IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LUIS POSADA-CARRILES, Petitioner,	§	
v.	§	NO. EP-06-CV-0130-PRM
ALFREDO CAMPOS, *et al.* Respondents.	§	

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Petitioner LUIS POSADA-CARRILES has filed a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2241. In his petition, he challenges his continued detention by the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), as unconstitutional. Petitioner is currently in detention at the INS Processing Center in El Paso, Texas. For the reasons stated below, this Court is of the opinion that the petition should be GRANTED.

PROCEDURAL HISTORY

On May 17, 2005, Petitioner was arrested in Miami-Dade county by ICE agents, after having entered the United States illegally. In a Notice To Appear, he was charged with violations of the Immigration and Nationality Act (INA) § 212 (a)(6)(A)(I)[1] (present without inspection), and INA § 212(a)(7)(A)(i)(I)[2] (immigrant not in possession of a valid immigration visa), and placed in removal proceedings. On July 25, 2005, an immigration judge (IJ) denied him bond. (Appendix of Exhibits to Respondents' Motion to Dismiss, Exh. A, p.1) During the removal proceedings, Petitioner conceded that he was ineligible for withholding of removal for having committed a serious non-political crime outside the United States. (Id., Exh. A, p1; Exh. B, p.2) On September 27, 2005,

[1]This provision has been codified at 8 U.S.C. § 1182(a)(6)(A)(I).

[2]*See* 8 U.S.C. § 1182(a)(7)(A)(i)(I).

he was ordered removed "to any country, other than Cuba and Venezuela, willing to accept him." (Id., Exh. B, p.7) The IJ granted deferral of removal to both Cuba and Venezuela, pursuant to 8 C.F.R. § 1208.17, implementing Art. III of the Convention Against Torture. (Id., Exh. B, p.4, 7) The IJ found, and DHS conceded, that Petitioner would face a clear probability of torture in Cuba, due to his long history of anti-Castro activities. (Id., Exh. B, p.5) The IJ further found that, due to political ties between Cuba and Venezuela, there was a likelihood that Cuban agents would be allowed to torture Petitioner in Venezuela. (Id., Exh. B, p.6)

Petitioner received a custody review on January 24, 2006, one day prior to the expiration of the 90 day removal period. (Id., Exh. J, p.1) *See* 8 C.F.R. § 241.4. On March 22, 2006, an Interim Decision to Continue Detention was issued by Field Office Director Robert Jolicoeur (of DHS/ICE), determining that Petitioner continued to present a danger to the community, and a flight risk, and would therefore not be released. (Id., Exh. A, p.1) The Field Office Director found that Petitioner's history of engaging in criminal activity, associating with individuals involved in criminal activity, and participating in violent acts, indicate a disregard for the safety of the general public, and that his propensity to engage in terrorist activities poses a risk to the national security of the United States. (Id., Exh. A, p.1) Further, ICE regards Petitioner's removal from the United States to be reasonably foreseeable. (Id., Exh. A, p.3)

On April 6, 2006, Petitioner filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Docket at 2) On April 19, 2006, the Court issued a Show Cause Order, directing Respondents to show cause in writing on or before May 19, 2006, why Petitioner's requested relief should not be granted. (Docket at 6) On May 19, 2006, Respondents filed a motion to dismiss for lack of jurisdiction, with an appendix of exhibits. (Docket at 9) On June 21, 2006, Petitioner filed

a reply to the motion to dismiss, and a supporting memorandum of law. (Docket at 10) On August 4, 2006, Petitioner filed a memorandum of law in support of his habeas petition. (Docket at 17) The Court conducted an evidentiary hearing on August 14, 2006.

FACTUAL BACKGROUND[3]

Petitioner is a 78-year-old native and citizen of Cuba, and naturalized citizen of Venezuela. As observed by the IJ, Petitioner's "case reads like one of Robert Ludlum's espionage thrillers, with all the plot twists and turns Ludlum is famous for." Petitioner was born in Cienfuegos, Cuba. After the Cuban revolution, he took up the fight against Fidel Castro, and was reportedly involved in the 1961 Bay of Pigs operation. He has remained active in anti-Castro activities for over 40 years.

In 1962, Petitioner was admitted to the United States as a Lawful Permanent Resident.[4] He received military training in the United States, and served as a second lieutenant in the United States Army. He later became involved with the Central Intelligence Agency as an operative, and became a gunrunner delivering weapons to the Cuban coast. He claims to have been dropped by the CIA in 1967.

In June of 1967, Petitioner went to work for the Venezuelan secret police, known as DISIP. In 1970, he became the head of the DISIP's security division, in charge of surveillance, VIP protection, weapons, and explosives. He also commanded a corps of secret agents. On October 6, 1976, a Cubana Airlines passenger jet departing from Barbados, and scheduled to arrive in Cuba was bombed, killing all 73 people aboard. Petitioner was charged with the offense, tried and

[3]This factual background was derived and compiled from the exhibits attached to the pleadings, motions, and responses in the record.

[4] He subsequently abandoned that status when he became a naturalized citizen of Venezuela in 1970.

acquitted in a military court. However, on appeal, the acquittal was deemed invalid on the basis of lack of jurisdiction of the military court. In 1985, while awaiting trial in a civil court, Petitioner escaped from a Venezuelan prison, after eight years of incarceration. He is currently the subject of an extradition request from the Venezuelan government for his alleged involvement in the 1976 bombing.[5]

After the escape from Venezuela, Petitioner went to El Salvador, and re-established ties with the CIA. He became involved in supplying arms and material to the U.S. backed Contras fighting the Sandanistas in Nicaragua. This operation would come to be known as the now infamous Iran-Contra Affair, under the direction of Lt. Colonel Oliver North. For some time afterwards, he worked in El Salvador as a spy for then Salvadorean President Jose Napoleon Duarte. In that capacity, he was able to make contacts in Guatemala. Petitioner claims to have resided primarily in San Salvador, El Salvador, from 1985 until 2000, although he lived for short periods of time in Honduras, Guatemala, and the Dominican Republic. Interpol records indicate an outstanding arrest warrant for Petitioner in El Salvador, based on his acquisition and use of false personal identification documents.

In September of 1989, after Duarte lost power in El Salvador, Petitioner moved to Guatemala, at the request of its President, Vinicio Cerezo. He was to identify and neutralize political threats, but instead, accepted a job providing security for the state telephone company, GUATEL. In February of 1990, he was shot numerous times in the face and torso during an assassination attempt. He received severe injuries from which he suffers to this day. After the assassination attempt, presidential aides escorted Petitioner to the airport, and flew him out of the country. It is reported that he convalesced in El Salvador.

---

[5]Petitioner has consistently denied his involvement in the bombing.

In 1997, a series of hotel and restaurant bombings occurred in Cuba over a several month period, killing an Italian tourist. Petitioner was suspected in the planning and coordination of the bombings. In interviews he has essentially admitted his involvement, showing no remorse. In November 2000, Petitioner was arrested in Panama regarding an alleged plot to assassinate Fidel Castro. Those charges were dropped, but on April 20, 2004, he was convicted in Panama for Crimes Against National Security and Counterfeiting Public Records. He was sentenced to 7 years and 1 year of imprisonment, respectively. However, he was released on August 25, 2004, when the outgoing Panamanian President Mireya Moscoso pardoned him.

Throughout his years, he has assumed numerous identities and utilized passports and travel documents from Venezuela, El Salvador, Colombia, Mexico, and the United States, to move freely throughout Central America. He has been known by many aliases, and, by his own admission, has lived clandestinely for more than thirty years.

In early April, 2005, Petitioner's attorney announced at a press conference in Florida that Petitioner had arrived in the United States illegally, by crossing the border from Mexico. The method of his illegal entry is in dispute. Petitioner claims to have entered the United States near Brownsville, Texas, on March 26, 2005, making his way to Florida. However, there is an alternate scenario in which it is believed that Petitioner entered the United States aboard a fishing vessel off the coast of Florida. On May 17, 2005, he was apprehended by ICE agents outside a residence located in Miami-Dade County, Florida, and has remained in custody since that date.

ISSUES

Petitioner challenges his continued and indefinite detention beyond the removal period as being unconstitutional, in violation of his Fifth and Fourteenth Amendment due process rights. He

further asserts that his continued custody violates the Supreme Court's decisions in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491 (2001), and *Clark v. Martinez*, 543 U.S. 371, 125 S.Ct. 716 (2005). He requests that relief from detention be granted, or that the government be required to show cause why he should be held, when it has been unable to remove him.

DISCUSSION

I. Jurisdiction

A. Post-Removal Alien Detention and the *Zadvydas* Standard

Post-removal detention of aliens is authorized by Congress in the Immigration and Nationality Act (INA) § 241(a)(1) and (2). With some exceptions, when an alien is ordered removed, the Attorney General has 90 days from the time the order becomes administratively final, in which to remove the alien from the United States. This time frame is referred to as the "removal period." *See* 8 U.S.C. § 1231(a)(1)(A). During this removal period, the alien must be detained. In the event an alien is not removed, 8 U.S.C. § 1231(a)(6) provides that an alien may be detained beyond his removal period as follows:

> An alien ordered removed who is inadmissible under § 1182 of this title, removable under § 1227(a)(1)(c), 1227(a)(2), or 1227(a)(4) of this title, or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

The Supreme Court in *Zadvydas*, determined that § 1231(a)(6) "limits an alien's post-removal period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *See Zadvydas*, 533 U.S. at 689, 121 S.Ct. at 2498. The Court further stated that "to avoid a serious constitutional threat, we conclude that, once

removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute." *Id.* at 699, 121 S.Ct. at 2503.

The Court determined that a presumptively reasonable period of post-removal detention is limited to six months (apparently from the beginning of the removal period). *Id.* at 701, 121 S.Ct. at 2505; *Zadvydas v. Davis*, 285 F.3d 398, 403 (5th Cir. 2005) (opinion on remand). "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 for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink. 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." 533 U.S. at 701, 121 S.Ct. at 2505.

"Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions."[6] 533 U.S. at 699-700, 121 S.Ct. at 2504.[7]

---

[6]An alien ordered released pursuant to [8 C.F.R.] § 241.4, shall be released pursuant to an order of supervision. 8 C.F.R. § 241.5. The order shall specify the conditions of supervision including, but not limited to, those set out under § 241.5. *See id.*

[7]The Court also stated that, "The choice, however, is not between imprisonment and the alien 'living at large' [citation omitted]. It is between imprisonment and supervision under release conditions that may not be violated." 533 U.S. at 696, 121 S.Ct. at 2502.

B. Respondents' Motion To Dismiss

The Court initially addresses Respondents' Motion To Dismiss the petition for lack of jurisdiction.[8] Respondents have questioned the Court's jurisdiction in a Motion To Dismiss on two grounds.

Respondents first move to dismiss pursuant to FED. R. CIV. P. 12(b)(1) asserting that the Court lacks jurisdiction to review the DHS's findings that Petitioner is a danger and a flight risk. The Real ID Act stripped district courts of jurisdiction over 28 U.S.C. § 2241 petitions attacking removal orders.[9] *See Rosales v. Bureau of Immigration and Customs Enforcement*, 426 F.3d 733, 735-36 (5th Cir. 2005); *Abdulle v. Gonzales*, 422 F.Supp.2d 774, 776 (W.D. Tex. 2006). Further, the scope of habeas review does not extend to review of factual or discretionary determinations. *See Finlay v. I.N.S.*, 210 F.3d 556, 557 (5th Cir.2000); *Sol v. I.N.S.*, 274 F.3d 648, 651 (2nd Cir. 2001) (habeas review does not extend to discretionary determinations by the IJ and the BIA, nor the agency's factual findings or the Attorney General's discretionary findings); *Grewal v. Dep't of Homeland Security Secretary*, No. Civ.A.05-4701, 2005 WL 3008886 at *3 n.2 (E.D. Pa. Nov. 8, 2005) (§2241 review did not extend to DHS's exercise of discretion).

However, the Real ID Act left intact a district court's ability to adjudicate an alien's claim

---

[8]Where a party moves for dismissal under both Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must consider the Rule 12(b)(1) challenge first. *See United States ex rel . Kreindler & Kreindler v. United Technologies. Corp.*, 985 F.2d 1148, 1155-56 (2nd Cir. 1993) (citations omitted). This is because a dismissal for lack of subject matter jurisdiction renders all other challenges moot. *See id.* Thus, a court must satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case. *See Ruhrgas A.G. v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 1569 (1999); *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs .*, 380 F.3d 872, 878 (5th Cir. 2004) ("Prior to reaching the merits, we must verify, *sua sponte*, that our jurisdiction. . . is proper.").

[9]The Real ID Act is part of the much broader Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub.L. No. 109-13, 119 Stat. 231 (May 11, 2005).

regarding the constitutionality of his continued detention. The Supreme Court in *Zadvydas* concluded that "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal period detention." *Zadvydas,* 533 U.S. at 688, 121 S.Ct. at 2498 (the extent of the Attorney General's authority under the post-removal-period detention statute is not a matter of discretion); *see also, Gul v. Rozos,* 163 Fed. Appx. 317, 2006 WL 140540 at *1 (5th Cir. 2006); *Abdulle*, 422 F.Supp.2d at 776. Because Petitioner challenges his continued detention, rather than the removal order, his petition is properly before the Court. *See Zadvydas*, 533 U.S. at 688, 121 S.Ct. at 2497-98; *Heagan v. Jolicoeur*, No. EP-05-CA-0413-FM, 2006 WL 897709 (W.D. Tex. Mar. 31, 2006) (§ 2241 habeas proceedings remain available to challenge post-removal period detention). In fact, in their Motion To Dismiss, Respondents concede the Court's limited jurisdiction to consider Petitioner's 28 U.S.C. § 2241 challenge to post-removal period detention. (Docket at 9, p.12) Thus, the Court finds that it has jurisdiction to entertain Petitioner's 28 U.S.C. § 2241 claim to the extent that it challenges his potentially indefinite post-removal detention.

Respondents next offer a two-pronged argument that the petition is not "ripe" for adjudication, and is therefore subject to dismissal for lack of jurisdiction. Respondents first argue that the petition is "premature" because it was filed one month prior to the expiration of the six-month *Zadvydas* period, thus precluding review by this Court. Respondents further argue that the petition is not ripe, because Petitioner has failed to met his *Zadvydas* burden of showing that there is "no significant likelihood of removal in the reasonably foreseeable future."

Article III of the United States Constitution limits federal courts' jurisdiction to "cases" or "controversies." U.S. CONST. Art. III, § 2. In order to give meaning to Article III's case or controversy requirement, the courts have developed justiciability doctrines, one of which is

"ripeness." *Sample v. Morrison,* 406 F.3d. 310, 312 (5th Cir. 2005). "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *National Park Hospitality Ass'n. v. Department of Interior,* 538 U.S. 803, 807-08, 123 S.Ct. 2026, 2030 (2003) (citations omitted). "The ripeness doctrine counsels against premature adjudication by distinguishing matters that are 'hypothetical' or 'speculative' from those that are poised for judicial review." *LeClerc v. Webb,* 419 F.3d 405, 413-14 (5th Cir. 2005). It is an essential element of federal subject matter jurisdiction. *Sample,* 406 F.3d at 312. In short, ripeness addresses the timing of litigation.

Regarding Respondents' assertion of "prematurity," the record reflects that an order of removal was issued against Petitioner on September 27, 2005. It became administratively final thirty days later on October 27, 2005. *See* 8 C.F.R. §§ 1240.15, 1241.1. Thus, the removal period began on October 27, 2005, the date the removal order became administratively final. *See id.* at § 1231(a)(1)(B). The 90-day removal period ended on January 25, 2006. The *Zadvydas* "presumptive" six-month period of detention did not end until April 25, 2006, six months from October 27, 2005, the date the removal order became final. Petitioner filed his 28 U.S.C. § 2241 claim on April 6, 2006. Thus, Respondents are correct: the petition was filed some three weeks prior to the expiration of the presumptive period.

Respondents rely upon *Olpoju v. Ridge,* 115 Fed. Appx. 302(5th Cir. 2004), in support of their contention of prematurity. Their reliance is misplaced however, because the issue is now moot, as Petitioner has been detained well beyond the presumptive six-month period. *See Olpoju,* 115 Fed.

Appx. 302 at *1 (alien's habeas petition was "premature because, **at the time of the district court's ruling,** Okpoju had not yet been in custody longer than the presumptively reasonable six-month post removal order period." (emphasis added)). The Court concludes that it has jurisdiction to consider Petitioner's claim, as it is no longer "premature."

The Court next considers Respondents' argument that Petitioner's supposed failure to meet his *Zadvydas* burden deprives the Court of jurisdiction. This argument actually addresses the merits of Petitioner's claim, not ripeness. It has nothing to do with the timing of litigation. A motion to dismiss for failure to state a claim tests the sufficiency of a complaint, not the merits of a case. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974); *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984). Whether Petitioner has met his burden under *Zadvydas* is precisely the issue the Court must decide, and by doing so, exercise its jurisdiction. The supposed failure of Petitioner to meet his burden of proof goes not to the Court's jurisdiction, but rather to whether relief should be granted or denied.

Petitioner has clearly stated a claim under *Zadvydas*. He has sufficiently alleged that he had been detained beyond the presumptively reasonable six-month period, and has alleged that there is no likelihood of his removal in the reasonably foreseeable future.[10]

C. Exhaustion of Administrative Remedies

Petitioner asserts in his petition that exhaustion of administrative remedies is not required by *Zadvydas*. (Docket at 2, p.5) Although not contested by Respondents in their motion to dismiss,

[10]Because the Court construes Respondents' arguments as jurisdictional attacks under Rule 12(b)(1), and because Respondents have not briefed an argument for dismissal under Rule 12(b)(6), the Court does not consider a challenge under 12(b)(6) further. *See U.S. v. Hall*, 455 F.3d 508, 514 n.3 (5th Cir. 2006) (arguments not sufficiently briefed will not be considered).

the Court will address the issue of exhaustion of administrative remedies. Under 28 U.S.C. § 2241, a federal habeas petitioner is not statutorily required to exhaust administrative remedies. *See Castro-Cortez v. I.N.S.*, 239 F.3d 1037, 1047 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, —U.S.—, 126 S.Ct. 2422 (2006); *Kundra v. Barrows*, No. 3-05-CV-2425-N, 2006 WL 1499772 (N.D. Tex., May 31, 2006). Although not statutorily required, a § 2241 petitioner in the Fifth Circuit is generally required to exhaust his administrative remedies before seeking a writ in federal court. *See Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994). Yet, exhaustion of administrative remedies is not a jurisdictional requirement in the context of a § 2241 claim. *See id.*; *see also Nichols v. Joslin*, No. 3:04-CV-0059-N, 2005 WL 1017833 at *2 (N.D. Tex. Mar. 25, 2005). The administrative exhaustion requirement is considered as a prudential matter, rather than as a jurisdictional prerequisite. *See Castro-Cortez*, 239 F.3d at 1047; *cf. Winck v. England*, 327 F.3d 1296, 1300 n.1 (11th Cir. 2003) (holding that the exhaustion requirement for a § 2241 habeas petition is jurisdictional).

In response to *Zadvydas*, regulations were promulgated to meet its requirements. Before the expiration of the removal period expires, the District Director or Field Office Director is to conduct a custody review if the alien's removal cannot be accomplished during the prescribed period. 8 C.F.R. § 241.4(k)(1)(i). When release is denied, pending removal, the District Director may retain responsibility for custody determinations for up to three months or refer the alien to the Headquarters Post-Order Detention Unit (HQPDU) for further custody review. *Id.* at § 241.4(k)(1)(ii). In fact, if the alien is not removed within three months after the District Director's 90-day review decision (denying release), authority over custody reviews automatically transfers to the Executive Associate Commissioner, acting through the HQPDU. *Id.* at § 241.4(k)(2)(ii). The initial HQPDU custody

review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. *Id.* A subsequent review will ordinarily be commenced within one-year of the Executive Associate Commissioner's decision declining release. Id. at § 241.4(k)(2)(iii). Between annual reviews, the alien may petition for interim reviews not more than once every three months. *Id.*

Section 241.13 establishes special review procedures for aliens subject to a final order of removal and detained beyond the expiration of the removal period. *Id.* at § 241.13. The HQPDU must determine whether the alien has provided good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. § 241.13(g). There is no administrative appeal from the HQPDU decision denying the alien's request. Id. at § 241.13(g)(2).

In the present case, Petitioner filed an administrative petition for release on January 23, 2006, during the initial 90-day period. However, he did not petition for a custody review after the expiration of the six-month presumptive period. Instead, he filed this habeas petition, stating that exhaustion is not mandated by either *Zadvydas* or *Clark*, the controlling decisions in his case. (Docket at 2, p.5)

The Court finds that to require Petitioner to further exhaust his administrative remedies would be futile and only cause further delay, because Respondents have made their position clear, both in the March 22, 2006, Interim Decision to Continue Detention and during the August 14, 2006, court hearing, that they deem Petitioner removable in the reasonably foreseeable future. It is unlikely that their position will change. The Court recognizes, however, that some courts have required exhaustion, in that the alien must request a custody review after the presumptive six-month period expires. *See, e.g. Morena v. Gonzales*, No. 4:CV 05 0895, 2005 WL 3307100 at *6 n.10 (M.D. Pa.

Oct. 4, 2005). Other courts have ordered that the habeas petition be treated as a request for custody review, to which the respondents must respond within thirty days, after which the petitioner may seek judicial review, if necessary. *See Irvin v. Arendale*, No. Civ.A. H-04-4515, 2005 WL 3088477 (S.D. Tex. Nov. 16, 2005); *Liloko v. Gonzales*, No. Civ.A. H-05-2110, 2005 WL 2095110 (S.D. Tex. Aug. 30, 2005); *French v. Ashcroft*, No. Civ. 4:CV-04-1116, 2005 WL 1309062 (M.D. Pa. Jun. 1, 2005). Nonetheless, as a prudential matter, the Court will not require further exhaustion of administrative remedies.

II. The Evidentiary Hearing

Satisfied that the Court had jurisdiction to entertain Petitioner's 28 U.S.C. § 2241 claim, an evidentiary hearing was conducted . At the evidentiary hearing, Petitioner presented testimony from two witnesses, Miguel Jimenez, and Deportation Officer Donald George. Mr. Jimenez, a friend of Petitioner, testified as to his failed attempts to secure travel documents for Petitioner in certain South American countries. He contacted numerous acquaintances of Petitioner, with political connections in Panama, El Salvador, and Honduras. However, his contacts proved unsuccessful, as they were either unable or unwilling to provide assistance. The contact in Panama indicated in April 2006, that the officials that could assist were under investigation by the government, concerning Petitioner's exit from Panama in 2004. (TR: p.8, 15-17)[11] The contact in El Salvador related in May 2006, that the government there was not willing to allow Petitioner to enter. (TR: p.8, 13) Lastly, the contact in Honduras responded that the President (of Honduras) answered, "No." (TR: p.9-10) When asked why he pursued personal, rather than official, channels, Jimenez replied that he thought it would be

[11]Reference to the transcript of the evidentiary hearing will be designated as "TR" followed by the page number.

more efficient at that level. (TR: p.11) When asked why he inquired in those three countries, he responded that Petitioner has good relations with those countries. (TR: p.11-12)

Next, an agent of the DHS/ ICE testified, Deportation Officer Donald George. (TR: p.20) He related that he is Petitioner's "docket officer" and handles his case for the removal proceedings. (TR: p.21) In his capacity as a supervising deportation officer, he is familiar with the process of obtaining travel documents. (TR: p.20-21) He testified that in October or November 2005, he made written contact with numerous countries, and verbal contact with two countries, in an effort to secure travel documents for Petitioner, namely Canada, Honduras, Costa Rica, Panama, El Salvador, Mexico, and Guatemala. (TR: p.26-28) He has obtained official responses from each, all of which have declined to provide the requested travel documents. (TR: p.28) To his knowledge, George stated there is no country willing to provide travel documents for Petitioner. (TR: p.28) During this process, Petitioner has cooperated with George in trying to secure travel documents, and has complied with all requests for information. (TR: p.23, 25) George forwarded all information received from Petitioner to the DHS headquarters office, which has the primary responsibility for assessing Petitioner's responses. (TR: p.30) On cross-examination, he testified that Petitioner stated in July 2006, that he remained "hopeful" that El Salvador would accept him, though "it didn't look good." (TR: p.31-32) Petitioner told George he was still waiting to hear from El Salvador. (TR: p.32) However, George stated that in November 2005, the consulate from El Salvador refused to provide travel documents for Petitioner. (TR: p.34-35) Further, George testified that he was making no efforts at this time towards Petitioner's removal, and he would not, unless instructed to do so by headquarters. (TR: p.36) He also stated that there has never been a notice of non-compliance issued for Petitioner's failure to answer or address questions posed to him in the post-custody review

process. (TR: p.33) Finally, it was George's assessment that the prospects of securing travel documents for Petitioner "didn't look good." (TR: p. 35)

Petitioner introduced into evidence copies of the DHS form letters, dated November 17, 2005, requesting travel documents from other countries, including Costa Rica, Mexico, Guatemala, and Honduras. (Petitioner's Exhibits 3-6) (TR: p.27) Petitioner also introduced evidence of his current medical condition, through a medical exam report dated August 7, 2006, prepared by his physician, Dr. Oscar Aguilar. (Petitioner's Exhibit 1) (TR: p.18-19)

Respondents presented no evidence at the hearing.

III. Analysis

A. Petitioner's Burden

Prior to determining whether Petitioner has met his *Zadvydas* burden, the Court must first determine whether he has cooperated with removal efforts, or has obstructed or hampered the removal process. *See* C.F.R. § 241.13(d)(2). If Petitioner has failed to cooperate, or has obstructed the removal process, the removal period is extended. *See* 8 U.S.C. § 1231(a)(1)(c); 8 C.F.R. § 241.4(g).[12] As presented at the evidentiary hearing, the Respondents' argument regarding Petitioner's duty and efforts to cooperate with removal was somewhat unclear.(TR: pp. 40-47) On the one hand, Respondents seemed to argue that Petitioner's efforts fell short of his duty to cooperate, while on the other hand, Respondents seemed to argue that his providing information regarding many potential

[12]Section 1231(a)(1)(c) provides that: "[t]he removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal."

Regulation § 241.13(d)(2) provides that: "[t]he alien shall include with the written request information sufficient to establish his or her compliance with the obligation to effect his or her removal and to cooperate in the process of obtaining necessary travel documents."

contacts undercut his contention that his removal was not reasonably foreseeable. Thus, according to Respondents, Petitioner's conduct, whether compliant or not, undercuts his position that there is no likelihood of removal in the reasonably foreseeable future. Be that as it may, from the testimony presented by the docket officer at the evidentiary hearing, it is clear that Petitioner has been in compliance with all requests for information, and has cooperated with removal efforts. The Court notes that there was no evidence presented that Respondents contacted the people Petitioner referenced as contacts in other countries for the purpose of obtaining travel documents. It is equally clear that both his and the government's efforts in obtaining removal documents have failed.

Under 8 C.F.R. § 241.13(d), Petitioner's burden is to cooperate and comply with the Government's requests for information, so as to facilitate the Government's efforts to obtain travel documents. It is not his burden to show that removal is impossible. *See Gui v. Ridge*, No. Civ.A. 3CV031965, 2004 WL 1920719 at *6 (M.D. Pa. Aug. 13, 2004). As the Supreme Court stated, to require an alien seeking release to show the absence of *any* prospect of removal – no matter how unlikely or unforeseeable – "demands more than our reading of the statute can bear." *Zadvydas*, 533 U.S. at 702, 121 S.Ct. at 2505. The record shows that he has fully cooperated and complied with Respondents' requests for information to facilitate obtaining travel documents. He has also made numerous contacts in other countries in an effort to obtain travel documents. Although not dispositive, it is telling that Respondents have not issued a notice of non-compliance, as they are authorized to do under the statute. *See* 8 C.F.R. §§ 241.4(g), 241.13(e)(2).[13]

[13]Regulation § 241.4(g) provides, in pertinent part, that the alien shall be served with a Notice of Failure to Comply, advising the alien of the circumstances demonstrating his failure to comply, and explaining the steps needed for compliance. Section 241.13(e)(2) states that an alien will be advised in writing of his failure to comply, also explaining the efforts required for compliance.

Next, the Court must assess whether Petitioner has met his *Zadvydas* burden of providing good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. Because Petitioner was ordered removed as an inadmissible alien, under § 1182(a)(6) and § 1182(a)(7), his continued detention was authorized under § 1231(a)(6). Under *Zadvydas*, his detention was presumptively reasonable for six months, until April 25, 2006. However, Petitioner has now been in custody beyond the six-month presumptive period, and asserts that there is no significant likelihood that he will be removed in the reasonably foreseeable future. From the evidence presented, this Court finds that Petitioner has in fact met his burden. He established that seven countries officially responded that they would not provide travel documents. Moreover, there is no evidence that any efforts have been made by Respondents to remove Petitioner since November of 2005. As a practical matter, considering Petitioner's notoriety, the Court finds that it is unlikely that any country other than Cuba or Venezuela would be willing to accept him.

B. Respondents' Burden

Once Petitioner meets his burden of providing good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future, the Respondents are required to respond with sufficient evidence to rebut that showing. *See Zadvydas*, 533 U.S. at 701, 121 S.Ct. at 2505. Respondents chose not to present any evidence at the hearing, simply adhering to their original premise that Petitioner was removable in the reasonably foreseeable future. However, the facts as presented belie that premise. The fact that each of the requests for travel documents have been officially refused, and that no action has been taken in the last nine months to procure travel documents, indicates that Petitioner's removal is remote at best. *See Gui*, 2004 WL 1920719 at *6 (a remote, non-specific possibility of removal does not satisfy the respondents' burden).

Respondents' reliance upon Petitioner's optimism in the face of official rejections by recipient countries, is insufficient to meet their burden of rebutting his *Zadvydas* showing. Thus, the Court finds that Respondents have not met their burden of rebutting the showing made by Petitioner.

C. Terrorism or Other Special Circumstances

In its March 22, 2006, Interim Decision to Continue Detention, ICE determined that Petitioner continued to present a danger to the community, and a flight risk, and that his propensity to engage in terrorist activities posed a risk to "the national security of the United States." (Appendix of Exhibits Attached to Respondents' Motion to Dismiss, Exh. A, p.1) However, these findings are insufficient as a basis for continued detention under § 1231(a)(6).

As stated above, Petitioner was ordered removed as an inadmissible alien, under § 1182(a)(6) and § 1182(a)(7), and therefore, his continued detention was authorized under § 1231(a)(6), as now limited by *Zadvydas*. The *Zadvydas* six month post-removal presumptively reasonable period does not apply in all situations. The Supreme Court's opinion did not encompass cases in which issues of terrorism, special circumstances, or matters of national security exist. "Neither do we consider terrorism, or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas*, 533 U.S. at 696, 121 S.Ct. at 2502. While the Supreme Court held that general immigration detention statutes do not authorize the Attorney General to incarcerate detainees indefinitely, it did recognize that Congress has enacted provisions that allow the Attorney General to detain suspected terrorists for indefinite periods of time. *Clark*, 543 U.S. at 386, 125 S.Ct. at 727 n.8; *see also* 543 U.S. at 387, 125 S.Ct. at 728 (O'Connor, J., concurring).

Respondents had other mechanisms, not limited by *Zadvydas*, available to detain Petitioner, of which they did not avail themselves. Certain provisions of the immigration statutes allow the Attorney General to detain specific categories of aliens for lengthy periods, but only with defined procedural safeguards. The Patriot Act authorizes continued detention for additional periods of up to six months of any alien (1) whose removal is not reasonably foreseeable and (2) who presents a national security threat or has been involved in terrorist activities. *See* 8 U.S.C. § 1226a(a)(6); *Clark*, 543 U.S. at 386, 125 S.Ct. at 727 n.8. However, in order to continue detention in this manner, the Attorney General is required to certify that he has "reasonable grounds to believe" an alien has engaged in certain terrorist or other dangerous activity specified by statute, 8 U.S.C. § 1226a(a)(3), and must review the certification every six months. *See* 8 U.S.C. § 1226a(a)(3), (a)(7). Upon such certification, the Secretary of Homeland Security may detain the alien for successive six-month periods if the alien's release would threaten the national security, or the safety of the community or any person. *See* 8 U.S.C. § 1226a(a)(6); *Clark*, 533 U.S. at 387, 125 S.Ct. at 728 (O'Connor, J., concurring).

Additionally, the provisions of 8 U.S.C. §§ 1531-1537 establish the Alien Terrorist Removal Court and the procedures that it must follow. Upon receipt of "classified information that an alien is an alien terrorist," the Attorney General may seek removal of the alien by filing an application with the removal court and may take the alien into custody. 8 U.S.C. §§ 1533, 1536. This application must contain the Attorney General's certification that the application satisfies the requirements of § 1533, including a statement to establish probable cause that the alien is a terrorist, physically present in the United States, and whose removal under "subchapter II"[14] would pose a risk to the

[14]Subchapter II encompasses the general detention statutes under which Petitioner is being held.

national security of the United States. *See* 8 U.S.C. § 1533(a)(1)(D); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1079 (9th Cir. 2006). These statues provide for indefinite detention, pursuant to procedural safeguards, even in cases where there is no significant likelihood that the alien would be removed in the reasonably foreseeable future. *See Nadarajah*, 443 F.3d at 1078.

In this case, Petitioner was never certified by the Attorney General as a terrorist or danger to the community or national security. Instead, the IJ found Petitioner removable as charged in the DHS Notice to Appear, *i.e.* as an inadmissible alien under 8 U.S.C. § 1182(a)(6) (for being physically present in the U.S. without admission or parole), and § 1182(a)(7) (pertaining to an immigrant at the time of application for admission who is not in possession of a valid immigrant visa or other valid entry document). (Docket at 13, Exh. B, p.1,2)

Another provision allowing for continued detention, despite a finding that the alien is not removable in the reasonably foreseeable future, is that provision found under the Regulations for "special circumstances." *See* 8 C.F.R. §§ 241.13(e)(6), 241.14. Regulation 241.14 authorizes the continued detention of a removable alien, despite a finding that removal will not take place within the reasonably foreseeable future, where the alien poses a special danger to the public, limited to: 1) aliens with a highly contagious disease that is a threat to public safety; 2) aliens detained on account of serious adverse foreign policy consequences of release; 3) aliens detained on account of security or terrorism concerns; and 4) and aliens determined to be specially dangerous by virtue of the severity of their crimes or by virtue of mental illness. *See id.* at §241.14(b), (c), (d), (f); *see also Jabir v. Ashcroft*, No. Civ.A. 03-2480, 2004 WL 60318 at *5 n.13 (E.D. La. Jan. 8, 2004). Certification by the Attorney General is required for aliens detained either on account of serious adverse foreign policy consequences or on account of security or terrorism concerns. *See* 8 C.F.R.

§ 241.14(c), (d). To further detain an alien as being specially dangerous, requires a finding by an immigration judge. *Id.* at § 241.14(f)-(i).[15] Respondents have not moved to detain Petitioner under any "special circumstances."

RECOMMENDATION

In light of the above findings, the Court recommends that Petitioner's request for habeas relief be granted, and that Petitioner be released, subject to the terms and conditions of supervised release to be set by the DHS/Bureau of Immigration and Customs Enforcement. *See* 8 C.F.R. § 241.5; *see also Heagan*, 2006 WL 897709 at *3. Failure to comply with the conditions of release will subject him to criminal penalties, including further detention. *See* 8 U.S.C. § 1253(b); *Zadvydas*, 533 U.S. at 695-96, 121 S.Ct. at 2501-02; *see also Clark*, 543 U.S. at 387, 125 S.Ct. at 728 (O'Connor, J., concurring).

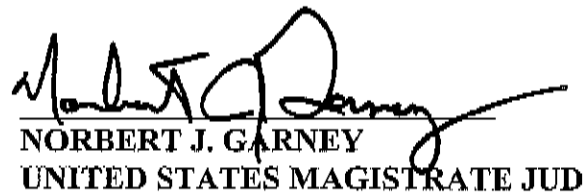
CONCLUSION

Wherefore, based on the foregoing REPORT, this Court RECOMMENDS that Petitioner's request for relief under 28 U.S.C. § 2241 be GRANTED, and that Respondents' Motion to Dismiss be DENIED.

---

[15]If the Commissioner determines in writing that an alien's release poses a special danger to the public, review proceedings must be initiated with an immigration judge (IJ) by the filing of a "Notice of Referral to the Immigration Judge." 8 C.F.R. § 241.14(f)(2), (g). The IJ shall hold a preliminary hearing to determine whether the Service's determination is sufficient to establish reasonable cause to proceed to a merits hearing. A finding of reasonable cause under this section is sufficient to warrant the alien's continued detention pending completion of the review process. *Id.* at § 241.14(h). If the IJ finds reasonable cause, the matter will proceed to a merits hearing, after which the IJ will render a decision of whether or not the Service has met its burden of establishing that the alien should remain in custody because his release would pose a special danger to the public. *Id.* at § 241.14(i). If the IJ finds that the Service has met its burden, he or she will enter an order for the continued detention of the alien. *Id.* On the other hand, upon a finding that the Service has failed to met its burden, the IJ will order the review proceedings be dismissed. *Id.*

SIGNED and ENTERED on September 11, 2006.



NORBERT J. GARNEY
UNITED STATES MAGISTRATE JUDGE

NOTICE

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THE FOREGOING REPORT, WITHIN TEN DAYS AFTER BEING SERVED WITH A COPY OF SAME, MAY BAR DE NOVO DETERMINATION BY THE DISTRICT JUDGE OF AN ISSUE COVERED HEREIN AND SHALL BAR APPELLATE REVIEW, EXCEPT UPON GROUNDS OF PLAIN ERROR, OF ANY UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS AS MAY BE ACCEPTED OR ADOPTED BY THE DISTRICT COURT.