UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TERESA CHIMBO,	:	
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Petitioner,	:	No. 3:04cv1671 (MRK)
	:	
v.	:	
	:	
SECRETARY of the DEPARTMENT of HOMELAND SECURITY, et al.	:	
	:	
Respondents.	:	

MEMORANDUM OF DECISION

Pending before the Court is Petitioner Teresa Chimbo's Petition for Writ of Habeas Corpus [doc. # 1]. Though the factual circumstances surrounding Ms. Chimbo's current detention are particularly heart-wrenching, the Court believes it must DENY Ms. Chimbo's Petition at this time.

I.

Ms. Chimbo, a citizen and native of Ecuador, entered the United States illegally without inspection in March 1995. Because Ms. Chimbo entered without inspection, she is considered an inadmissible alien. The Immigration and Naturalization Service (INS) later began immigration proceedings against Ms. Chimbo, and on April 25, 1995, Ms. Chimbo was served with an Order to Show Cause and Notice to Appear (the "Show Cause Order") for a deportation hearing scheduled for October 11, 1995 in New York City. The INS officer who personally served the Show Cause Order on Ms. Chimbo certified that it was read to Ms. Chimbo in Spanish, and Ms. Chimbo acknowledged receipt of the Show Cause Order, the text of which was written in both Spanish and English. *See* Ex. A [doc. #13]. The Show Cause Order not only set the time and

place of the hearing (in both English and Spanish), but it also contained a detailed explanation, also in both English and Spanish, of Ms. Chimbo's rights and the consequences of failing to appear at the hearing. In particular, the Show Cause Order states, in both English and Spanish, the following: "**You are required to be present at your deportation hearing prepared to proceed.** If you fail to appear at any hearing after having been given written notice of the date, time and location, you will be ordered deported **in your absence**." *Id*. at 4 (emphasis in original). The Show Cause Order also states: "If you choose to seek judicial review of a deportation order entered **in your absence**, you must file the petition for review within 60 days . . . after the date of the final order . . ." *Id*. (emphasis in original).

Ms. Chimbo did not appear for her deportation hearing on October 11, 1995, and deportation proceedings were held *in absentia*. On October 12, 1995, an Immigration Judge issued a ruling finding that Ms. Chimbo "was duly notified of the time and place of the hearing but without reasonable cause failed to appear." Ex. C [doc. #13]. He also concluded based upon the record before him that "deportability ha[d] been established by evidence which is clear, convincing and unequivocal," and as a consequence he ordered Ms. Chimbo to be deported to Ecuador. *Id.* A copy of the deportation order and a letter advising Ms. Chimbo of her right to seek to reopen the matter, *see* Letter of 10/12/95, Ex. C [doc. #13], was mailed to the address of record that Ms. Chimbo had provided the INS at the time the Show Cause Order was personally served on her. On November 8, 1995, the INS sent Ms. Chimbo another letter to the same address advising her that she had been ordered deported to Ecuador and that she should report for deportation. *See* Letter of 11/08/95, Ex. C [doc. #13]. On January 8, 1997, another notice was mailed to Ms. Chimbo's address of record advising her to report to the INS for deportation to

Ecuador. *See* Letter of 01/08/97, Ex. D [doc. #13].

Ms. Chimbo did not report to the INS for deportation to Ecuador and she did not appeal or otherwise contest her deportation order. For nine years following entry of the deportation order, Ms. Chimbo remained in the United States as an inadmissible alien subject to a final order of deportation. In April 2001, Ms. Chimbo remarried her former husband, José Chimbo. Mr. and Mrs. Chimbo have four children, two of whom are United States citizens and the latest of whom, a son, was born in July 2004. Mr. Chimbo was granted permanent residency status on September 27, 2004.

On September 14, 2004, Ms. Chimbo visited a Bureau of Immigration and Customs Enforcement (BICE) office in Hartford in connection with her request to adjust her status based upon her husband's anticipated permanent residency status. In connection with its review of that request, BICE learned that Ms. Chimbo was subject to a final order of deportation, and as a consequence, she was immediately taken into custody. On the basis of the 1995 deportation order, Ms. Chimbo has been detained in INS custody since September 14. On October 4, 2004, Ms. Chimbo filed an Emergency Motion to Reopen her deportation order with immigration officials in New York, claiming that she did not receive oral notice in her native language of her deportation hearing. *See* Ex. F [doc. #13]. The filing of the Emergency Motion to Reopen automatically stayed Ms. Chimbo's removal. 8 C.F.R. § 1003.23(b)(4)(ii).

The next day, October 5, 2004, Ms. Chimbo filed in this Court a Petition for Habeas Corpus challenging her deportation order and eligibility for immigration benefits. At the same time, she filed an Emergency Motion to Stay Deportation [doc. # 3]. After a telephonic on-the-record conference with counsel for the parties on October 6, 2004, during which an Assistant

United States Attorney assured the Court that Ms. Chimbo's deportation was stayed because of her Emergency Motion to Reopen and that in any event Respondents would give the Court and Ms. Chimbo's counsel 72-hours advance notice before any deportation, the Court deferred ruling on her stay application and entered an Order to Show Cause [doc. #6] ordering briefing on both the Petition and stay application. Thereafter, the parties filed two sets of supplemental briefs[1] and the Court heard arguments from counsel on the merits of the Ms. Chimbo's requests during on-the-record telephonic conferences on October 26, 2004 [doc. #14] and October 27, 2004 [doc. #15]. In view of the fact that Ms. Chimbo had been separated from her young son and that even the Government conceded that she did not appear to be a flight risk, the Court asked Respondents, through the Assistant United States Attorney, to voluntarily provide Ms. Chimbo a bail hearing during the pendency of her Emergency Motion to Reopen.

On October 14, 2004, an Immigration Judge denied Ms. Chimbo's Emergency Motion to Reopen because he found from the face of the Show Cause Order itself that Ms. Chimbo had in fact received oral notice in Spanish, her native language, regarding the deportation hearing and that she had acknowledged receipt of the hearing notice. *See* Ex. G [doc. #13]. On October 26, the Assistant United States Attorney reported to the Court that Respondents were unwilling voluntarily to provide Ms. Chimbo with a bail hearing because her Emergency Motion to Reopen had now been denied on the basis that she had, in fact, received notice of her deportation hearing and because Ms. Chimbo was not entitled to a bail hearing under governing law. Ms. Chimbo recently filed a Motion to Reconsider the denial of her Emergency Motion to Reopen. *See* Ex. A

[1] The filings consist of: Resp. Response to Pet. [doc. ##8-9]; Pet. Response [doc. #10]; Pet. Supp. Response [doc. #12]; Resp. Supp. Response [doc. #13]; and Pet. Second Supp. Response [doc. #16].

[doc. #16]. She also represents that she intends to appeal the denial of her Emergency Motion to Reopen to the Bureau of Immigration Appeals ("BIA") and that she intends to pursue both an adjustment of status on the basis of her husband's permanent residency status and a waiver of inadmissibility. In the meantime, she remains detained by the INS.

II.

Ms. Chimbo advances three claims in her Petition and supplemental briefing. First, she argues that her 1995 deportation order was unconstitutional because she did not have notice of her deportation hearing. Second, Ms. Chimbo argues that even if the 1995 deportation order was constitutional, her continued detention is unconstitutional because she is entitled to a waiver of inadmissibility and to adjust her status based upon her husband's permanent residency status. Finally, Ms. Chimbo asserts that Respondents are violating her constitutional rights by continuing to detain her and refusing to provide her with a bail hearing while she pursues her administrative and court remedies in an effort to reopen her deportation order and to adjust her status. The Court will address each argument in turn.

A.

There is no question that the Due Process Clause of the Fifth Amendment protects aliens in deportation proceedings and requires notice of deportation proceedings. *See Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950)) (due process rights of aliens includes the right to notice of the deportation hearing that is "reasonably calculated to reach interested parties"); *Fuentes-Argueta v. INS*, 101 F.3d 867, 872 (2d Cir. 1996) (same); *Ying Fong v. Ashcroft*, 317 F. Supp. 2d 398, 405 (S.D.N.Y. 2004) (also applying notice requirements of *Mullane* to deportation proceedings); *United States*

v. Perez-Valdera, 899 F. Supp.181, 184 (S.D.N.Y. 1995) (same). However, it is also clear that if Ms. Chimbo received notice in her native language regarding her deportation hearing – as Immigration Judges found in both 1995 and most recently in connection with her Emergency Motion to Reopen – then her deportation order would be constitutional even though it was entered *in absentia*. *See Fuentes-Argueta*, 101 F.3d at 872 (*in absentia* deportation after notice provided according to requirements of Immigration and Nationality Act (INA) § 242B, comports with due process).

Although Ms. Chimbo initially claimed that she did not receive notice of the date and location of her deportation hearing, it now appears from the record (which Ms. Chimbo does not dispute) that she was personally served with the Show Cause Order and that it was read to her in Spanish. *See* Pet. Supp. Brief. [doc. #12] at 1. It is also conceded that the Show Cause Order contained notice of the date, time and place for her hearing and the consequences of a failure to appear. Nor does Ms. Chimbo dispute that on October 12, 2004, the INS mailed to Ms. Chimbo, at the address she had provided the INS, a copy of the deportation order that had been entered *in absentia.* Nevertheless, Ms. Chimbo asserts that she is "not completely literate in the Spanish language", *see* Pet. Supp. Response [doc. #12] at 2, and that there is "no clear evidence that the officer who claimed to have read the document in Spanish was competent to do so," *see* Pet. Second Supp. Response [doc. #16] at 5.

As a threshold matter, the Court agrees with Respondents that this Court lacks jurisdiction to review the substance of Ms. Chimbo's challenge to her 1995 deportation order because she has failed to exhaust her administrative remedies. Section 242(d) of the INA requires exhaustion in order to challenge "final orders of removal." 8 U.S.C. § 1252(d).

Moreover, the Second Circuit recently held, "by its plain language, § 1252(d)'s mandate that unless a petitioner has exhausted all administrative remedies available, a court may [not] review a final order of removal, applies to all forms of review including habeas corpus." *See Theodoroplous v. INS*, 358 F.3d 162, 171-72 (2d Cir. 2004) (internal citation and quotations omitted) (also stating that since § 1252(d) is a statutory exhaustion requirement, the common law exceptions "are simply not available"); *Johnson v. Ashcroft*, 378 F.3d 164 (2d Cir. 2004) (same). Ms. Chimbo concedes that she did not timely appeal her final order of deportation to the BIA. To the extent that Ms. Chimbo asserts that her failure to take a timely appeal should not be deemed a failure to exhaust remedies due to an alleged defective notice of the deportation hearing,[2] she has already filed a motion to reopen her immigration proceedings based on that identical ground. *See* Pet. Emergency Mot. to Reopen, Ex. F [doc. # 11].[3] While an Immigration Judge has denied Ms. Chimbo's motion, concluding that she had in fact received sufficient notice, she has asked for reconsideration of the judge's ruling and has also represented that she intends to appeal that ruling to the BIA, as is her right. As a consequence, Ms. Chimbo has not as yet exhausted her administrative remedies regarding her 1995 deportation order.

Indeed, Ms. Chimbo herself asserts that "[d]enial of the Motion to Reopen is not the final administrative decision on the matter." Pet. Second Supp. Response [doc. #16] at 1. The Court

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[2] *See* 8 C.F.R. Section 3.23(b)(4)(iii) (an order entered *in absentia* in deportation or exclusion proceedings may be rescinded upon a motion to reopen filed "[a]t any time if the alien demonstrates that he or she did not receive notice. . .").

[3] "Once an order of removal is entered *in absentia*, it may be rescinded only upon a motion to reopen if the alien demonstrates that the failure to appear was due to exceptional circumstances or was due to his failure to receive notice." *Webb v. Weiss*, 69 F. Supp. 2d 335, 338 (D. Conn. 1999).

agrees with Ms. Chimbo's statement. But that simply underscores that she has not yet exhausted her administrative remedies regarding the validity of the notice of her deportation hearing. *See Pichardo v. Ashcroft*, 374 F.3d 46, 52 (2d Cir. 2004) (holding that exhaustion requires a party to pursue all administrative relief within the deciding agency before seeking federal judicial review) (citing *Theodoropoulos,* 358 F.3d at 171-72) .[4]

Even if the Court had jurisdiction to consider Ms. Chimbo's constitutional challenge to her final order of deportation, on the basis of the present record, the Court could not conclude that Ms. Chimbo's constitutional rights were violated. As the Court explained above, if Ms. Chimbo received notice of her deportation hearing, her *in absentia* deportation order complies with the Constitution. *See Gurung v. Ashcroft*, 371 F.3d 718, 721 (10th Cir. 2004) ("It is well-settled [under the statute] that if an alien is provided proper written notice of a removal hearing and fails to attend, the immigration judge is *required* to enter an *in absentia* order of removal . . . notice that meets statutory requirements also fulfills the due-process protections accorded to aliens in exclusion proceedings.") (emphasis added) (internal quotations removed).

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[4] The Court notes that a motion to reopen is a request for discretionary relief. There is some authority suggesting that requests for discretionary relief are not subject to the exhaustion requirements of § 1252(d). *See Ying Fong*, 317 F. Supp. 2d at 407-08 (motion to reopen not subject to exhaustion requirement because it is not a remedy that is available "by right"); *Zhang v. Reno*, 27 F. Supp. 2d 476, 477 (S.D.N.Y. 1998) (same, citing *Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994)). The Second Circuit has not squarely addressed this issue regarding §1252(d). However, with respect to a similar exhaustion requirement in 8 U.S.C. § 1105a(c), the Second Circuit has held that even though exhaustion through the filing of a motion to reopen is not statutorily required, there are prudential reasons that militate against deciding an issue that is currently subject to review by the immigration courts. *See Arango-Aradondo,*13 F.3d at 614 (declining to decide an issue that could be addressed on a motion to reopen until the BIA had an opportunity to consider it, in order to avoid any premature interference with agency processes). *See also Hernandez v. Reno*, 238 F.3d 50, 54-55 (1st Cir. 2001) (stating that a "court is free to require exhaustion" such as filing of a motion to reopen in circumstances likes these, not because it is statutorily required, "but simply because it makes sense").

Applying the Supreme Court's *Mullane* decision to immigration proceedings, courts have concluded that due process requires service that is "conducted in a manner reasonably calculated to ensure that notice reaches the alien." *Gurung,* 371 F.3d at 721 (internal citation and quotation omitted) (citing *Farhoud*, 122 F.3d at 796). A survey of the case law in the various circuits makes clear that the notice Ms. Chimbo received (both oral and written notice, in both English and Spanish) surpasses the minimum requirements of due process. *See Khan v. Ashcroft*, 374 F.3d 825, 828-29 (9th Cir. 2004) ("Our case law has made clear that actual notice of a hearing is not always required to satisfy the requirements of due process . . . Actual notice is, however, sufficient to meet due process requirements.") (internal citations omitted); *Dominguez v. United States Attorney General*, 284 F.2d 1258, 1259-60 (11th Cir. 2002) (alien's due process rights were not violated when the INS sent notice of a removal hearing by regular mail to an address that the alien had provided several years earlier); *Fuentes-Argueta v. INS*, 101 F.3d 876, 872 (2d Cir. 1996) (no per se due process violation where a notice of deportation proceedings was returned unclaimed); *United States v. Estrada-Trochez*, 66 F.3d 733, 735-36 & n.1 (5th Cir. 1995) (due process satisfied where notice of deportation hearing, sent to alien by first-class mail, was returned because alien had moved without providing forwarding address).

Ms. Chimbo asserts that the notice she received was defective based on the language in which it was provided. Given that some courts have held that due process does not even require an alien physically to receive a notice of deportation, *see, for example, Estrada-Trochez*, 66 F.3d at 735-36, it is not clear that Ms. Chimbo would prevail on this constitutional claim even if there were a factual basis for it. However, the record shows, and it is undisputed, that Ms. Chimbo received (and acknowledged receipt of) both oral and written notice of her deportation hearing,

which was provided to her in both English and Spanish.[5] It is also undisputed that Ms. Chimbo's listed Spanish as her "native" language in the memorandum accompanying her Emergency Motion to Reopen, *see* Ex. F [doc. #11], and she swore in an affidavit that she understood Spanish, see Translation of Chimbo Aff., Ex. B [doc. #12].

In spite of these facts, Ms. Chimbo persists in claiming that she does is not "completely literate" in Spanish. However, this claim conflicts with her prior representations her Emergency Motion to Reopen and her sworn affidavit. Furthermore, Ms. Chimbo does not suggest that another language would have been more appropriate. Therefore, it appears to this Court that the notice Ms. Chimbo received was in fact "reasonably calculated" to reach her and inform her of

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[5] INA § 242B requires that a written Order to Show Cause "shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any)" specifying the following:

> (A) The nature of the proceedings against the alien.
> (B) The legal authority under which the proceedings are conducted.
> (C) The acts or conduct alleged to be in violation of law.
> (D) The charges against the alien and the statutory provisions alleged to have been violated.
> (E) The alien may be represented by counsel and, upon request, the alien will be provided a list of counsel prepared under subsection (b)(2).
> (F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 242.
> (ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.
> (iii) The consequences under subsection (c)(2) of failure to provide address and telephone information pursuant to this subparagraph.

8 U.S.C. § 1252b(1). In addition, § 1252b(2) also requires written notice of "(i) the time and place at which the proceedings will be held, and (ii) the consequences under subsection (c) of the failure to appear at such proceedings." Finally, § 1252b(3) states that each Order to Show Cause or Notice Appear "shall be in English and Spanish." *Id.*

the date, time and location of her deportation hearing.

Ms. Chimbo also argues that the notice she received was constitutionally defective because the interpreter used by immigration officials at the time the Show Cause Order was served did not certify his translation and may actually have been another detainee. *See* Pet. Second Supp. Response [doc. #16] at 2. However, the Court could find nothing in the applicable immigration regulations or case law that requires a certification of translation. *See* 8 U.S.C. § 1252b. Nor does Ms. Chimbo cite to any such statutory requirement or case so holding. In any event, due process does not require a certified oral translation but rather only some reasonable assurance that the oral and written notice Ms. Chimbo received was "reasonably calculated, under all the circumstances" to appraise Ms. Chimbo of the pendency of the deportation proceedings against her. *See Mullane*, 339 U.S. at 314; *Farhoud*, 122 F.3d at 796. Based upon the record provided by Ms. Chimbo, it appears to the Court that this constitutional standard was satisfied.

B.

Ms. Chimbo also argues that even if the 1995 deportation order was constitutional, she is statutorily entitled to adjust her status based upon her husband's lawful permanent residency status under 8 U.S.C. § 1255(i) and the amendments to it under the Legal Immigration Family Equity Act ("LIFE" Act), Pub. L. No. 106-553, 114 Stat. 2762 (2000).[6] The Government

[6] The relevant provisions of § 1255(i) state:

> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States . . . (A) who . . . (i) entered the United States without inspection . . . may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien

however, points out that even under the amended § 1255(i), the Attorney General "may" adjust the status of the alien only if "the alien is admissible to the United States for permanent residence." *See* 8 U.S.C. § 1255(i)(2). Ms. Chimbo, the Government contends, is inadmissible because she was ordered deported in 1995 and is therefore inadmissible for at least ten years under 8 U.S.C. § 1182 (a)(9)(c). In response to this, Ms. Chimbo argues that she is eligible for a Form I-212 waiver that would retroactively cancel the disqualifying affect of the prior deportation order. There is at least some support for Ms. Chimbo's position in the very recent Eighth Circuit decision *Lopez -Flores v. Dep't of Homeland Sec.*, 387 F.3d 773, 776-77 (8th Cir. 2004) (explaining that a person in Ms. Chimbo's position may be eligible for the I-212 waiver and accordingly, eligible to adjust status). Nevertheless, the Government argues that Ms. Chimbo's failure "to submit an approved I-212 waiver" renders her "ineligible for adjustment of status." *See* Resp. Supp. Response [doc. #13] at 10.

The Court does not express an opinion on the merits of Ms. Chimbo's claim, because once again, Ms. Chimbo has failed to exhaust her administrative remedies regarding her claim of entitlement for adjustment in status. Indeed, it appears that Ms. Chimbo's administrative efforts

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> remits with such application a sum equaling $1,000 as of the date of receipt of the application.
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> (2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if— (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed.

8 U.S.C. § 1255(i)(1) - (2).

to adjust status have only just begun as she has a motion for reconsideration pending before the Immigration Judge, and she plans to take an appeal before the BIA. *See* Pet. Second Supp. Response [doc. #16] at 1-2. Although the statutory requirements of § 1252(d) apply only to challenges to final orders of removal, the Supreme Court has held that "where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992). In a situation similar to this, where a petitioner labels her argument constitutional but the premise of her argument is in effect statutory, "as a general rule" the petitioner "may not skip bringing the statutory issue before the BIA. *Gonzalez v. O'Connell*, 335 F.3d 1010, 1017 (7th Cir. 2004). *See McCarthy,* 503 U.S. at 144-45 ("[T]he general rule [is] that parties exhaust prescribed administrative remedies before seeking relief from the federal courts."); *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1256 (D.C. Cir. 1996) ("although a Constitutional attack upon a statute need not be raised before the agency, an attack upon an agency's interpretation of a statute is subject to the exhaustion requirement.") (internal quotations and citations omitted); s*ee also Theodoroplous*, 358 F.3d 162 (exhaustion requirement applies to an Immigration Judge's incorrect interpretation, even unconstitutional interpretation, of a statute). Accordingly, in the exercise of discretion, this Court would require Ms. Chimbo to exhaust the administrative remedies that she has, in fact, already invoked.

In addition, although Ms. Chimbo makes a futility argument, the Court does not find it persuasive. *See, e.g.*, *Gonzalez*, 355 F.3d at 1018-19 (recognizing an exception to exhaustion where a petitioner has "no reasonable prospect of obtaining relief"). Even if Ms. Chimbo is correct that the BIA is without jurisdiction to grant her application for adjustment of her status, the BIA does have jurisdiction to interpret the immigration statutes to determine whether Ms.

Chimbo is eligible for adjustment of status and to determine how that question affects her request for relief from deportation. Presumably it is for this reason that Ms. Chimbo included her readjustment of status argument in her Emergency Motion to Reopen filed before the Immigration Judge. *See* Emergency Mot. to Reopen, Ex. F at 2 [doc. #13]. Therefore, the Court disagrees that requiring Ms. Chimbo to pursue this claim before the BIA would be futile.

Even apart from exhaustion requirements, the fact that Ms. Chimbo's claim is essentially a statutory argument for discretionary relief, necessitating consideration of "the Attorney General's exercise of [his] discretion," appears to deprive this Court of subject matter jurisdiction to review the issue on a § 2241 habeas petition. *See Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001) ("[F]ederal jurisdiction over §2241 petitions does not extend to review of discretionary determinations by the IJ and the BIA."); § 1252(a)(2)(B)(ii) ("[N]o court has jurisdiction to review a discretionary determination of the Attorney General."). The Court concludes that both of the traditional purposes of exhaustion – "protecting administrative agency authority and promoting judicial efficiency" – would be better served if the BIA makes the initial determination regarding Ms. Chimbo's statutory claims. *McCarthy,* 503 U.S. at 145 ("When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided."). Therefore, the Court declines to review Ms. Chimbo's adjustment of status claim until the BIA has had a chance to decide the issue.

C.

Finally, Ms. Chimbo argues that her continued detention without a bail hearing violates

the Due Process Clause. A district court's habeas jurisdiction encompasses denial of bond, even where the court lacks jurisdiction over the underlying claims in the petition. *See, e.g.*, *Gornicka v. INS*, 681 F.2d 501, 505 (7th Cir. 1982) ("It is clear bond hearings are separate and apart from deportation hearings . . A bond hearing is not a final order of deportation "); *Ulysee v. Dep't of Homeland Security*, 291 F. Supp. 2d 1318, 1324 (M.D. Fla. 2003) (exerting jurisdiction over petitioner's detention challenge even where petitioner failed to exhaust her remedies with respect to her challenge of her underlying removal order). Ms. Chimbo is not challenging a discretionary denial of bail, but rather the constitutionality of the "statutory framework that permits [her] detention without bail." *Demore v. Kim*, 538 U.S. 510, 516-17 (2003) (habeas jurisdiction extends to such challenges). It follows, therefore, that this purely constitutional aspect of her Petition it is not subject to the exhaustion requirements that bar the Court from reviewing other aspects of her Petition. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001).

Ms. Chimbo is currently being held pursuant to a final order of removal, and therefore she is subject to the requirements of § 241(a) of the INA, 8 U.S.C. § 1231(a). Under this section, detention of aliens during the removal period is mandatory. *See* 8 U.S.C. § 1231(a) ("During the removal period, the Attorney General *shall* detain the alien.") (emphasis added). *See also Sinal v. INS*, No. 3:03CV1196, 2003 WL 23198122 (D. Conn. Dec. 22, 2003) (denying a bond hearing to a petitioner who was mandatorily detained pursuant to § 241(a)); *Polizio v. Jenifer*, 217 F. Supp. 2d 811, 815-16 (E.D. Mich. 2002) (finding that mandatory detention of a non-criminal alien under § 241(a) did not violate due process).

Ms. Chimbo makes two arguments in support of her request for a bail hearing. She initially argued that both this Court and Respondents should treat her as if she was being held

under § 236(c) of the INA, 8 U.S.C. § 1226, because she was challenging her deportation order and because, as she claims, she had not received adequate notice of her deportation hearing. Notably, detention under § 236, unlike § 241, is not mandatory, and courts have held that under certain circumstances, detaining aliens under § 236(c) without a bond hearing violates due process. *See Bi Zhu Lin v. Ashcroft,* 183 F. Supp. 2d 551, 558 (D. Conn. 2002) (collecting cases).

Ms. Chimbo appears to have retreated from this statutory argument, for good reason. The Court discerns no basis on which it could consider Ms. Chimbo as being held under § 236. Section 236 governs detention of an alien who is challenging a deportation order *before* it becomes "administratively final." *See Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003). However as the Second Circuit made clear in *Wang*, when an alien challenges a removal order that has *already* become administratively final, she is held under INA § 241(a), not § 236. *See Wang,* 320 F.3d at 147 (stating that it did *not* accept petitioner's assertion that "where an alien has an administratively [final] removal order but is pursuing habeas review, his detention is pursuant to INA § 236(c)."). Ms. Chimbo's removal order became final in 1995 when she failed to appeal her deportation order to the BIA. *See Theodoropoulos*, 358 F.3d at 169. Therefore, INA § 236(c) is inapplicable to Ms. Chimbo.

Accordingly, Ms. Chimbo's principal argument is that her detention under § 241 without a bail hearing violates the Constitution. In particular, Ms. Chimbo emphasizes that she is not a criminal alien, she is not a flight risk, and she is asserting and pursuing arguments in opposition to her final order of deportation. In those circumstances, Ms. Chimbo argues, it is unfair and contrary to due process requirements to detain her while her administrative appeals are being

pursued, particularly since her continued detention separates her from her infant son.

The Court is truly sympathetic to Ms. Chimbo's plight. Who could not be. Nevertheless, it is clear that detention under § 241(a) is mandatory at least for the first 90 days of the removal period. Ms. Chimbo has been in custody since September 14, 2004, therefore her removal period will not expire until mid-December.[7] The question then becomes whether Ms. Chimbo's continued detention without a bail hearing during this 90-day removal period is constitutional.

"It is well-settled that the Fifth Amendment entitles aliens to the due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 307 (1993). However, it is equally well-settled that Congress has broad powers over immigration and may "make[] rules that would be unacceptable if applied to citizens." *Id*. at 306 (citing *Matthews v. Diaz*, 426 U.S. 67, 81 (1976)). Guided by the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court concludes that Ms. Chimbo's detention without a bail hearing during the 90-day removal period does not violate her right to due process.[8] *Id*. at 699-700 (Government may continue to

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[7] Ordinarily, the removal period begins on the latest of the following:

> (i) the date the order of removal becomes administratively final; (ii) If the removal order is judicially reviewed and if a court orders a stay of removal of the alien, the date of the court's final order; (iii) If the alien is detained (except under an immigration process), the date that alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B). Ms. Chimbo's deportation order became administratively final in 1995 when she failed to timely appeal to the BIA. However Ms. Chimbo does not argue that the removal period has expired. Therefore, the Court need not resolve the issue at this time.

[8] The Court notes that while the petitioners in *Zadvydas* were criminal aliens, *see* 533 U.S. at 684, and Ms. Chimbo is a non-criminal alien, Ms. Chimbo is inadmissible and it is currently unclear whether the protections of *Zadvydas* apply to inadmissible aliens. *See Napoles v. INS*, 278 F. Supp. 2d 272, 275 (D. Conn. 2003) (laying out the circuit split and noting that the

detain an alien pursuant to § 241 so long as her removal is "reasonably foreseeable"); *Chalas-Zapata v. Ashcroft*, 305 F. Supp. 2d 333, 336 (S.D.N.Y. 2004) (same); *Sinal*, 2003 WL 23198122 at *1 (An alien detained pursuant § 241 is "not entitled to a bond hearing or other opportunities for mandatory release through a petition for habeas corpus until his 90-day removal period is over and he provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."). As the Supreme Court emphasized in *Demore v. Kim*, 538 U.S. 510, 524 (2003), in noting that it had rejected aliens' claims that they were entitled to be released from detention if they did not pose a flight risk, " '[d]etention is necessarily a part of this deportation procedure.' " *Id*. at 524 (quoting *Carlson v. Landon*, 342 U.S. 524, 538 (1952)). While Ms. Chimbo is currently pursuing efforts to vacate her final order of deportation, she has failed to establish at this time, as noted above, that her deportation is not reasonably foreseeable. Indeed, the Government is prepared to deport her immediately; it is only her challenges – which she is entitled to pursue and may yet prevail upon – that keep her in the United States. Therefore, while regrettable, the detention of Ms. Chimbo (an inadmissible alien who is subject to a long-standing final order of deportation) during the 90-day removal period does not violate the Constitution.

Under § 241(a), after the 90-day removal period has expired, Ms. Chimbo's detention is no longer mandated by statute. Instead, under § 241(a)(6), "[a]n alien ordered removed [1] who is inadmissible . . . *may* be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision." 8 U.S.C. § 1231(a)(6) (2002) (emphasis added). In fact,

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Second Circuit has not yet decided this issue). *See also* Resp. Supp. Response [doc. #13] at 14 n.12. The Court need not resolve that question in this case and intimates no view on the issue.

related immigration regulations contemplate – if not require – that alien detainees receive a custody review prior to the expiration of the removal period to determine whether detention is still necessary. *See* 8 C.F.R. §§ 241.4(c)(1) and 241.4(g). Among the factors to be taken into account in a custody review are: "the likelihood that the alien is a significant flight risk," the alien's "ties to the United States such as the number of close relatives residing here lawfully," and the alien's "criminal conduct and criminal convictions." 8 C.F.R. § 241.4(f).

The Court anticipates that Ms. Chimbo will in fact be given a custody review in connection with the expiration of the 90-day removal period and that immigration officials will likely conclude, as it appears to this Court, that Ms. Chimbo should be released under supervision since that she is not a criminal, there is no indication that she is a flight risk, and she has two sons and a husband who reside in the United States lawfully. In light of this, the Court sees no reason at this time to consider or address Ms. Chimbo's claim that her detention beyond the 90-day removal period would be unconstitutional. Any such claim is premature at this point. However, since Ms. Chimbo appears to be entitled to a custody review by approximately mid-December in any event, the Court once again urges Respondents to give her a custody review now so as not to prolong any further Ms. Chimbo's separation from her infant son and family.

III.

In conclusion, the Court DENIES Ms. Chimbo's Petition for Writ of Habeas Corpus [doc. # 1], but does so without prejudice to Ms. Chimbo's right to renew her Petition if she has not received a custody review upon the expiration of the 90-day removal period, and also without intimating any view regarding the jurisdictional or substantive merits of any such renewed petition. The Court reminds the Government that it continues to be bound by its commitment to

the Court and to Ms. Chimbo's counsel that in the event of Ms. Chimbo's imminent removal, the Government will notify Ms. Chimbo's counsel at least seventy-two (72) hours before she is scheduled to depart, so that he can seek a stay of removal.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut on November 18, 2004.