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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Marcos Antonio Lomeli,)	No. CV-08-00955-PHX-PGR (MHB)
Petitioner,)	REPORT AND RECOMMENDATION
vs.)	
Michael B. Mukasey, et al.,)	
Respondents.)	

TO THE HONORABLE PAUL G. ROSENBLATT, UNITED STATES DISTRICT JUDGE:

On May 27, 2008, Petitioner Marcos Lomeli filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, contending that his mandatory detention in immigration custody pending removal is unconstitutional (Doc. #1). On August 14, 2008, Respondents were served with the Petition, and on August 22, 2008, Respondents entered a Notice of Appearance. (Docs. ##10, 13.) On August 30, 2008, Respondents filed a Motion to Hold Proceedings in Abeyance Pending Extrajudicial Resolution Efforts, based upon two recent Ninth Circuit opinions holding that Petitioner “may seek a bond redetermination hearing before an immigration judge.” (Doc. #14.) On September 3, 2008, the Court entered an Order to Show Cause, directing Respondents to file a Response showing good cause why Petitioner’s Petition should not be granted, given Respondents’ stated position on Petitioner’s right to a bond hearing before an immigration judge. (Doc. #17.)

On September 10, 2008, Respondents filed their Response, arguing therein that the Petition should be denied, as Petitioner was afforded a bond hearing on September 15, 2008,

1 before an immigration judge, and although bail was denied, Petitioner does not have recourse
2 before this Court to challenge that bail determination. (Doc. #18.) Petitioner filed a Traverse
3 on October 2, 2008, alleging that his detention remains unlawful on numerous grounds, that
4 his bond hearing was constitutionally inadequate, and that he should not be required to
5 exhaust administrative remedies before seeking judicial review of the bond determination.
6 (Doc. #21.) Respondents sought leave to file a Reply, given the newly raised issues in
7 Petitioner’s Traverse, which was granted by this Court. (Doc. #24.) Respondents filed their
8 Reply on October 21, 2008. (Doc. #26.)

9 **BACKGROUND**

10 The Immigration and Naturalization Service (“INS”)¹ considers Petitioner to be a
11 native and citizen of Mexico. (Doc. #18, Exh. A.) In 1998, Petitioner was convicted of two
12 counts of Lewd Acts with a Child under the age of 14 a felony, in violation of California
13 Penal Code section 288(A). (Doc. #18, Exh. B.) He was sentenced to ten years in prison for
14 these offenses. (Id.) On November 11, 2006, Petitioner was served with an INS Notice to
15 Appear for removal proceedings, based upon his status as an alien not admitted or paroled
16 into the United States, and his aforementioned felony convictions. (Doc. #18, Exh. C.)

17 During the removal proceedings, on December 9, 2006, Petitioner filed a Motion For
18 Cancellation of Removal and For Res Judicata and Termination of Proceedings, based upon
19 a claim of American citizenship. (Doc. #18, Exh. D.) On March 9, 2007, the Immigration
20 Judge (“IJ”) sustained the INS allegations that Petitioner is a native and citizen of Mexico,
21 and did not sustain the allegations that Petitioner was not admitted or paroled into the United
22 States. (Doc. #18, Exh. E.) Subsequently, on March 21, 2007, ICE filed Superseding
23 Additional Charges of Removability, alleging Petitioner’s admission into the United States
24 “on an unknown date and at an unknown time on an unknown status,” and that Petitioner
25 does not possess a valid permit or visa to remain in the United States. (Doc. #18, Exh. F.)

26
27 ¹Now the Department of Homeland Security, Bureau of Immigration and Customs
28 Enforcement (“ICE”).

1 On May 3, 2007, an IJ denied Petitioner’s application for deferral of removal under Article
2 II of the Convention Against Torture and ordered Petitioner removed to Mexico. (Doc. #18,
3 Exh. G.)

4 Petitioner appealed the Order of Removal on May 11, 2007, to the Board of
5 Immigration Appeals (“BIA”), specifically appealing the denial of relief from removal under
6 the Convention Against Torture based upon his status as a homosexual and fear of reprisal
7 in Mexico. (Doc. #18, Exh. H.) The BIA dismissed the appeal, upholding the IJ’s decision
8 that Petitioner had failed to satisfy his burden of establishing his eligibility for deferral of
9 removal under the Convention Against Torture. (Doc. #18, Exh. I.) On August 17, 2007,
10 Petitioner filed a Petition for Review with the Ninth Circuit Court of Appeals. (Doc. #18,
11 Exh. J.) On February 15, 2008, the Ninth Circuit granted Petitioner’s Motion to Stay
12 Removal. (*Id.*, at 3.) Mediation was ordered on September 9, 2008. (*Id.*, at 4.) Petitioner’s
13 initiated stay of removal prevents ICE from effectuating his removal to Mexico. If the stay
14 were lifted, ICE would then be able to consummate its efforts to remove Petitioner. (Doc.
15 #18, Exh. K.)

16 Petitioner filed his Petition for Writ of Habeas Corpus on May 27, 2008, challenging
17 his prolonged detention, since November 9, 2006, on statutory and constitutional grounds.
18 (Doc. #1, at 1-2.) In his Petition, he raised three “distinct challenges” to his detention:

19 1) His removal is not reasonably foreseeable, and therefore he should be released
20 pursuant to Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006).

21 2) His removal proceeding is not expeditious, and he therefore should be afforded an
individualized bond hearing.

22 3) His continued detention violates the Due Process Clause due to the length of
23 detention and the lack of being afforded a bond hearing.
(Doc. #1, at 8-9.)

24 While his Petition was pending, and before the deadline for Respondents to file an
25 Answer, the Ninth Circuit decided two cases bearing on the issues raised by Petitioner:
26 Prieto-Romero v. Clark, 534 F.3d 1053 (9th Cir. 2008), and Casas-Castrillon v. Dept. of
27 Homeland Security, 535 F.3d 942 (9th Cir. 2008). The government then notified Petitioner
28 of these decisions, indicating that he could request a bond hearing before an IJ. (Doc. #14.)

1 On September 15, 2008, Petitioner received a bond hearing before an IJ, wherein the IJ heard
2 evidence and ultimately denied bond upon finding Petitioner a danger to the Community.
3 (Doc. #18, Exh. N.)

4 Since Petitioner has received a bond redetermination, Claim 2 and part of Claim 3 of
5 his Petition are now moot. Claim 1 and the remaining issue of Claim 3 relate to the length
6 of Petitioner's detention and the foreseeability of his removal. In Petitioner's Traverse, filed
7 in response to Respondents' Response to Order to Show Cause, he raises the following new
8 claim, that his bond hearing was constitutionally inadequate, for the following reasons:

- 9 1) The bond proceeding was not recorded.
- 10 2) The IJ failed to advise him of his right to an attorney.
- 11 3) The IJ improperly placed the burden on Petitioner to prove that he is not a flight
12 risk or danger to the community.
- 13 4) The IJ allowed hearsay, uncorroborated testimony to be introduced as evidence.
- 14 5) The IJ disregarded Petitioner's evidence of good moral conduct.

15 (Doc. #21.)

16 Respondents argue that Petitioner's continued detention comports with due process
17 as he is "capable of being removed once his stay of removal is lifted," and that Petitioner's
18 bond hearing was constitutionally adequate, and that in any event, Petitioner must exhaust
19 administrative avenues prior to seeking judicial review. (Doc. #26, at 2.)

20 **LAWFULNESS OF DETENTION**

21 **A. Petitioner's Continued Detention.**

22 In his Petition, Petitioner cites Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006)
23 for the proposition that his detention is unlawful because it has exceeded the presumptively
24 reasonable period of six months. (Doc. #1, at 9.) Petitioner has been in INS custody now
25 for almost two years. The IJ's Order of Removal has been stayed, pursuant to Petitioner's
26 request, by the Ninth Circuit Court of Appeals. In a recent Ninth Circuit decision, the court
27 held, in facts almost identical to the facts of Petitioner's case, that 8 U.S.C. §1226(a)
28 authorized the continued detention of Prieto-Romero, a Mexican citizen seeking review of

1 his removal order. Prieto-Romero, 534 F.3d at 1063-64. The court refused to read Nadarajah
2 to hold that an alien’s removal is not “reasonably foreseeable” simply because the exact date
3 his detention will conclude is uncertain. Id., at 1064. Rather, the court found that Prieto-
4 Romero’s removal had been delayed by his decision to seek judicial review, and that review
5 has a final termination point, and that Prieto-Romero’s detention therefore was not indefinite.
6 Id.

7 The court further rejected Prieto-Romero’s contention that his detention was in
8 violation of the constitutional concerns expressed in Zadvydas v. Davis, 533 U.S. 6787
9 (2001). In Zadvydas, the issue before the U.S. Supreme Court was whether or not aliens who
10 had received a final order of removal could continue to be indefinitely detained under
11 §1231(a)(6). Id. While Prieto-Romero, like Petitioner, was being detained under §1226(a),
12 and not §1231(a)(6), the Ninth Circuit held that detention under either may not be indefinite.²
13 Prieto-Romero, 534 F.3d at 1062-63. Nevertheless, the court held that Prieto-Romero’s
14 continued detention was authorized:

15 Although his removal has certainly been delayed by his pursuit of judicial
16 review of his administratively final removal order, he is not stuck in a
17 “removable-but-unremovable limbo,” as the petitioners in Zadvydas were.
18 Here there is no evidence that Prieto-Romero is unremovable because the
19 destination country will not accept him or his removal is barred by our own
20 laws. To the contrary, the government introduced evidence showing that
21 repatriations to Prieto-Romero’s country of origin, Mexico, are routine and the
22 government stands ready to remove Prieto-Romero as soon as judicial review
23 is complete.

24 Id., at 1063 (internal citations omitted).

25 The court distinguished Zadvydas further by noting that the removal of the aliens in
26 that case was not reasonably foreseeable because no country would accept them. Id., at
27 1063-64. The court further placed the onus on the alien to demonstrate that he was
28 unremovable in order for his detention to be considered indefinite. Id.; Diouf v. Mukasey, ---

26 ²Petitioner argues that he should be considered detained pursuant to the mandatory
27 provisions of 8 U.S.C. §1226(c). Petitioner’s detention falls under 1226(a) given his pending
28 Petition for Review in the Ninth Circuit and stay of removal. Casas-Castrillon, 535 F.3d 942;
Prieto-Romero, 534 F.3d 1053.

1 F.3d ----, 2008 WL 4253851, *8 (9th Cir. Sept. 18, 2008) (stating: “[i]n Prieto-Romero, the
2 Ninth Circuit construed this [Zadvydas] language to require the alien to show that he would
3 be unremovable even after the government defeated his petition for review”). Petitioner has
4 not demonstrated that he is unremovable. In fact, ICE removes on average, 154,000 Mexican
5 citizens or nationals each year. (Doc. #18, Exh. K.) In the event the Ninth Circuit dismisses
6 his Petition for Review, then ICE will complete its efforts to remove Petitioner to Mexico.
7 (Id.) Petitioner’s continued detention is authorized.

8 **B. Petitioner’s Bond Hearing.**

9 Respondents contend that this Court should not consider Petitioner’s claimed defects
10 in his bond proceedings, because “[a]ny review of the bond decision should first be
11 conducted by the BIA, which Petitioner recognized when he reserved appeal to the BIA of
12 his bond decision,” and that “Petitioner should be required to exhaust his administrative
13 remedies before seeking review from this Court.” (Doc. #26, at 4.) Decisions of IJ s may
14 be appealed to the BIA. 8 C.F.R. §1003.38. On September 22, 2008, Petitioner filed his
15 Notice of Appeal to the BIA, raising the identical bond hearing issues as he raises here.
16 (Doc. #21, Exh. Z.) That appeal has not yet been decided. “[A]s a prudential matter, ...
17 habeas petitioners [must] exhaust available judicial and administrative remedies before
18 seeking relief under 2241.” Castro-Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001),
19 abrogated on other grounds, Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006); Arango
20 Marquez v. I.N.S., 346 F.3d 892, 897 (9th Cir. 2003)(“we require, as a prudential matter, that
21 habeas petitioners exhaust available judicial and administrative remedies before seeking
22 relief under 2241”); Paga v. Chertoff, 488 F.3d 812, 815 (9th Cir. 2007)(finding that even
23 when not mandated, exhaustion “may be judicially imposed as a matter of precedence”).

24 Petitioner claims that he should be excused from the exhaustion requirement, as his
25 bond hearing was constitutionally inadequate, and that this Court should “excuse exhaustion
26 because the BIA has no jurisdiction to adjudicate constitutional issues,” and because he “has
27 established an overriding interest that warrants disregarding exhaustion.” (Doc. #21, at 7,
28 11.) He cites Bagues-Valles v. INS, 779 F.2d 483 (9th Cir. 1985), and Garcia-Ramirez v.

1 Gonzales, 423 F.3d 935 (9th Cir. 2005) in support of his position. The holding of Bagues
2 was called into doubt in Liu v. Waters, 55 F.3d 421 (9th Cir. 1995). Citing Bagues, the court
3 in Liu noted that “in accepting for review some other so-called due process claims in
4 immigration cases we have also broadly stated that we did so because the BIA lacks
5 jurisdiction to adjudicate constitutional questions. . . . A narrower and more accurate
6 statement would be that the BIA lacks jurisdiction to decide questions of constitutionality of
7 governing statutes or regulations.” 55 F.3d at 425 (citations omitted). Also the court noted
8 that “[i]t is equally clear that the BIA does have authority to reopen cases to fix
9 administratively correctable procedural errors, even when these errors are failures to follow
10 due process.” Id., at 426. The court concluded as follows:

11 On the one hand, we will not hear claims that have not been presented to the
12 BIA simply because they have been labeled constitutional questions; on the
13 other, we will not require a petitioner to engage in the futile exercise of making
14 a motion to reopen when the BIA lacks the jurisdiction to entertain the claim.

13 Id.

14 In Garcia-Ramirez, the court held that the alien was excused from the exhaustion
15 requirement because her claim involved the retroactivity of legislation, and that
16 “[r]etroactivity challenges to immigration laws implicate legitimate due process
17 considerations that need not be exhausted in administrative proceedings because the BIA
18 cannot give relief on such claims.” Garcia, 423 F.3d at 938.

19 Petitioner couches his claims regarding the bond hearing as constitutional error. This
20 label does not transform otherwise non-constitutional errors into constitutional ones. See
21 Torres-Aguilar v. I.N.S., 246 F.3d 1267, 1271 (9th Cir. 2001)(“Petitioner may not create the
22 jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion
23 argument in constitutional garb.”). Petitioner claims that his hearing was constitutionally
24 defective for the following reasons: (1) The bond proceeding was not recorded; (2) The IJ
25 failed to advise him of his right to an attorney; (3) The IJ improperly placed the burden on
26 Petitioner to prove that he is not a flight risk or danger to the community; (4) The IJ allowed
27 hearsay, uncorroborated testimony to be introduced as evidence; and (5) The IJ disregarded
28 Petitioner’s evidence of good moral conduct.

1 1. Failing to Record Bond Proceeding.

2 Petitioner has not demonstrated that there is a constitutional requirement that bond
3 proceedings be recorded. In fact, bond hearings are not generally recorded. (Doc. #26, Exh.
4 1, at 126, 127.) Petitioner was given a summary notice of the decision of the IJ, and will
5 receive the IJ’s “written decision based on notes from the hearing” on appeal. (Doc. #26,
6 Exh. 2; Exh. 1, at 127.) Thus, Petitioner’s “lack of record” claim should be administratively
7 exhausted so that the BIA can review the claim based upon the IJ’s written decision.

8 2. Failure to Apprise of Right to Counsel.

9 Petitioner does not allege that the immigration court did not comply with the Due
10 Process requirement that an alien be apprised of his right to counsel not at government
11 expense. This right is codified in 18 U.S.C. §1362, which provides the right to counsel, at
12 no government expense, during removal and appeal proceedings. Furthermore, there must
13 be a knowing and voluntary waiver of this right before an alien can appear *pro se*. Baltazar-
14 Alcazar v. I.N.S., 386 F.3d 940, 945 (9th Cir. 2004). Petitioner does not allege that he was
15 not advised of his right to counsel in the removal proceedings. He alleges that he was not
16 “reapprised” during the bond hearing. There is no requirement that the court reappraise an
17 alien of this right before a bond hearing. Petitioner also claims that counsel should have been
18 appointed to represent him if he could not afford to hire an attorney. This claim is without
19 merit. See id. at 945; 8 U.S.C. §1362.

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25 3. Improper Shifting of the Burden of Proof, Introduction of Hearsay, and Failure to
26 Consider Evidence of Good Moral Conduct.

27 Petitioner challenges the IJ’s decision to consider certain evidence, and not to
28 consider other evidence. These discretionary decisions by the IJ do not rise to the level of

1 constitutional magnitude and Petitioner should exhaust these issues administratively. See
2 Prieto-Romero, 534 F.3d at 1067. Petitioner is correct that the burden of establishing that
3 Petitioner should not be entitled to bond is on the government. Casas-Castrillon, 535 F.3d
4 at 951 (citing Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005)). Even if the IJ improperly
5 shifted the burden, Petitioner must still demonstrate prejudice. Prieto-Romero, 534 F.3d at
6 1066. At his bond hearing, counsel for ICE submitted conviction documents “corroborating
7 Mr. Lomeli’s 1998 conviction for Lewd and Lascivious Acts with a Minor Under 14,” for
8 which he received a 10-year prison sentence, and noted that the victims in that case were
9 Petitioner’s eight and fourteen-year old nieces. (Doc. #26, Exh. 5, ¶¶ 5, 6.) Counsel also
10 noted Petitioner’s additional criminal history:

11 [A]n October 11, 1986 conviction for Possession of a Controlled Substance,
12 a February 24, 1987 conviction for Disorderly Conduct and Under the
13 Influence of a Controlled Substance, a March 28, 1989 conviction for Under
14 the Influence of a Controlled Substance, and a September 14, 1989 conviction
15 for Under the Influence of a Controlled Substance.

16 (Id.)

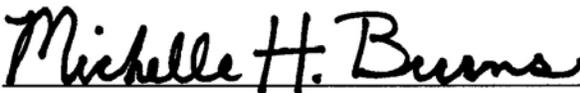
17 The IJ found that Petitioner “continues to be a danger to the community based on the
18 severity of his criminal history.” (Id., ¶ 9.) Given that the IJ was presented with evidence
19 supporting the finding of danger, and the denial of bond, Petitioner has not demonstrated
20 prejudice.

21 **IT IS THEREFORE RECOMMENDED** that Marcos Antonio Lomeli’s Petition
22 for Writ of Habeas Corpus be **DENIED** and **DISMISSED WITH PREJUDICE** (Doc. #1).

23 This recommendation is not an order that is immediately appealable to the Ninth
24 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
25 Appellate Procedure, should not be filed until entry of the district court’s judgment. The
26 parties shall have ten days from the date of service of a copy of this recommendation within
27 which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules
28 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within
which to file a response to the objections. Failure timely to file objections to the Magistrate
Judge’s Report and Recommendation may result in the acceptance of the Report and

1 Recommendation by the district court without further review. See United States v. Reyna-
2 Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual
3 determinations of the Magistrate Judge will be considered a waiver of a party's right to
4 appellate review of the findings of fact in an order or judgment entered pursuant to the
5 Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

6 DATED this 31st day of October, 2008.

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12 _____
13 Michelle H. Burns
14 United States Magistrate Judge
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