner is still not removed. *See Khan*, 194 F. Supp. 2d at 1138; *Kim*, 02cv1524-J(LAB); *Novikov*, 2018 WL 4100694, at *3.

In this case, the evidence provided by the government includes the declaration of Alice Wu, a Detention and Deportation Officer with the DHS ICE, Enforcement and Removal Operations (ERO). (Wu Decl. ¶ 1, ECF No. 3-1). Wu states in the declaration:

> 6. On September 21, 2018, ERO San Diego field office submitted a travel document (TD) packet to the Embassy of Eritrea. On October 1, 2018, RIO presented this TD packet at the Embassy of Eritrea in Washington D.C. and a TD was issued on December 28, 2018. However, for some months, ICE has encountered difficulties in executing removal orders to Eritrea due to the inability to secure a travel itinerary that met with the approval of all governments involved in getting Eritrean nationals ordered removed from the United States back to Asmara, Eritrea.
>
> 7. In late June of 2019, the Department of State notified ICE that the issues with travel to Eritrea had been resolved and commercial flights could be resumed for aliens ordered removed from the United States. The TD issued in December 2018 has since expired. On July 12, 2019, the ICE ERO San Diego office confirmed that Petitioner's travel document (TD) is in process for renewal with the Eritrean Embassy. While the government of Eritrea is working on issuance of a new TD, ICE will prepare an itinerary for Mr. Sereke's removal from the United States via commercial airline.
>
> Mr. Sereke's removal is significantly likely in the reasonably foreseeable future. ICE anticipates that his removal will take place in approximately two months from the date the TD is issued.

Id. ¶¶ 6–7.

Respondent has set forth evidence that demonstrates progress and the reasons for the delay in Petitioner's removal. Respondent has shown that the Eritrean government

previously issued travel documents within three months of the government's submission. Respondent has shown that, as of July 12, 2019, the renewal of Petitioner's travel documents is in progress. Respondent has shown that Petitioner's removal is anticipated within two months of the issuance of travel documents. The Court concludes that the record at this stage in the litigation does not support a finding that there is no significant likelihood of Petitioner's removal in the reasonably foreseeable future. *See Zadvydas*, 533 U.S. at 701; *see also Fahim*, 227 F. Supp. 2d at 1366 ("In short, petitioner has not alleged facts indicating that Egypt will never issue him papers nor has he alleged any reasons why Egypt . . . would not ultimately comply with a request from the United States Government in this particular instance."); *Khan*, 194 F. Supp. 2d at 1138 ("Progress, however slow, is being made on his individual case: travel documents have been requested . . . ."); *Novikov*, 2018 WL 4100694, at *3 ("Novikov does not explain how the past lack of progress in the issuance of his travel documents means that Ukraine will not produce the documents in the foreseeable future."). The Court concludes that dismissal without prejudice is proper in this case based on the possibility that Petitioner's continued detention could give rise to a plausible claim for relief. *See Khan*, 194 F. Supp. 2d at 1138 (granting leave to refile if removal was not effectuated within six months); *Novikov*, 2018 WL 4100694, at *3 (recommending dismissal without prejudice).

III. CONCLUSION

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 is denied without prejudice and with leave to refile in the event that Petitioner is not removed in the next five months, or in the event that circumstances change and Petitioner can demonstrate entitlement to relief.

Dated: August 15, 2019

William Q. Hayes

Hon. William Q. Hayes
United States District Court