

1 NOT FOR PUBLICATION
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Monica Marroquin-Perez,

10 Petitioner,

11 v.

12 Dana Boente, *et al.*,

13 Respondents.
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No. CV-17-00366-PHX-JJT (JFM)

ORDER

15 At issue is the Report and Recommendation (“R&R”) (Doc. 17) entered by United
16 States Magistrate Judge James F. Metcalf in this matter on June 17, 2017. In the R&R,
17 Judge Metcalf recommends that the Court dismiss without prejudice the Petition for Writ
18 of Habeas Corpus filed February 15, 2017 (Doc. 1) and deny Petitioner’s accompanying
19 request for class certification. The time for Petitioner to object to the R&R has passed and
20 Petitioner has filed no objections. The Court therefore may consider such non-objection
21 as a waiver of Petitioner’s right to *de novo* consideration of the issues addressed in the
22 R&R. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*).
23 Nonetheless, the Court has conducted a full *de novo* review of all issues despite counsel’s
24 failure to file objections to the R&R, and upon conclusion of that review, will adopt the
25 R&R in part and reject it in part, as set forth below, grant the Petition for Writ of Habeas
26 Corpus, and deny Petitioner’s request for class certification.

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1 **A. Entitlement of an Alien Held on a Reinstated Order of Removal**
2 **Pending Withholding-Only Proceedings to any Bond Hearings**

3 In a thoroughly reasoned passage correctly analyzing the law current as of the
4 filing of the R&R, Judge Metcalf concluded that the status of Petitioner’s reinstated
5 Order of Removal was “pending,” and therefore governed by 8 U.S.C. § 1226(a), rather
6 than “administratively final,” in which case it would be governed by 8 U.S.C. § 1231(a).
7 This determination is significant because an alien detained under Section 1226(a) is
8 entitled to an initial bond hearing, but an alien detained under Section 1331(a) is not so
9 entitled.

10 At the time Judge Metcalf drafted the R&R, the Ninth Circuit had not squarely
11 addressed the issue of whether a reinstated removal order is administratively final during
12 the pendency of withholding-only proceedings. The Second Circuit, however, had held in
13 *Guerra v. Shanahan* that “ongoing administrative challenges [the withholding-only
14 proceedings] to Petitioner’s removal kept his removal order from being ‘administratively
15 final.’” 831 F.3d 59, 62 (2d Cir. 2016). Thus, the Second Circuit concluded that Section
16 1226(a) governed his detention and the alien was entitled to an initial bond hearing.
17 Without Ninth Circuit case law on point and finding the Second Circuit’s reasoning in
18 *Guerra* persuasive, Judge Metcalf recommended that this Court adopt it.

19 During the pendency of the objection period, however, the Ninth Circuit explicitly
20 rejected the Second Circuit’s reasoning in *Guerra* and held that an order of removal is
21 administratively final during removal-only immigration proceedings, and therefore
22 Section 1231(a) operates to deny an initial bond hearing. *Padilla-Ramirez v. Bible*, No.
23 16-35383, 2017 WL 2871513, at *3-5 (9th Cir. July 6, 2017). It is now the law of the
24 circuit that Petitioner’s detention is governed by Section 1231(a) and she is thus not
25 entitled to an initial bond determination hearing.

26 As Judge Metcalf correctly noted, however, even an alien detained under Section
27 1231(a) becomes entitled to periodic review of bond status when his or her detention is
28 prolonged. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The Ninth Circuit has

1 subsequently defined “prolonged” detention in this context as reaching the 180-day mark.
2 *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081, 1097 (9th Cir. 2011). And in *Rodriguez v.*
3 *Robbins, (Rodriguez III)*, 800 F.3d 1060, 1089 (9th Cir. 2015), the circuit court held that
4 the government must provide continuing hearings not just at the six-month point of
5 detention, but at six month intervals thereafter. In the present case, then, where Petitioner
6 has been detained under Section 1231(a) on a reinstated order of removal for over a year
7 awaiting conclusion of withholding-only proceedings, she would be entitled to bond
8 hearing every six months until removed or released.

9 Due to the intervening change in Ninth Circuit law, the Court will reject Judge
10 Metcalf’s proposed conclusion that Section 1226(a) governs the determination of
11 Petitioner’s entitlement to an initial bond hearing, but it adopts Judge Metcalf’s
12 recommendation that even under Section 1231(a), Petitioner would be entitled to bond
13 hearings after prolonged detention every six months.

14 **B. Exhaustion**

15 The R&R recommends that the Court should decline to exercise jurisdiction over
16 the Petition because Petitioner has failed to exhaust her administrative remedies.
17 Exhaustion is a prudential rather than a jurisdictional requirement. *Singh v. Holder*, 638
18 F.3d 1196, 1203 n. 3 (9th Cir. 2011). Courts may require prudential exhaustion if (1)
19 agency expertise makes agency consideration necessary to generate a proper record and
20 reach a proper decision; (2) relaxation of the requirement would encourage the deliberate
21 bypass of the administrative scheme; or (3) administrative review is likely to allow the
22 agency to correct its own mistakes and to preclude the need for judicial review. *Puga v.*
23 *Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007). Even if these factors favor application of the
24 exhaustion requirement, however, waiver of the requirement may nevertheless be
25 appropriate “where administrative remedies are inadequate or not efficacious, pursuit of
26 administrative remedies would be a futile gesture, irreparable injury will result, or the
27 administrative proceedings would be void.” *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th
28 Cir. 2004) (citation and quotation marks omitted).

1 The Court finds that the potential for irreparable harm to Petitioner, in the form of
2 continued unlawful denial of hearings, outweighs any incremental incentive that a waiver
3 of the exhaustion requirement would provide to potential litigants. The Court thus rejects
4 the R&R insofar as it recommends denial of the Petition for failure to exhaust
5 administrative remedies.

6 **C. Standing and Class Certification**

7 The Court adopts the R&R insofar as it concludes that the Court should not
8 dismiss the Petition due to lack of standing. At the November 23, 2016 hearing before the
9 Immigration Judge (IJ), the IJ found Petitioner was not entitled to a bond hearing. The IJ
10 went on to state that, if Petitioner was entitled to such hearing, the IJ would deny bond
11 upon a finding that Petitioner was a flight risk. (Doc. 17 at p. 3.) Respondents argue that
12 the IJ’s finding in the alternative constitutes a bond determination and thus Petitioner has
13 suffered no harm and has no standing. But as Judge Metcalf correctly observes in the
14 R&R, pursuant to *Rodriguez III*, “Petitioner is entitled to periodic bond hearings, not
15 simply one such hearing.” (Id. at p. 12.) Despite being detained under Section 1231(a) for
16 over 15 months, Petitioner has received at most one bond hearing, which occurred more
17 than six months ago. The Court will not deny the Petition for lack of standing.

18 The Court also adopts the R&R’s reasoning and conclusion that it should deny
19 Petitioner’s request for class certification. Petitioner fails to meet the adequacy
20 requirement. In the face of contested issues of law raised in the Response to her Petition,
21 Petitioner failed to join the issues by filing a Reply. And she failed to file any objection to
22 the R&R recommending dismissal of her Petition despite having meritorious objections,
23 as the Court has found. This inaction subjected her to summary dismissal pursuant to
24 *Reyna-Tapia*. Only the Court’s exercise of discretion to look beyond the waiver of *de*
25 *novo* review saved the Petition from dismissal. The Court concludes that “[P]laintiff’s
26 prosecution of the case to [this] point indicate[s] that [s]he would not be an adequate
27 representative of the class.” *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170
28 (9th Cir. 1975). The Court therefore will deny class certification.

1 IT IS ORDERED adopting in part, as set forth in detail above, the R&R (Doc. 17)
2 in this matter.

3 IT IS FURTHER ORDERED granting in part and denying in part the Petition for
4 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241(Doc. 1) as follows:

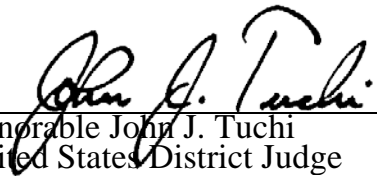
5 1. The Immigration Court shall conduct a bond determination hearing
6 pursuant to *Rodriguez III* no later than 20 days from the date of issue of this Order.

7 2. Petitioner's request for class certification is denied.

8 3. The Clerk of Court must terminate this action and enter judgment
9 accordingly.

10 Dated this 1st day of August, 2017.

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Honorable John J. Tuchi
United States District Judge