District Judge James L. Robart
Magistrate Judge Mary Alice Theiler

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VINCENT FREDRICS BANDA Petitioner, v. KIRSTJEN NIELSEN, *et al.*, Respondents.	CASE NO. C18-1841 JLR-MAT RESPONDENTS' RETURN MEMORANDUM AND MOTION TO DISMISS **Noted for consideration: February 22, 2019**

I. INTRODUCTION

Respondents, by and through their undersigned counsel of record, Brian T. Moran, United States Attorney for the Western District of Washington, and Priscilla T. Chan, Assistant United States Attorney for said District, respectfully submit this Return Memorandum and Motion to Dismiss this Petition for Writ of Habeas Corpus (Dkt. No. 1). Petitioner Vincent Fredrics Banda ("Petitioner") is an arriving alien from Malawi who is currently detained under Section 235(b)(1) of the Immigration and Nationality Act ("INA"), as an alien who attempted to enter the United States without valid entry documents. Exhibit A of the Declaration of Priscilla T. Chan ("Chan Decl."), submitted herewith. Petitioner claims he is entitled to a bond hearing based on prolonged detention based on ICE's efforts to secure him a Chichewa interpreter during his removal proceedings. Petition at pp. 13-16, Dkt.1. Petitioner's habeas should be dismissed for lack of

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merit because he has received all the benefits of due process to which he is entitled. Specifically, under the Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018), detention is mandatory for arriving aliens such as Petitioner, pending "further consideration of the application for asylum." Because Petitioner's asylum and removal proceedings are not yet complete, and because he has been afforded all the benefit of due process entitled to him, his continued detention is statutorily authorized and required. Accordingly, his habeas petition should be dismissed.

II. FACTS

Petitioner is a native and citizen of Malawi. Declaration of Deportation Officer ("DO") Gerardo T. Carranza ("Decl. of Carranza"), at ¶ 3, submitted herewith. On September 14, 2017, Petitioner submitted a nonimmigrant visa application ("DS160") to the Department of State, written in English. *Id*. at ¶ 4. In response to a list of languages spoken, Petitioner listed only English. *Id*. Petitioner indicated his purpose for travel to the United States was for tourism and that he planned to stay at an address in Parkway, Minnesota with a contact listed as Calla Brown. *Id*. On or about September 20, 2017, Petitioner was interviewed in connection with his nonimmigrant visa at the United States Embassy in Lilongwe, Malawi. *Id*. at ¶ 5. The interview was conducted in English, which is the official language of Malawi. *Id*. According to the interviewing officer's recorded remarks, Petitioner indicated his intent to visit Ms. Brown in Minnesota for two weeks and that he met her when she worked at a local Malawian hospital where Petitioner supplied food. *Id*. Petitioner's visa was thereupon approved and he was issued a B1/B2 nonimmigrant visa on September 21, 2017. *Id*.

On November 8, 2017, Petitioner attempted to enter the United States at the Seattle-Tacoma International Airport port of entry. *Id.* at ¶ 6; *see also* I-213 Deportable/Inadmissible

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Alien, attached as Exhibit B of the Chan Decl. Petitioner presented his Malawi passport containing the B1/B2 visa to the Inspecting Officer from Customs and Border Protection ("CBPO") along with a Customs Form 6059B, which had been completed in English. Carranza Decl. at ¶ 6. Petitioner told the CBPO that he wanted to travel to the United States to see his friend, Calla Brown, in Minnesota. *Id.* Petitioner presented the CBPO with an invitation letter, written in English, purportedly written by Calla Brown, along with a copy of the facepage of Ms. Brown's United States passport. *Id.*, *see also* Letter from Calla Brown, attached as Exhibit C of the Chan Decl. CBPO determined that Petitioner warranted further inspection and referred him to passport control secondary accordingly. Carranza Decl. at ¶ 6.

While subject to immigration inspection, Petitioner was given instructions in English and indicated his understanding of what was said to him and swore an oath to tell the truth during that interview. Record of Sworn Statement, attached as Ex. D of the Chan Decl; Carranza Decl. at ¶ 7. During that interview, Petitioner repeated the claim that he knew Ms. Brown; that he had met her in Malawi; and that she had sent him the invitation letter that he used to obtain his nonimmigrant visa. *Id*. at ¶ 7. However, when CBPO officials contacted Ms. Brown to verify Petitioner's story, she denied ever having written the letter, meeting Petitioner or inviting him to visit. *Id*. Ms. Brown did acknowledge that she had previously been an aid worker in Malawi, but did not know Petitioner, had not invited him to visit her in the United States, and had not provided him with a copy of her passport. *Id.* When confronted with this information, Petitioner continued to maintain to the CBPO that Calla Brown had sent the invitation letter. *Id.* At the conclusion of the interview, Petitioner claimed fear of return to Malawi. *Id.* Based on the totality of the evidence, CBP determined that Petitioner was inadmissible into the United States pursuant to Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA"), as amended, as an immigrant

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who is not in possession of valid unexpired immigrant visa at the time of application for admission. *Id.* As Petitioner had expressed fear of returning to Malawi, Petitioner was transferred to ICE custody at the Northwest Detention Center ("NWDC") the same day. *Id.*

ICE referred Petitioner's credible fear claim to the United States Citizenship and Immigration Services ("USCIS"). *Id.* at ¶ 8. By regulation, credible fear interviews are conducted by Asylum Officers from USCIS. *Id.* USCIS is the sole agency responsible for scheduling and conducting credible fear interviews. *Id.* As part of this process, USCIS contracts with various professional language interpretation services to provide telephonic interpretation for credible fear interviews. *Id.* USCIS conducts credible fear interviews at the NWDC for detainees housed at the facility. *Id.* With the exception of forwarding credible fear claims to USCIS for scheduling, ICE is not involved in the credible fear process. *Id.*

On November 8, 2017, Petitioner was placed in ICE's custody. Ex. E of the Chan Decl. He was also provided English instructions about requesting parole from detention and indicated he understood those instructions. Ex. F of the Chan Decl. ICE then served him with an expedited removal order and later, a Notice to Appear ("NTA"), charging him with removability under Section 212(a)(7)(A)(i)(l) of the INA as an immigrant who, at the time of admission, was not in possession of a valid unexpired entry document. Exs. G and H of the Chan Decl.

On or about November 22, 2017, Petitioner was scheduled for a credible fear interview with USCIS. Carranza Decl. at ¶ 9. Although the record does not reflect that Petitioner requested Chichewan interpreter services at that time, an immigration official noted in a file memo that for Petitioner's benefit, the credible fear interview would need to be conducted in Chichewan. Ex. I of the Chan Decl. However, according to the officer, "[t]he primary, secondary, and tertiary language services, Transperfect, Language Line and Lionbridge . . informed the asylum office that

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they did not have a Chichewan interpreter." *Id.* For that reason, ICE issued an NTA to avoid "an undue delay in the processing of the case and to afford the applicant all possible avenues to have his claim of fear heard." *Id.*; Carranza Decl. at ¶ 10.

On January 9, 2018, Petitioner appeared for his master calendar hearing ("MCH"). Ex. J of the Chan Decl.; Carranza Decl. at ¶ 11. The purpose of the MCH was to set the matter for trial on the individual calendar so that admissibility and removability could be decided. The Immigration Judge ("IJ") continued the MCH to February 20, 2018, in order to secure Chichewa interpretation services for Petitioner.[1] Carranza Decl. at ¶ 11.

On February 20, 2018, a Nyanja[2] interpreter was present telephonically to provide translation services for Petitioner's master calendar hearing. *Id.* at ¶ 13. However, Petitioner had difficulty understanding the interpreter and the Immigration Court ordered a continuance to April 9, 2018, to secure a different interpreter. *Id.*

On March 7, 2018, Petitioner was scheduled for a bond hearing, which was conducted in English. The IJ concluded Petitioner was ineligible for a bond hearing as an arriving alien. *Id.* at ¶¶ 14-15. Exs. K and L of the Chan Decl. Petitioner had until April 6, 2018 to file an appeal. *Id.* Petitioner waived appeal. *Id.*

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[1] The Department of Justice, Executive Office for Immigration Review ("EOIR") is the sole agency responsible for arranging interpretation services for Immigration Court hearings. To this end, EOIR contracts with various professional interpretation services to provide both telephonic and in-person interpretation services. Each Immigration Court arranges for the scheduling of interpreters. The record does not therefore reflect the specific availability, procedures, or efforts made by EOIR to secure a Chichewa interpreter for Petitioner's case. Carranza Decl. at ¶ 12.

[2] As explained by the Immigration Judge at the October 31, 2018 hearing and confirmed by the Department's research, Chichewa is a Bantu language spoken in parts of Malawi. It is also spoken in Zimbabwe, where the language is known as Nyanja or Chinyanja. Chichewa and Nyanja are considered the same language, however, there can be some local variants that differ. *See* https://www.omniglot.com/writing/chichewa.php; https://www.ethnologue.com/language/nya. Review of the recordings indicates that the Immigration Judge has referred to the language of Petitioner's case as Nyanja with the understanding that it is the same language as Chichewa.

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At the master calendar hearing on April 9, 2018, Petitioner entered pleadings through a Nyanja interpreter. Carranza Decl. at ¶ 16. Petitioner denied the allegation contained in the NTA, alleging that he did not possess or present a valid immigrant visa, reentry permit, border crossing card or other valid entry docket, and denied the charge of inadmissibility. *Id.* The case was continued to April 24, 2018, at ICE's request to determine if it wished to amend the NTA, provide additional evidence, or set for a contested removal hearing. *Id*.

At the master calendar hearing on April 24, 2018, a Nyanja interpreter was provided by the Immigration Court. At that time, the Department informed the Immigration Court that it would not be amending the charge and the case was set to a contested removal hearing on May 29, 2018 for the sole purpose of addressing the charge of inadmissibility. *Id*. at ¶ 17.

On or about May 4, 2018, Petitioner requested voluntary departure or expedited removal, stating that he was "unwilling to prosecute [his] case." Ex. M of the Chan Decl.; *see also* Carranza Decl. at ¶ 18. If voluntary departure was denied, Petitioner desired to waive his rights to an attorney or to call witnesses. Ex. K. He also sought to have an order of removal entered deporting him to Malawi. *Id.*

On May 21, 2018, Petitioner filed an application for asylum. Carranza Decl. at ¶ 19.

On May 29, 2018, Petitioner was scheduled for a contested removal hearing, however, a Chichewa interpreter was not available. *Id.* at ¶ 20. The Immigration Judge had a discussion with Petitioner in English about the possibility of proceeding in English, but Petitioner chose to continue to proceed in Chichewa. *Id.* The case was therefore reset to October 31, 2018, for a Chichewa interpreter. *Id*.

At the October 31, 2018 hearing, EOIR secured and scheduled a telephonic Nyanja interpreter. However, for unknown reasons outside the control of EOIR, the scheduled interpreter

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failed to answer the phone after repeated attempts to contact her. Carranza Decl. at ¶ 21. An alternate interpreter was not available on that date. *Id.* The case was therefore reset to February 25, 2019. *Id.*

In light of the current litigation, ICE inquired from EOIR as to whether a Chichewa/Nyanja interpreter has been secured for the upcoming hearing. *Id.* at ¶ 22. EOIR confirmed that it has secured an in-person Chichewa/Nyanja interpreter, who will be flown in for a hearing on the afternoon of either February 26, 2019 or February 27, 2019. *Id.*

III. ANALYSIS

A. ICE Has Authority to Detain Arriving Aliens Pursuant to Section 235(b) of the INA.

1. Arriving Aliens under Section 235(b) of the INA.

Section 235(b) governs the detention of "aliens arriving in the United States," and mandates the detention of "arriving aliens" who, like Petitioner, do not possess valid entry or travel documents when they arrive. Section 235(b) provides that arriving aliens are inspected immediately upon arriving in the United States by an immigration officer, and that if the officer determines that the alien is inadmissible because the alien cannot produce valid entry documents, *see* 8 U.S.C. § 1182(a)(7), "the officer shall order the alien removed from the United States without further hearing or review." 8 C.F.R. § 1235.3(b)(1)(i), (b)(2)(ii) (providing that arriving aliens subject to expedited removal are not entitled to a hearing or appeal of this decision).

If, however, the alien "indicates an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer." INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii); *see* 8 C.F.R. § 235.3(b)(4) ("If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further

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with removal of the alien until the alien has been referred for an interview by an asylum officer."). Should the asylum officer determine that the alien has a credible fear of persecution, the alien "shall be detained for further consideration of the application for asylum." INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii). If the alien receives a positive credible fear determination, the alien will be placed in removal proceedings. 8 C.F.R. § 235.6(a)(1)(ii). The alien, however, remains detained pursuant to 8 U.S.C. § 1225(b) during the pendency of these proceedings.

Parole from detention is the only status which permits an alien's release from Section 235(b) custody. Specifically, Section 212(d)(5)(A) of the INA provides that:

> The Attorney General may in his discretion, parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A)(emphasis added). Decisions under section 212 are purely discretionary and the regulations prevent an immigration judge from "redetermin[ing] conditions of custody" with respect to certain classes of aliens, including "[a]rriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act." 8 C.F.R. § 1003.19(h)(2)(i)(B).

Here, Petitioner entered the United States on November 8, 2017, without valid, unexpired entry documents, and was declared inadmissible on that basis. Carranza Decl. at ¶ 7; Exs. G and H of the Chan Decl. ICE has authority to detain Petitioner because he is arriving alien detained pending a determination on his credible fear claim. *Id.* at ¶ 8; Exs. E and F of the Chan Decl.

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Furthermore, because parole from detention falls solely within the discretion of ICE, an immigration court lacks jurisdiction over custody determinations.

B. Petitioner's Continued Detention is Lawful Pursuant to *Jennings v. Rodriguez*.

1. Under *Jennings*, there is no implicit limit to the length of detention and no entitlement to periodic bond hearings.

The Ninth Circuit previously held in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), that Section 235(b) contained an implicit six-month limitation on the length of detention which entitled aliens detained under that provision to periodic bond hearings. *Id*. However, the Supreme Court in *Jennings* overruled *Rodriguez*, holding instead that "nothing in the statutory text imposes any limit on the length of detention. And neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings." *Jennings*, 138 S.Ct. at 842. *Jennings* also explicitly held that, with respect to arriving aliens like Petitioner, detained pending removal proceedings and consideration of their asylum claims, "Section 1225(b)(1) mandates detention 'for further consideration of the application for asylum,' § 1225(b)(1)(B)(ii) and § 1225(b)(2) requires detention 'for [removal proceeding,' § 1225(b)(2)(A)." *Id*. at 844. The Court found that the "plain meaning of those phrases is that detention must continue until immigration officers have finished 'consider[ing]' the application for asylum . . . or until removal proceedings have concluded . . . ." *Id*.

Here, ICE has continued authority to detain Petitioner because his removal proceedings are ongoing and have not yet concluded. Specifically, his individual calendar hearing is scheduled for February 26 or 27, 2019 (depending on the availability of the Chichewa/Nyanja interpreter), at which time the IJ will consider the charges of inadmissibility and removal. Carranza Decl. at ¶ 22. Although denied for lack of jurisdiction under section 235(b)(1) of the INA, Petitioner did receive a bond hearing before an IJ on March 7, 2018. Pursuant to *Jennings*, Petitioner is not entitled to

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multiple periodic automatic bond hearings thereafter. *Jennings*, 138 S.Ct. at 842. Petitioner could have appealed the bond determination but chose to waive his appeal instead, thus failing to exhaust his administrative remedies as available under 8 C.F.R. § 1003.19(e). *See also Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011) (requirement of exhaustion); *but see Liang v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (futility is grounds for waiver). For these reasons, the Court should dismiss Petitioner's claim that his continued detention is unlawful pending removal proceedings.

2. Petitioner has been afforded all the benefits of due process to which he is entitled.

The Court should also dismiss Petitioner's claim that his due process rights have been violated on the basis of prolonged detention. Respondents acknowledge that Petitioner's detention has been lengthy; however the length of his detention, alone, does not violate due process. Under the Supreme Court's *Mathews* analysis, "[d]ue process is flexible and calls for procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The three-part test articulated in *Mathews* requires considering (1) the private interest affected, (2) the government's interest, and (3) the value added by alternative procedural safeguards to what has already been provided in the particular situation before the court. *Id*. at 334-335; *see also Soto v. Sessions*, 2018 WL 3619727 at *3-4 (N.D. Cal. Jul. 30, 2018) (applying *Mathews v. Eldridge*).

a. Petitioner's interest.

Applying the *Mathews* test, Petitioner's right of due process has not been violated. Petitioner presented what ICE concluded were fraudulent documents in order to gain entry into the country. Carranza Decl. at ¶ 7. He expressed a credible fear of returning to Malawi and was served with an NTA which promptly placed him in removal proceedings. *Id.* at ¶¶ 8-10. The record reflects that Petitioner has been afforded many opportunities to be heard. Specifically,

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Petitioner has been provided notices and has appeared in approximately nine master calendar, individual calendar and bond hearings. *Id*. at ¶¶ 11-21. Petitioner chose not to appeal the denial of bond.

In regards to Petitioner's ability to understand his proceedings, English is an official language of Malawi, as evidenced by Petitioner's election to proceed in English at times, specifically during his interview with CBPO during immigration inspection on November 8, 2017, at his March 7, 2018 bond hearing, in papers filed on May 4, 2018 requesting voluntary departure and in his application for asylum filed on May 21, 2018. *See* Carranza Decl. at ¶¶ 6-18.

Even so and although fairly proficient in English, as evidenced during hearings, interviews and in submitted documents, a Chichewa/Nyanja interpreter was present in person or telephonically during about three of the six hearings in which Petitioner requested interpreter services. *Id*. Unfortunately, due to factors outside of ICE's control, some hearings had to be postponed because a Chichewa/Nyanja interpreter was unavailable or failed to appear. For that reason, ICE has asked EOIR about ensuring that such services will be provided at Petitioner's next hearing. *Id*. at ¶ 22. EOIR has confirmed that a Chichewa/Nyanja interpreter will be flown in for a hearing on February 26 or 27, 2019. *Id*.

Although lengthy, Petitioner's detention is also not indefinite. Once a decision is made on Petitioner's asylum and removal order, he will either be granted asylum or subject to a final removal order. Furthermore, courts have declined to recognize an implicit limit on the duration of detention for arriving aliens detained pending removal proceedings, contrary to what was afforded to aliens detained under Section 241 of the INA under *Zadvydas v. Davis*, 533 U.S. 678 (2001). Rather, courts have expressly held that there are no such limitations imposed on aliens detained under Section 235(b)(1). *Jennings*, 138 S.Ct. at 842; *Soto*, 2018 WL 3619727 at *3-4 (finding

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detention not indefinite); *see also Hurtado-Romero v. Sessions*, 2018 WL 2234500, at *3 (N.D. Cal. May 16, 2018) (distinguishing implicit limit under Section 241(a)(6) with lack of express exemption for detention under Section 235(b)); *Sied v. Nielsen*, 2018 WL 1876907, at *5 (N.D. Cal. Apr. 19, 2018)(same).

b. Respondents' interest and alternative procedural safeguards.

Respondents' interest in securing Petitioner's presence for removal is established by Section 235(b)(1) of the INA, the applicable regulations and most recently, in *Jennings*. Furthermore, the provision of an interpreter in the language of Chichewa/Nyenja is not entirely within Respondents' control especially in light of the scarcity of available and competent interpreters. To hold Respondents solely accountable for any delays of this kind would be unduly burdensome and prejudicial to Respondents. Even so, Respondents have inquired of EOIR and have confirmed that a Chichewa/Nyanja interpreter will be present at Petitioner's next scheduled hearing. There are no alternative procedural safeguards that are necessary other than what has already been provided in this case. *Mathews*, 424 U.S. at 334-335. For these reasons, Petitioner habeas petition should be dismissed because he has been afforded all the rights of due process to which he is entitled.

IV. CONCLUSION

Based on the foregoing, Respondents respectfully requests that the Court deny Petitioner's habeas petition and grant their motion to dismiss.

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DATED this 28th day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of the United States Attorney for the Western District of Washington and am a person of such age and discretion as to be competent to serve papers;

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I hereby certify that on this date, I mailed the foregoing to the following non-CM/ECF participants via USPS mail, postage pre-paid:

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Dated this 28th day of January, 2019.

s/ Caitlin Froelich

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