

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

LUIS POSADA-CARRILES	§	
	§	
Petitioner,	§	
	§	
v.	§	EP-06-CA-0130-PRM
	§	(Magistrate Judge Norbert J. Garney)
ALFREDO CAMPOS, ET AL.,	§	
	§	
Respondents.	§	

**RESPONDENTS' RESPONSE TO
POSADA'S REPLY TO RESPONDENTS' OBJECTIONS**

The Government's objections to the Magistrate's Report and Recommendation explain in detail the evidentiary shortcomings of Posada's claim that he has satisfied his burden under *Zadvydas v. Davis*, 533 U.S. 678 (2001). Respondent's Objections to the Magistrate Judge's September 11, 2006, Report and Recommendation ("Objections") at 5-9, 12-15. Remarkably, Posada makes no effort to deny or address any of these shortcomings in his Reply, filed on October 6, 2006 ("Reply"). Nowhere does he contend that he pursued all the avenues for obtaining travel documents that he previously pledged to undertake, and nowhere does he explain the stark inconsistencies between his testimony and that of his witness. Because Posada failed to meet his burden of demonstrating no significant likelihood of removal in the reasonably foreseeable future, this Court should deny his habeas petition.

Moreover, the Court should reject Posada's misguided argument that the Department of Homeland Security ("DHS") lacks the authority to detain an alien pending a final decision on whether his release would present serious adverse foreign policy consequences. Under the plain

language of 8 C.F.R. § 241.13(e)(2), a regulation which Posada fails to cite, DHS “shall” detain such an alien. Similarly, the Court should reject Posada’s assertion that DHS is engaged in “dilatory tactics” to detain him longer than the law allows.

1. Posada Failed To Satisfy His Burden of Demonstrating That There Is No Significant Likelihood of Removal in the Reasonably Foreseeable Future.

As explained in the Government’s brief, Posada informed DHS in April 2006 that he had substantial removal prospects with respect to three particular countries, namely El Salvador, Panama, and Honduras. Objections at 6-8. Despite previous unsuccessful attempts to obtain travel documents, Posada insisted that he regarded these countries as promising candidates because he had more than twenty high level government contacts who “will serve to negotiate a deportation.” Exh. M to Government’s Motion to Dismiss (*Supplemental Requirements to Assist in Removal of Luis Posada-Carriles*, April 12, 2006) at 4. Posada then proceeded to list these contacts by name, location, and occupation. Given that many of his contacts reached the highest levels of multiple foreign governments, DHS reasonably credited Posada’s optimism.

At the Magistrate Judge’s hearing, however, he and his witness conceded that they had not fully pursued several of the prospects that Posada had previously identified. *See* Objections at 13-15. For instance, Posada and his witness admitted that they never contacted any of the Panamanian officials Posada had earlier identified. In addition, although they testified that El Salvador denied Posada’s request for travel documents, neither one of them could identify a single Salvadoran official involved in the denial. Nor could they maintain consistency in their stories. Whereas Posada’s witness testified that this refusal occurred in May 2006, Posada

himself advised DHS in July 2006 that he was still waiting to hear from El Salvador. Hearing Tr. at 32.

In his Reply, Posada makes no attempt to address these evidentiary infirmities. Rather, he merely asserts that the Court should relieve him of his *Zadvydas* burden because he has pursued other avenues for obtaining travel documents, which “have all failed.” Objections, at 13; *see also* Petitioner’s Reply to Respondent’s Objections, at 2. Under established case law, however, these limited efforts are insufficient (as is simply offering the Government a list of foreign contacts and expecting DHS to do all the work for the alien). Posada was required to act “to the best of his ability,” *Pelich v. INS*, 329 F.3d 1057, 1061 & n.3 (9th Cir. 2003), and to pursue his own removal “fully and honestly,” *Lema v. INS*, 341 F.3d 853, 857 (9th Cir. 2003); *see also Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (finding, pre-*Zadvydas*, that an alien who opted to “postpon[e] the inevitable” by delaying his removal proceeding “has no constitutional right to remain at large during the ensuing delay”).¹ Because Posada failed to take all actions necessary to comply with his removal order – including actions that he personally pledged to take – he has failed to meet his burden under *Zadvydas*. *See also* 8 U.S.C. §§ 1231(a)(1)(C); 1324d; *Andrade v. Gonzales*, 459 F.3d 538, 543-44 (5th Cir. 2006) (holding that “conclusory statements suggesting that [the alien] will not be immediately removed” do not satisfy his burden under *Zadvydas*); *Balogun v. INS*, 9 F.3d 347, 351 (5th Cir. 1993) (concluding that, if an alien’s conduct furthers a delay in his removal, the alien should not “benefit from that delay”); Objections at 16-17.

¹ For the same reason, Posada is incorrect to suggest that the Government must specifically tell an alien whom to contact, especially where, as here, the alien claims to have his own high-level contacts that will issue travel documents.

Accordingly, the Court should dismiss Posada's habeas petition. At the very least, the Court should grant the Government the rebuttal opportunity envisioned under *Zadvydas* and this Court's decision in *Abdulle v. Gonzales*, 422 F. Supp.2d 774, 779 (W.D. Tex. 2006). See Objections at 17-19.

2. Even If This Court Concludes That There Is No Significant Likelihood of Removal in the Reasonably Foreseeable Future, The Government Has Authority Under the Regulations To Continue To Detain Posada.

In any event, even if the Court were to conclude that Posada has met his burden and that he is not likely to be removed in the reasonably foreseeable future, the Court should not order his release at this time. As Respondents explained in their opening brief, DHS's Headquarters Post-Order Detention Unit (HQPDU) determined that the special circumstances regulation may be applicable here and therefore gave notice to Posada that it has initiated the review procedure in 8 C.F.R. § 241.14(c). Objections at 20-21. Under the regulations, DHS's HQPDU² "shall continue in custody" an alien for whom it has "initiated" custody procedures under § 241.14. 8 C.F.R. § 241.13(b)(2) (emphasis added).

² The regulations refer to the HQPDU as being part of the former Immigration and Naturalization Service (INS). The Homeland Security Act, however, transferred from the INS Commissioner to the Under Secretary for Border and Transportation Security all functions, personnel, assets, and liabilities performed under, among other things, "[t]he detention and removal program." Homeland Security Act of 2002 ("HSA"), § 441(2), Pub. L. No. 107-296, 116 Stat. 2135, 6 U.S.C. § 251(2); *see also* 6 U.S.C. § 552(d) ("References relating to an agency that is transferred to the Department in statutes, Executive orders, rules, regulations, directives, or delegations of authority that precede such transfer or the effective date of this chapter shall be deemed to refer, as appropriate, to the Department, to its officers, employees, or agents, or to its corresponding organizational units or functions."). The Under Secretary's authority was in turn redelegated within the DHS. *See* 8 C.F.R. § 2.1(a). Accordingly, the HQPDU is now part of the DHS.

Misunderstanding the regulations, Posada argues that they do not authorize his detention until the “‘Attorney General or Deputy Attorney General’ certifies the need for continued detention.” Reply at 4. Posada reaches this conclusion, however, only by ignoring the operative regulation, 8 C.F.R. § 241.13(b)(2), cited above, and by overlooking the fact that the regulations expressly contemplate a two-step process. First, “the Service” (now an agency within DHS, *see supra* note 1), “initiate[s] the review procedures” and “provide[s] written notice to the alien.” 8 C.F.R. § 241.13(e)(6). Second, the “Attorney General or Deputy Attorney General”³ consummates the review procedures by certifying in writing, *inter alia*, that the alien’s release is likely to have serious adverse foreign policy consequences for the United States and that no conditions of release can reasonably be expected to avoid these consequences. 8 C.F.R. § 241.14(c). Under the regulations, the HQPDU “shall” detain an alien after the first step, “pending determination[.]” by the high-level official in the second step. 8 C.F.R.

³ The authority to detain an alien under section 241 of the INA, 8 U.S.C. § 1231, has been reasonably understood to have been transferred from the Attorney General to the Secretary of Homeland Security pursuant to 6 U.S.C. §§ 251(2), *see supra* n.2, and § 551(d)(2) (“Upon the transfer of an agency to the Department . . . the Secretary shall have all functions relating to the agency that any other official could by law exercise in relation to the agency immediately before such transfer, and shall have in addition all functions vested in the Secretary by this Act or other law.”). *See Jama v. ICE*, 543 U.S. 335, 338 n.1 (2005) (“On March 1, 2003, the Department of Homeland Security and its Bureau of Border Security assumed responsibility for the removal program. Accordingly, the discretion formerly vested in the Attorney General is now vested in the Secretary of Homeland Security.”) (citations omitted). The Executive Branch has acted in accordance with this understanding since the passage of the HSA. Therefore, the regulations promulgated under § 241 of the INA, including 8 C.F.R. § 241.14, should now be construed as requiring a certification from the Secretary of Homeland Security, rather than from the Attorney General. *See* 6 U.S.C. § 552(d).

§ 241.13(b)(2)(i). Accordingly, because the regulatory procedures are being followed, DHS can continue to detain Posada even if the Court were to conclude that there is no significant likelihood of removal in the reasonably foreseeable future.

Finally, the Court should reject Posada's premature and speculative concerns that DHS would detain him for "months or even years" if detention were permissible pending a certification. Reply at 5. As of now, DHS has not detained Posada for a single day under such authority, let alone for an unreasonable length of time. Posada is still detained under the basic authority to detain aliens with final removal orders who are likely to be removed in the reasonably foreseeable future. *See* 8 U.S.C. § 1231; 8 C.F.R. §§ 241.3 & 241.4; and Attachment A (October 5, 2006, ICE Interim Decision To Continue Custody) to Respondents' Objections to the Magistrate Judge's September 11, 2006, Report and Recommendation (filed October 5, 2006).

Additionally, rather than demonstrating an intent to prolong the detention, DHS has acted expeditiously and reasonably. First, it elected to initiate the process described in 8 C.F.R. § 241.14(c) in advance of a court determination that Posada has met his *Zadvydas* burden, and even before DHS completed its own internal review of the likelihood of removal. Under neither the regulations nor *Zadvydas*, was it required to do so. *See* 8 C.F.R. § 241.13(e)(6) ("In appropriate cases, the Service *may* initiate review proceedings under § 241.14 before completing the HQPDU review under this section.") (emphasis added); *Zadvydas* 533 U.S. at 699-70 ("if removal is not reasonably foreseeable" continued detention would be unreasonable) (emphasis added); *Id.* at 700 (courts must "grant the government appropriate leeway where its judgments rest upon foreign policy expertise"). Second, DHS promptly issued Posada notice of the

commencement of the process and provided him a week (until October 13, 2006) to respond to its Interim Decision to Continue Custody. These proactive, short term, and expeditious preparations evidence no indefinite decisional process. Posada's "dilatory tactic[s]" charge is groundless, and the arguments in his reply must be rejected.

Respectfully submitted,

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/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2006, copies of Respondents' Response to Posada's Reply to Respondents' Objections were served upon opposing counsel of record Felipe D.J. Millan electronically through CM/ECF, and served upon Eduardo Soto, Esq. at his fax number, (305) 529-0445.

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