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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAILESH SUBEDI,

Petitioner,

v.

KRISTI NOEM, *et al.*,

Respondents.

Case No.: 26-cv-00569-BAS-VET

RETURN TO PETITION

I. INTRODUCTION

Petitioner Sailesh Subedi has filed a habeas petition and, for the reasons set forth below, the Court should deny Petitioner's requests for relief and dismiss the petition.

II. FACTUAL BACKGROUND

Petitioner is a native and citizen of Nepal. On December 27, 2024, he was apprehended by United States Border Patrol agents approximately 20 miles west of the Calexico, California Port of Entry. A Border Patrol agent determined Petitioner had made an unlawful entry into the United States. Petitioner was processed as an expedited removal under Section 235(b)(1) of the Immigration and Nationality Act (INA) and booked into ICE custody at the Imperial Regional Adult Detention Facility on December 28, 2024. Declaration of Eduardo Vazquez ("Vazquez Decl.") ¶ 3.

On January 13, 2025, Petitioner was referred to U.S. Citizenship and Immigration Services (USCIS) for a credible fear interview. USCIS conducted the credible fear interview on January 22, 2025. *Id.* ¶ 4. On February 12, 2025, the USCIS asylum officer found no credible fear and Petitioner requested review by an immigration judge. *Id.* ¶ 5. On March 3, 2025, an immigration judge vacated the negative credible fear determination. *Id.* ¶ 6. On March 3, 2025, a Notice to Appear was served on the Petitioner and filed with the Immigration Court on March 5, 2025, placing the Petitioner in removal proceedings. *Id.* ¶ 7. On July 29, 2025, Petitioner was denied asylum and ordered removed to Nepal, but the immigration judge granted withholding of removal to Nepal under Section 241(b)(3) of the INA.

On August 13, 2025, September 5, 2025, October 20, 2025, ERO contacted ERO Removal and International Operations (RIO) to identify a third country for removal. *Id.* ¶¶ 9-11. ERO is pending further response from RIO on identifying a third country for removal. *Id.* ¶ 12.

III. ARGUMENT

An alien ordered removed must be detained for ninety (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). The statute "limits an alien's post-removal detention to a period reasonably necessary to bring about the alien's removal from the United States" and does not permit "indefinite detention." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The Supreme Court has held that a six-month period of post-removal detention constitutes a "presumptively reasonable period of detention." *Id.* at 683. 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.* at 701.

In *Zadvydas*, the Supreme Court held: "[T]he habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely, *assuring the alien's presence at the moment of removal*." *Id.* at 699 (emphasis added). In so holding, the Court recognized that detention is presumptively reasonable pending efforts to obtain travel documents, because the noncitizen's assistance is needed to obtain the travel documents, and a noncitizen who is subject to an imminent, executable warrant of removal becomes a significant flight risk, especially if he or she is made aware that removal is imminent.

The Supreme Court also held that the detention could exceed six months: "This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an 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.* 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 and that the noncitizen has the initial burden of proving that removal is not significantly likely." *Id.*

Petitioner is subject to a final, executable order of removal, which means that he has no right to remain in the United States. *See* Exhibit 2 (Removal Order). He has a

temporary right not to be repatriated to Nepal, but he has no right to indefinitely avoid resettlement to a third country. ICE has long-standing authority to remove noncitizens and resettle them in third countries where removal to the country designated in the final order is "impracticable, inadvisable, or impossible." 8 U.S.C. § 1231(b)(2)(E)(vii); *see also* 8 U.S.C. § 1231(b) (outlining framework for designation). Accordingly, noncitizens who have received protection against removal to the designated country (either withholding of removal under 8 U.S.C. § 1231(b)(3) or CAT protection), may be removed and resettled in third countries.

Section 1231(b)(2)(E) provides that the Secretary of Homeland Security shall remove the noncitizen to any of the following countries:

> (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.
> (vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

Id. Accordingly, if the Secretary of Homeland Security is unable to remove a noncitizen to a country of designation or an alternative country per Section 1231(b)(2)(D), the Secretary may, in her discretion, remove the noncitizen to any country listed in subparagraphs (E)(i) through (E)(vi). To effectuate Petitioner's removal to a third country, ERO has actively searched for a third country for resettlement. ERO continues to work as expeditiously as possible to locate a third country for resettlement and to effectuate Petitioner's removal to a third country.

Petitioner has been detained for approximately seven months since his removal order became final. The Ninth Circuit has emphasized, "*Zadvydas* places the burden on the alien to show, after a detention period of six months, that there is '*good reason* to believe that there is no significant likelihood of removal in the reasonably foreseeable future.'" *Pelich v. INS*, 329 F. 3d 1057, 1059 (9th Cir. 2003) (quoting *Zadvydas*, 533 U.S. at 701) (emphasis added); *see also Xi v. INS*, 298 F.3d 832, 840 (9th Cir. 2003). Though the removal period has extended beyond six months, Petitioner cannot show that there is no significant likelihood of removal in the reasonably foreseeable future. ICE is in the process of locating a country for resettlement pursuant to 8 U.S.C. § 1231(b)(2)(E), so it is premature for Petitioner to seek administrative or judicial review of that process. Evidence of progress, even slow progress, in negotiating a petitioner's repatriation will satisfy *Zadvydas* until the petitioner's detention grows unreasonably lengthy. *See, e.g.*, *Sereke v. DHS*, Case No. 19-cv-1250-WQH-AGS, ECF No. 5 at 5 (S.D. Cal. Aug. 15, 2019) ("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."); *Marquez v. Wolf*, Case No. 20-cv-1769-WQH-BLM, 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"). Here, ERO has demonstrated continuous efforts to identify a third country for removal. Vazquez Decl. ¶¶ 9-11. Because Petitioner's detention has not grown unreasonably lengthy, and ERO is continuously attempting to locate a third country that satisfies the withholding of removal to Nepal that he requested, he cannot show that there is no significant likelihood of 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 6-7. ICE attests, however, that once a third country is identified, it will provide Petitioner with written notice of the

identified third country. Vazquez Decl. at ¶ 13. ICE further attests that ICE will generally wait at least 24 hours following the notice of third country removal before executing it. *Id.* 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.

As to the regulatory violation claims, Petitioner was provided with a written Notice of Revocation of Release and an informal interview. *See* Exhibit 1. Even if the agency's compliance with the regulations fell short, Petitioner has not established prejudice nor a constitutional violation. *See Brown v. Holder*, 763 F.3d 1141, 1148–50 (9th Cir. 2014) ("The mere failure of an agency to follow its regulations is not a violation of due process."); *United States v. Tatoyan,* 474 F.3d 1174, 1178 (9th Cir.2007) ("Compliance with . . . internal [customs] agency regulations is not mandated by the Constitution") (internal quotation marks omitted); *United States v. Barraza-Leon*, 575 F.2d 218, 221–22 (9th Cir. 1978) (holding that even assuming that the judge had violated the rule by failing to inquire into the alien's background, any error was harmless because there was no showing that the petitioner was qualified for relief from deportation). As Petitioner cannot show prejudice under these circumstances, the alleged violation of agency regulations does not warrant the relief he seeks. *See, e.g.*, *Rodriguez v. Hayes*, 578 F.3d 1032, 1044 (9th Cir. 2009), *opinion amended and superseded on other grounds*, 591 F.3d 1105 (9th Cir. 2010) ("While the regulation provides the detainee some opportunity to respond to the reasons for revocation, it provides no other procedural and no meaningful substantive limit on this exercise of discretion as it allows revocation 'when, in the opinion of the revoking official . . . [t]he purposes of release have been served . . . [or] [t]he conduct of the alien, or *any other circumstance*, indicates that release would no longer be appropriate.'") (emphasis in original) (citing 8 C.F.R. §§ 241.4(*l*)(2)(i), (iv)); *Carnation Co. v. Sec'y of Labor*, 641 F.2d 801, 804 n.4 (9th Cir. 1981) ("violations of procedural regulations should be upheld if there is no significant possibility that the violation affected the

ultimate outcome of the agency's action" (citation omitted)); *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980) (INS' failure to follow regulations requiring that an arrested alien be advised of his right to speak to his consul was not prejudicial and thus not a ground for challenging the conviction); *United States v. Barraza-Leon*, 575 F.2d 218, 221–22 (9th Cir. 1978) (holding that even assuming that the judge had violated the rule by failing to inquire into the alien's background, any error was harmless because there was no showing that the petitioner was qualified for relief from deportation).

To the extent Petitioner is challenging ICE's decision to detain him for the purpose of removal, such a challenge is precluded by statute. *See* 8 U.S.C. § 1252(g) ("Except as provided in this section and *notwithstanding any other provision of law* (statutory or nonstatutory), *including section 2241 of Title 28, or any other habeas corpus provision*, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or *execute removal orders* against any alien under this chapter.") (emphasis added); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of "commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—which represent the initiation or prosecution of various stages in the deportation process."); *Limpin v. United States*, 828 Fed. App'x 429 (9th Cir. 2020) (holding district court properly dismissed under 8 U.S.C. § 1252(g) "because claims stemming from the decision to arrest and detain an alien at the commencement of removal proceedings are not within any court's jurisdiction").

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IV. CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's request for relief and dismiss the petition as premature under *Zadvydas*.

DATED: February 6, 2026

Respectfully submitted,

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s/ Hunter V. Norton
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