

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

SOMPHSONG SOUKHAVONG,
PETITIONER,

V.

KRISTI NOEM, *ET AL*,
RESPONDENTS.

NO. 3:25-CV-700-KC

FEDERAL¹ RESPONDENTS' RESPONSE TO PETITION OF WRIT FOR HABEAS
CORPUS

¹ The named warden in this action is not a federal employee. The Department of Justice does not represent him in this action.

STATEMENT OF ISSUES

1. Whether Petitioner is lawfully detained under 8 U.S.C. § 1231(a)(6)?
2. Whether Petitioner's substantive due process violation allegations are premature?
3. Whether Petitioner's alleged procedural due process violation allegations merit release?

Respondents submit this timely response to Petitioner's petition for a writ of habeas corpus [ECF No. 1]. Petitioner alleges ICE's detention violates the Fifth Amendment's Due Process Clause, and the Immigration and Nationality Act. *See* ECF No. 1.

Despite being granted relief from removal, referred to as deferral of removal under Convention Against Torture, 8 C.F.R. § 1208.17, such relief extends only to the country where Petitioner was found to have a reasonable fear of being persecuted: Laos. *See* 8 C.F.R. §§ 208.16–208.17, 1208.16; 1208.17; 208.31(a); 1208.31(a); 8 U.S.C. § 1231(b)(3)(A). In other words, nothing prevents DHS from removing Petitioner to a third country if such a country is willing to accept him. *See e.g., Guzman Chavez v. Johnson*, 594 U.S. at 531–32, 535–36 (2021); 8 U.S.C. § 1231(b)(1)(c)(iv); 8 C.F.R. §§ 208.16(f); 1208.16(f); 208.17(b)(2); 1208.17(b)(2). There are removal options for ICE to consider under this statute, including any country willing to accept the alien. *Guzman Chavez*, 594 at 536–37; 8 U.S.C. § 1231(b)(2). ICE is actively seeking third country acceptance. Exh. A (Garite declaration).

Petitioner argues his continued detention is contrary to the Immigration and Nationality Act and raises alleged violations of his substantive and procedural due process rights. *See* ECF No. 1 at 10–17. He further claims ICE is violating his substantive and procedural rights under the Constitution's Fifth Amendments. *See e.g.,* ECF No. 1 at 8. He also argues he should be released based on alleged deficient conditions of confinement in ICE custody. ECF No. 1 at 8–9. But conditions of confinement do not provide a basis for release in habeas. *See Rice v. Gonzalez*, 985 F.3d 1069, 1070 (5th Cir. 2021).

Finally, he argues his removable is not reasonably foreseeable. ECF No. 1 at 16. Notably, however, he does not proffer an acceptable third country that would be suitable, nor does he outline any efforts to seek permission to live in any acceptable third countries. *Id.*

These arguments are insufficient reason to believe that removal is unlikely in the foreseeable future, which means the burden of proof does not shift to ICE to show the likelihood of removal. *See Andrade v. Gonzales*, 459 F.3d 538, 543–44 (5th Cir. 2006); *Gonzalez v. Gills*, No. 20-60547, 2022 WL 1056099 at 1 (5th Cir. Apr. 8, 2022). Even if the burden has so shifted, Respondents can show that removal to a third country is, in fact, likely in the reasonably foreseeable future. For these reasons, the Court should deny this habeas petition.

I. Removal Efforts

On December 2, 2003, an immigration judge ordered Petitioner removed from the United States and granted deferral of removal under the Convention Against Torture. ECF No. 1-3 at 6. On April 20, 2015, ICE issued Petitioner an order of supervision. ECF No. 1-3 at 8. On October 28, 2025, ICE detained Petitioner. Exh. A at ¶ 8. ICE has been working to identify a third country that will accept Petitioner. Exh. A at ¶ 15.

II. Detention Is Lawful Under 8 U.S.C. § 1231(a)(6).

Petitioner’s detention is lawful. The authority to detain aliens after the entry of a final order of removal is set forth in 8 U.S.C. § 1231(a). That statute affords ICE a 90-day mandatory detention period within which to remove the alien from the United States following the entry of the final order. 8 U.S.C. § 1231(a)(2). The 90-day removal period begins on the latest of three dates: the date (1) the order becomes “administratively final,” (2) a court issues a final order in a stay of removal, or (3) the alien is released from non-immigration custody. 8 U.S.C. § 1231(a)(1)(B).

Not all removals can be accomplished in 90 days, and certain aliens may be detained beyond the 90-day removal period. *See Zadvydas*, 533 U.S. at 701. Under §1231, the removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep’t of Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien

presents a flight risk or other risk to the community. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). An alien may be held in confinement until there is “no significant likelihood of removal in a reasonably foreseeable future.” *Zadvydas*, at 533 U.S. at 680.

III. Petitioner’s Substantive Due Process Claim under *Zadvydas* is Premature.

Petitioner’s reliance on *Zadvydas* is premature because he has been detained less than six months. To state a claim for relief under *Zadvydas*, Petitioner must show that: (1) he is in DHS custody; (2) he has a final order of removal; (3) he has been detained in *post*-removal-order detention for six months or longer; and (4) there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 700. Petitioner does not and cannot make this showing, as he has been detained less than six months in post-order custody. ECF No. 1 at 1 (Petitioner detained on October 28, 2025); *Chance v. Napolitano*, 453 F. App’x 535, 2011 WL 6260210 at *1 (5th Cir. Dec. 15, 2011); *Agyei-Kodie v. Holder*, 418 F. App’x 317, 2011 WL 891071 at *1 (5th Cir. Mar. 15, 2011); *Gutierrez-Soto v. Sessions*, 317 F.Supp.3d 917, 929 n.33 (W.D. Tex. 2018); *Kasangaki v. Barr*, 2019 WL 13221026 at *3 (W.D. Tex. July 31, 2019); *Linares v. Collins*, 1:25-CV-00584-RP-DH, ECF No. 14 at 7–16 (W.D. Tex. Aug. 12, 2025).

A. There is No Good Reason to Believe that Removal is Unlikely in the Reasonably Foreseeable Future.

Petitioner cannot show “good reason” to believe that removal to a third country is unlikely in the reasonably foreseeable future. In *Zadvydas*, the U.S. Supreme Court held that § 1231(a)(6) “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” but “does not permit indefinite detention.” 533 U.S. at 689. “[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute.” *Id.* at 699. The Court designated six months as a presumptively reasonable period of post-order detention but made clear

that the presumption “does not mean that every alien not removed must be released after six months.” *Id.* at 701.

Once the alien establishes that he has been in post-order custody for more than six months at the time the habeas petition is filed, the alien must provide a “good reason” to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *See Andrade v. Gonzales*, 459 F.3d 538, 543–44 (5th Cir. 2006); *Gonzalez v. Gills*, No. 20–60547, 2022 WL 1056099 at *1 (5th Cir. Apr. 8, 2022). Unless the alien establishes the requisite “good reason,” the burden will not shift to the government to prove otherwise. *Id.*

The “reasonably foreseeable future” is not a static concept; it is fluid and country-specific, depending in large part on country conditions and diplomatic relations. *Ali v. Johnson*, No. 3:21–CV–00050-M, 2021 WL 4897659 at *3 (N.D. Tex. Sept. 24, 2021). Additionally, a lack of visible progress in the removal process does not satisfy the petitioner’s burden of showing that there is no significant likelihood of removal. *Id.* at *2 (collecting cases); *see also Idowu v. Ridge*, No. 3:03–CV–1293-R, 2003 WL 21805198, at *4 (N.D. Tex. Aug. 4, 2003). Conclusory allegations are also insufficient to meet the alien’s burden of proof. *Nagib v. Gonzales*, No. 3:06–CV–0294-G, 2006 WL 1499682, at *3 (N.D. Tex. May 31, 2006) (citing *Gonzalez v. Bureau of Immigration and Customs Enforcement*, No. 1:03–CV–178-C, 2004 WL 839654 (N.D. Tex. Apr. 20, 2004)). One court explained:

To carry his burden, [the] petitioner must present something beyond speculation and conjecture. To shift the burden to the government, [the] petitioner must demonstrate that “the circumstances of his status” or the existence of “particular individual barriers to his repatriation” to his country of origin are such that there is no significant likelihood of removal in the reasonably foreseeable future.

Idowu, 2003 WL 21805198, at *4 (citation omitted).

Petitioner's substantive due process claim is not ripe because he has not been detained 'post-order' for more than six months. *Compare* Exh. A at ¶ 8 with ECF No. 1 at 1 (noting recent detention on October 28, 2025). Therefore, he cannot provide a "good reason" to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *See Andrade v. Gonzales*, 459 F.3d 538, 543–44 (5th Cir. 2006); *Gonzalez v. Gills*, No. 20–60547, 2022 WL 1056099 at *1 (5th Cir. Apr. 8, 2022). As such, he has been detained less than 90 days in post-order custody.

Petitioner is subject to a final order of removal, but he, nonetheless, urges this Court to order that his continued detention pending removal is contrary to his substantive and procedural rights under the Fifth Amendment. Petitioner is aware ICE is attempting to remove him to a third country. Petitioner fails to allege any reason, much less a "good reason," to believe that there is no significant likelihood of removal in the foreseeable future. These claims are wholly insufficient under *Zadvydias. Andrade*, 459 F.3d at 543–44; *Boroky v. Holder*, No. 3:14-CV-2040-L-BK, 2014 WL 6809180, at *3 (N.D. Tex. Dec. 3, 2014); *see also Thanh v. Johnson*, No. EP-15-CV-403-PRM, 2016 WL 5171779, at *4 (W.D. Tex. Mar. 11, 2016) (denying habeas relief where government was taking affirmative steps to obtain Vietnamese travel documents). The burden of proof, therefore, does not shift to Respondents to prove that removal is likely.

Even if the burden did shift to ICE in this analysis, ICE could show that removal is likely in the foreseeable future. During the brief amount of time Petitioner has been detained, ICE has been and continues to work to identify a third country that will accept Petitioner. *See* Exh. A at ¶ 15. As such, removal is likely in the reasonably foreseeable future, and his continued detention is lawful. Petitioner's substantive due process claim fails and should be denied.

VI. ICE Has Afforded Petitioner Procedural Due Process.

Petitioner cannot show a procedural due process violation here. To establish a procedural due process violation, Petitioner must show that he was deprived of liberty without adequate safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

The Fifth Circuit finds no procedural due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). Even if the Court were to find a procedural due process violation here, the remedy is substitute process. *Mohammad v. Lynch*, No. EP-16-CV-28-PRM, 2016 WL 8674354, at *6 n.6 (W.D. Tex. May 24, 2016) (finding no merit to petitioner's procedural due process claim where the evidence demonstrated that the review had already occurred, thereby redressing any delay in the provision of the 90-day and 180-day custody reviews). Even in the criminal context, failure to comply with statutory or regulatory time limits does not mandate release of a person who should otherwise be detained. *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990).

ICE nonetheless conducts post-order custody reviews of an alien's detention as required by regulation for aliens detained under § 1231.² Once the 90-day removal period concludes in this case, ICE will perform a post-order custody review ("POCR") under 8 C.F.R. § 241.4 to determine whether Petitioner should remain detained or whether he should be released in the exercise of discretion under an Order of Supervision. At or around the 180-day mark, Petitioner will receive another POCR if he remains detained, wherein ICE will determine whether he should remain

² The Fifth Circuit has not provided guidance to lower courts, post-*Arteaga-Martinez*, on the appropriate standard for reviewing a procedural due process claim alleged by an alien detained under § 1231. The Fourth Circuit, post-*Arteaga-Martinez*, used the *Zadvydas* framework to analyze a post-order-custody alien's due process claims. *See Linares v. Collins*, 1:25-CV-00584-RP-DH, ECF No. 14 at 10–14 (W.D. Tex. Aug. 12, 2025) (discussing *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022) and *Castaneda v. Perry*, 95 F.4th 750, 760 (4th Cir. 2024)).

detained. *See* 8 C.F.R. § 241.13. POCRs are set to occur at the 270-day and the one-year marks, as well. *Id.*

The POCR process addresses constitutional concerns that were identified in *Zadvydas*, providing safeguards and allowing the alien notice and opportunity to be heard regarding continued detention pending removal. *See, e.g.*, 8 C.F.R. § 241.13. Courts have found that these regulatory deadlines are not firm, so long as the review itself has occurred. *See Mohammad v. Lynch*, No. EP-16-CV-28-PRM, 2016 WL 8674354 at *6 n. 6 (W.D. Tex. May 24, 2016). Even if Petitioner had alleged such a violation, the remedy is not immediate release from custody, but an opportunity for the government to provide substitute process. *Virani v. Huron*, No. SA-19-CV-00499-ESC, 2020 WL 1333172 at *12 (W.D. Tex. Mar. 23, 2020).

Petitioner alleges his order of supervision was wrongfully revoked and seeks release. ECF No. 1 at 2–3. Again, the remedy to a procedural due process violation is not immediate release, rather it's substitute process. As such, Petitioner's procedural due process claim, like his substantive one, should be denied.

Furthermore, Petitioner requests fifteen days after notice of third country acceptance. ECF No. 1 at 18. Importantly, he doesn't cite any case law, statute, or regulation requiring fifteen days. *Id.* On July 9, 2025, the ICE Director issued written guidance to all ICE employees that explicitly rescinded all prior guidance implementing the previously issued preliminary injunction. Exh. B ("July 9 Guidance"). The July 9 Guidance ordered ICE, effective immediately, to adhere to the Secretary of Homeland Security, Kristi Noem's, March 30, 2025, memorandum, *Guidance Regarding Third Country Removals*. Exh. C ("March Guidance").

The March Guidance provides that aliens may be removed to a "country [that] has provided diplomatic assurances that aliens removed from the United States will not be persecuted or

tortured.” *Id.* If the State Department finds the representations credible, the “alien may be removed without the need for any further procedures.” *Id.*

The process provided in the March Guidance satisfies all Constitutional requirements. The Supreme Court has held that when an Executive determines a country will not torture a person on his removal, that is conclusive. *Munaf v. Geren*, 553 U.S. 674, 702–03 (2008); *see also Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (federal courts “may not question the Government’s determination that a potential recipient country is not likely to torture a detainee”), *cert. denied*, 559 U.S. 1005 (2010). As now-Justice Kavanaugh explained in concurrence in *Kiyemba*, the “*Munaf* decision applies here a fortiori: That case involved the transfer of *American Citizens*, whereas this case involves the transfer of alien detainees with no constitutional or statutory right to enter the United States.” *Kiyemba*, 561 F.3d at 517–18 (Kavanaugh, J., concurring). These cases stand for the proposition that when the Executive decides an alien will not be tortured abroad, courts may not “second guess [that] assessment,” unless Congress has specifically authorized judicial review of that decision. *Id.* at 517 (citations omitted); *Munaf*, 553 U.S. at 703 n.6.

This framework also requires rejection of any argument of entitlement to an individualized determination under the CAT regulations. The law provides for assurances that an alien would not be tortured if removed to a “specific country,” but once the Attorney General and the Secretary of State deem those assurances “sufficiently reliable,” that is the end of the inquiry. *See* 8 C.F.R. § 1208.18(c)(1)-(3); *see also Munaf*, 553 U.S. at 703 n.6.

If removal is to a third country not covered by adequate assurances, the March Guidance makes clear that ICE will first inform the alien of the intent to remove him to that country and then give him an opportunity to establish that he fears removal there. Ex. C (March Guidance). If the alien affirmatively states a fear, immigration officials from U.S. Citizenship and Immigration

Services (“USCIS”) will screen the alien, generally within 24 hours, to determine whether he “would more likely than not” be persecuted on a statutorily protected ground or tortured in the country of removal. *Id.* at 2. If USCIS determines that the alien has not met this standard, the alien will be removed. *Id.* If the alien does meet the standard, the alien will be referred to the immigration judge in the first instance, or if previously in proceedings before an immigration judge, USCIS will notify ICE to file a motion to reopen those proceedings, as appropriate, for the sole purpose of determining eligibility for protection under INA § 241(b)(3) and CAT, specifically to the newly designated country of removal. *Id.* Alternatively, ICE may choose another country for removal, subject to the same processes. *Id.* This process satisfies due process and Petitioner’s request to order ICE to take additional measure or afford Petitioner fifteen days should be denied.

V. Conclusion

Petitioner is lawfully detained by statute until his removal, and his detention comports with the limited due process he is owed as an applicant for admission subject to a final order of removal. This Court should deny the petition.

Respectfully submitted,

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