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6
7 UNITED STATES DISTRICT COURT
8 DISTRICT OF ARIZONA

9 Moses Gai Geng,
10
11 Petitioner,

12 v.

13 Michael Chertoff, et al.,
14
15 Respondents.

CIV-07-0870-PHX-EHC (JRI)

**REPLY TO PETITIONER'S
RESPONSE TO ORDER TO SHOW
CAUSE**

16 In his petition seeking a writ of habeas corpus (Doc. No. 1), Petitioner Geng (Geng)
17 challenged his continued post-order detention based on the Supreme Court's decision in
18 *Zadvydas v. Davis*, 533 U.S. 678 (2001). While Geng's petition was pending, the Department
19 of Homeland Security, Immigration and Customs Enforcement (ICE) determined that Geng
20 should be released from custody on the condition that he post a \$10,000 bond. *See Release on*
21 *Bond Notice*, dated June 21, 2007, attached as Exhibit 1 to Respondents' *Response to Petition*
22 *for Writ of Habeas Corpus and Suggestion of Mootness* (Doc. No. 7).¹ Therefore, Geng received
23 the relief that he sought in his petition, Respondents requested that the Court dismiss the petition
24 as moot (Doc. No. 7), and the Court issued an order to show cause for Geng to establish why his
25 petition should not be dismissed as moot. (Doc. No. 8).

26
27 ¹ The *Release on Bond Notification* also requires that Geng (1) report to his parole officer
28 within 48 hours of his release to fulfill probationary requirements, (2) present a current travel
document or application for travel document within 60 days of release, and (3) report monthly
in person to an ICE office and report weekly by telephone until he is removed. It does not appear
that Geng objects to these conditions.

1 In response to the Court’s order to show cause why his petition should not be dismissed
2 as moot, Petitioner Geng makes two arguments. First, it appears that he is arguing that the
3 government cannot order his release subject to conditions of supervision, including the posting
4 of a bond. This argument must fail because both the Supreme Court and the Ninth Circuit have
5 held that the imposition of a bond as a condition of supervised release is lawful. Second, Geng
6 argues that he cannot pay any amount for a bond and, therefore, the requirement that he post
7 bond subjects him to “indefinite detention.” This argument must fail as well because Geng has
8 not requested a bond redetermination from ICE and, therefore, he has failed to exhaust
9 administrative remedies and the Court should not determine the alternative relief that Geng now
10 seeks.

11 For these reasons, the Court should dismiss Geng’s petition as moot or order a stay until
12 Geng exhausts his administrative remedies.

13 ARGUMENT

14 I. The Supreme Court and the Ninth Circuit have Determined that Bond is a 15 Reasonable and Lawful Condition of Release.

16 In his response to the Court’s order to show cause, Geng argues that his petition is not
17 moot because “nothing prevents ICE from later revoking my bond or increasing the bond
18 amount.” *Response to Respondents’ Response to Petition for Writ of Habeas Corpus and*
19 *Suggestion of Mootness*, at 1 (*Response to Order to Show Cause*) (Doc. No. 10). In this
20 argument, it appears that Geng is arguing that ICE may not impose conditions upon his release
21 or revoke his release if he violates those conditions.

22 The Supreme Court, however, has held that release subject to conditions is the appropriate
23 alternative to detention. *See Zadvydas v. Davis*, 533 U.S. 678, 696 (2001). The Court explained
24 that “the choice, however, is not between imprisonment and the alien ‘living at large.’ It is
25 between imprisonment and supervision under release conditions that may not be violated.” *Id.*
26 (citing 8 U.S.C. §§ 1231(a), 1253; 8 C.F.R. § 241.5) (internal citations omitted). “[T]he alien’s
27 release may and should be conditioned on any of the various forms of supervised release that are
28

1 appropriate in the circumstances, and the alien may no doubt be returned to custody upon a
2 violation of those conditions. *Id.* at 700.

3 The Ninth Circuit has also held ICE may condition an alien’s release upon posting of a
4 bond. *See Doan v. Immigration and Naturalization Service*, 311 F.3d 1160,1161 (9th Cir. 2002)
5 (“a bond is well within the kinds of conditions contemplated by the Supreme Court in *Zadvydas*,
6 where the Court observed that 8 C.F.R. § 241.5 (2001) establishes conditions of release. Those
7 conditions include the posting of a bond.”) (citing *Zadvydas*, 533 U.S. at 688-89).² Thus,
8 Supreme Court and Ninth Circuit precedent establish that an alien’s release may be subject to
9 conditions and can be revoked if those conditions are violated. Therefore, this Court should
10 reject Geng’s argument that his habeas petition is not moot because his conditions of release
11 could be altered or revoked.

12 **II. The Petition Should be Dismissed or Stayed Because Geng has Failed to Exhaust**
13 **Administrative Remedies.**

14 Geng also argues that his petition is not mooted by the *Release on Bond Notification*
15 because he cannot pay a bond in any amount and, therefore, requiring him to post a bond as a
16 condition of release is the same as imposing indefinite detention. *See Response to Order to Show*
17 *Cause*, at 3 (Doc. No. 10). To support his argument, Geng attaches a declaration in which he
18 claims that he cannot pay a bond of any amount and that he has no family or friends who could
19 pay a bond of any amount. *Id.* Based on this declaration alone, Geng argues that he should be
20 released without bond.

21 ICE, however, has established an administrative procedure for an alien to request
22 reconsideration of a bond amount set as a condition of release. *See Declaration of Marcos*
23 *Contreras*, at ¶ 7 (attached as Ex. A). The *Release on Bond Notification* informs the alien of this
24 procedure and states: “[s]hould you have any concerns regarding you ability to post the required
25

26 ² *See also Mahmoud v. Cangemi*, 2006 WL 1174214, at *2 (D. Minn. 2006)(collecting
27 cases in which the courts have held that the government may impose conditions upon an alien’s
28 release under *Zadvydas*).

1 bond, you may seek reconsideration by making a written request to ICE Headquarters Post-order
2 Detention Unit (HQPDU) at the above address. Your request should include any financial
3 documentation in support of your claim.” *Response to Petition for Writ of Habeas Corpus and*
4 *Suggestion of Mootness*, at Ex. 1 (Doc. No. 7). Despite receiving this notice, Geng has not
5 submitted a written bond reconsideration request. Ex. A at ¶ 8.

6 The bond reconsideration process that ICE has established is a reasonable interpretation
7 of 8 C.F.R. § 241.5(b) that is entitled to substantial deference and should be upheld. *See, e.g.,*
8 *Auer v. Robbins*, 519 U.S. 452, 461-63 (administrative agencies’ interpretations of their own
9 regulations are entitled to substantial deference); *Udall v. Tallman*, 380 U.S. 1, 16 (1965)
10 (“When faced with a problem of statutory construction, the Court shows great deference to the
11 interpretation the statute by the officers or agency charged with its administration When the
12 construction of an administrative regulation is in issue, deference is even more clearly in order.”)
13 (internal citations omitted). An agency’s interpretation of its regulations is entitled this
14 substantial deference because the agency is presumed to have authority to set policy within the
15 sphere of its responsibility. *See Martin v. Occupational Safety and Health Review Comm’n*, 499
16 U.S. 144, 151 (1991) (“Because applying an agency’s regulations to complex or changing
17 circumstances calls upon the agency’s unique expertise and policymaking prerogatives, we
18 presume that the power authoritatively to interpret its own regulations is a component of the
19 agency’s delegated lawmaking powers.”). Therefore, Geng should be required to comply with
20 ICE’s bond reconsideration process and exhaust his administrative remedies before seeking a
21 judicial determination of the issue.

22 Requiring Geng to exhaust his administrative remedies would also comport with the
23 doctrine of prudential exhaustion, which requires that parties generally exhaust available
24 administrative remedies before seeking relief from the federal courts. *See McCarthy v. Madigan*,
25 503 U.S. 140, 145 (1992) (The exhaustion rule applies "with particular force when the action
26 under review involves exercise of the agency's discretionary power or when the agency
27 proceedings in question allow the agency to apply its special expertise."), *superseded by statute*

1 on other grounds as stated in *Garrett v. Hawk*, 127 F.3d 1293 (10th Cir. 1997); *Schlesinger v.*
2 *Councilman*, 420 U.S. 738, 756 (1975) (The rule "is based on the need to allow agencies to
3 develop the facts, to apply the law in which they are peculiarly expert, and to correct their own
4 errors" and it "ensures that whatever judicial review is available will be informed and narrowed
5 by the agencies' own decisions."); *Joint Bd. of Control of the Flathead, Mission and Jocko*
6 *Irrigation Dist. v. United States*, 862 F.2d 195, 199 (9th Cir. 1988) ("Exhaustion insures that a
7 court will have the benefit of the agency's experience in exercising administrative discretion, as
8 well as a factual record to review."). Moreover, the Ninth Circuit has expressly held that the
9 prudential exhaustion requirement applies to habeas petitions, such that a district court lacks
10 authority to hear a claim by a petitioner who has not exhausted his available judicial and
11 administrative remedies before seeking relief under 28 U.S.C. § 2241. See *Castro-Cortez v.*
12 *INS*, 239 F.3d 1037, 1047 (9th Cir. 2001) ("we require, as a prudential matter, that habeas
13 petitioners exhaust available judicial and administrative remedies before seeking relief under §
14 2241.") (citations omitted), *abrogated on other grounds, Fernandez-Vargas v. Gonzales*, 126
15 S. Ct. 2422 (2006).

16 Furthermore, the Court should require Geng to exhaust his administrative remedies in the
17 interest of practical concerns of judicial economy because the agency's decision often will end
18 the need for any involvement by the courts. See *King v. Gonzales*, 2006 WL 2051697, at *3
19 (W.D. La. 2006) (denying habeas petition in which alien, who was ordered released subject to
20 posting bond, argued that the amount of bond was unreasonable; the court noted that the
21 petitioner could seek a review of the bond amount by ICE) (citing *Shokeh v. Thompson*, 375 F.3d
22 351 (5th Cir. 2004)). In addition, requiring Geng to exhaust his administrative remedies would
23 allow ICE to reconsider the amount of Geng's bond, with the possibility that ICE would impose
24 a lower bond, or impose no bond, or impose other conditions for release instead of a bond.
25 Finally, even if Geng submits a request for bond reconsideration and ICE determines that the
26 original bond imposed is reasonable, the Court will have the benefit of ICE's reasons and a more
27 complete record. For these reasons, it is in the best interest of the Court and the parties to

1 require that Geng comply with the bond reconsideration procedure before seeking habeas relief
2 in federal court.

3 **CONCLUSION**

4 For the foregoing reasons, the Court should dismiss Geng's Petition for Writ of Habeas
5 Corpus as moot or, in the alternative, stay its ruling on the petition until Geng exhausts
6 administrative remedies.

7 Respectfully submitted this 6th day of August, 2007.

8 DANIEL G. KNAUSS
9 United States Attorney
10 District of Arizona

11 *s/Bridget S. Bade*

12 BRIDGET S. BADE
13 Assistant U.S. Attorney

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on August 6, 2007, I submitted the attached document for filing
16 through the CM/ECF System and served a copy of the attached document by mail, on the
17 following, who is not a registered participant of the CM/ECF System to the following addresses:

18 Moses Gai Geng
19 Reg. # A-79-820-796
20 Eloy Detention Center
21 1705 East Hanna Road
22 Eloy, Arizona 85231

23 *s/Rufina Lebario*
24 Office of the U.S. Attorney