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56 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
89 Jonathan Rios-Troncoso,
10 Petitioner,
11 v.
12 Jeff B. Sessions, III, et al.,
13 Respondents.
14

No. CV 17-01492-PHX-DGC (MHB)

ORDER

15 On May 16, 2017, Petitioner Jonathan Rios-Troncoso filed, through counsel, a
16 Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Doc. 1) and a Motion for
17 Preliminary Injunction and/or Temporary Restraining Order (Doc. 3). On June 5, 2017,
18 the Court entered an Order to Show Cause requiring Respondents Jeff Sessions, III, John
19 F. Kelly, and Enrique Lucero¹ to show cause why the Petition should not be summarily
20 granted for the reasons set forth in the Order.

21 On June 16, 2017, Respondents filed a combined Answer and Response to the
22 Order to Show Cause and Response to the Petition (Doc. 14). On June 19, 2017,
23 Petitioner filed a Reply (Doc. 15), followed subsequently by two Notices of
24 Supplemental Authority and Motions to Expedite Ruling (Docs. 16 and 18).² The Court
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26 ¹ The Court dismissed Respondents Juan P. Osuna and Richard Phelps after
27 concluding that these individuals were not proper Respondents in a habeas case
28 challenging a petitioner's confinement.

² Respondents have also filed a Response to the first Notice of Supplemental
Authority (Doc. 17).

1 will grant the Petition and deny as moot Petitioner’s Motion for Preliminary Injunction
2 and/or Temporary Restraining Order, as well as the two Motions to Expedite.

3 **I. Background**

4 Petitioner is a native and citizen of Mexico. Petitioner first entered the United
5 States in June 2014 and was subsequently removed in 2015. (Doc. 1 at 5). Sometime
6 thereafter, Petitioner returned to the United States seeking asylum. (*Id.*). When DHS
7 sought to reinstate Petitioner’s prior order of removal, Petitioner claimed a fear of
8 returning to his country of origin and the reinstatement of his removal order was
9 suspended pursuant to 8 C.F.R. § 1208.31. (*Id.* at 6.) Petitioner was subsequently
10 detained by ICE and given a reasonable fear interview, as a result of which he received “a
11 positive reasonable fear determination” and was placed into “withholding only
12 proceedings” pursuant to 8 C.F.R. § 1208.2(c)(3). (*Id.*).

13 As part of those proceedings, Petitioner applied for Withholding of Removal and
14 relief under the Convention Against Torture Act. (*Id.*) Petitioner’s hearing on his claim
15 for protection from return to Mexico is presently scheduled for September 5, 2017. (*Id.*).

16 Meanwhile, on April 12, 2017, Petitioner filed a request for a bond
17 redetermination hearing with the Immigration Judge. (*Id.*). No hearing was held. (*Id.*).
18 Instead, on April 28, 2017, Immigration Judge Phelps denied the motion on the basis that
19 he lacked jurisdiction to consider the motion because Petitioner “is in Withholding-Only
20 proceedings.” (*Id.*, Doc. 1-7). Petitioner’s appeal of that ruling remains pending.

21 **II. Petition**

22 Petitioner states that he has now been “detained longer than six months under the
23 authority of either 8 U.S.C. § 1236(a) or 8 U.S.C. § 1231(a).” (*Id.* at 2.) Petitioner
24 contends that pursuant to *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir.
25 2015), and *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), mandatory detention
26 under these statutes terminates after six months, at which time the detained alien must be
27 granted a hearing to determine whether he or she may be released from custody on bond.
28 (*Id.* at 2-3.). Similarly, in his Motion for Preliminary Injunction and/or Temporary

1 Restraining Order, Petitioner seeks an order requiring Respondents to provide him with
2 an individualized bond hearing as soon as possible. (Doc. 3 at 1-2).

3 Petitioner acknowledges that he has failed to exhaust his administrative remedies
4 because his challenge to the IJ's decision is still pending. He argues, however, that
5 exhaustion is a prudential rather than a jurisdictional, requirement and the factors
6 favoring application of the exhaustion requirement are not present here. Specifically,
7 Petitioner claims that an administrative appellate record is not material to "the purely
8 legal issue of whether aliens in withholding-only proceedings are entitled . . . to bond
9 hearings after six months of ICE detention" (Doc. 1 at 21); that a decision to waive the
10 exhaustion requirement will not encourage litigants to bypass the administrative review
11 scheme, but will instead prevent this issue from arising in the future; and that BIA review
12 would not preclude the need for judicial review because the parties would undoubtedly
13 seek further review in this Court or in the Court of Appeals.

14 **III. Response to Order to Show Cause**

15 Respondents argue that the Petition should be dismissed for lack of jurisdiction
16 because Petitioner has not yet exhausted his administrative remedies. According to
17 Respondents, this action is an improper attempt to circumvent the administrative review
18 process and would, if successful, encourage other litigants to sidestep the administrative
19 review scheme in favor of immediate action in the district courts.

20 Respondents also argue that the Petition is subject to dismissal on the merits.
21 They claim that the order of reinstatement is a final order and that Petitioner is therefore
22 detained pursuant to 8 U.S.C. § 1231, not § 1226. Thus, according to Respondents,
23 Petitioner is in withholding-only proceedings, not removal proceedings, and the IJ
24 properly held that the immigration court lacked jurisdiction under 8 C.F.R. §§ 1003.19(a)
25 and 1236.1(d) to redetermine Petitioner's custody status. Respondents further allege that
26 the Ninth Circuit's decisions in *Diouf II* and *Rodriguez III* do not support Petitioner's
27 claim because those holdings do not apply to aliens subject to reinstated orders of
28 removal.

1 **IV. Discussion**

2 **A. Detention Authority**

3 While there was disagreement as to the source of the government’s detention
4 authority in this case, after the Order to Show Cause was issued, the Ninth Circuit held
5 that the finality of a reinstated removal order is not affected by the pendency of
6 withholding-only proceedings. *Padilla-Ramirez v. Bible*, ___ F.3d ___, 2017 WL
7 2871513, at *4 (9th Cir. Jul. 6, 2017). Thus, aliens in withholding-only proceedings are
8 detained pursuant to the government’s § 1231(a) post-removal detention authority, rather
9 than the pre-removal detention authority provided by § 1226(a). *Id.* The Court therefore
10 concludes that Petitioner is being detained pursuant to § 1231(a).

11 **B. Exhaustion**

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

27 Respondents rely solely on the second factor enumerated in *Puga* to argue that
28 Petitioner should be precluded from seeking review in this Court until his BIA appeal is

1 complete. But the Court has identified no fewer than six cases in this District in which
2 the exhaustion requirement was waived for similarly-situated petitioners. *See Rivas-*
3 *Moreira v. Lynch*, CV 16-04518-PHX-DJH (BSB), Doc. 17; *Mendez-Cruz v. Lynch*, CV
4 16-04416-PHX-GMS (DMF), Doc. 18; *Velarde-Maldonado v. Sessions*, CV 17-01018-
5 PHX-JJT (MHB), Doc. 16; *Urias-Alvarenga v. Sessions*, CV 17-01005-PHX-JJT (JFM),
6 Doc. 17; *Fuentes-Barnett v. Sessions*, CV 17-00858-PHX-DGC (JZB), Doc. 24; *Gomez-*
7 *Vasquez v. Lynch*, CV 17-00269-PHX-JJT (JFM), Doc. 11. The Court finds that the
8 potential for irreparable harm to Petitioner, in the form of continued unlawful detention,
9 outweighs any incremental incentive that a waiver of the exhaustion requirement would
10 provide to potential litigants.

11 **C. Application of *Diouf II***

12 Petitioner maintains that he is entitled to a bond hearing pursuant to *Diouf II*. In
13 that case, the Ninth Circuit addressed the due process requirements for prolonged
14 detention under 8 U.S.C. §§ 1226(a) and 1231(a)(6). The court concluded that because
15 prolonged detention of an alien without an individualized determination of flight risk and
16 danger would “raise serious constitutional concerns,” aliens facing prolonged detention
17 under § 1231(a)(6) “are entitled to a bond hearing before an immigration judge and [are]
18 entitled to be released from detention unless the government establishes that the alien
19 poses a risk of flight or a danger to the community.” *Diouf II*, 634 F.3d at 1092.

20 Respondents’ efforts to distinguish *Diouf II* are unavailing. Although the
21 petitioner in *Diouf II* was undertaking a collateral challenge to his removal order, the
22 Ninth Circuit expressly extended the right to a bond hearing to *all* aliens detained under
23 § 1231(a)(6), stating: “Section 1231(a)(6) encompasses aliens such as Diouf, whose
24 collateral challenge to his removal order (a motion to reopen) is pending in the court of
25 appeals, *as well as to aliens who have exhausted all direct and collateral review of their*
26 *removal orders* but who, for one reason or another, have not yet been removed from the
27 United States.” *Diouf II*, 634 F.3d at 1085 (emphasis added). Respondents do not
28 identify any basis for concluding that Petitioner falls outside the latter category of aliens.

1 Thus, the clear language of *Diouf II*, which was echoed in *Padilla-Ramirez*, 2017 WL
2 2871513, at *2, extinguishes any doubt that the government is required to provide
3 Petitioner with a bond hearing before an immigration judge. The Petition for Writ of
4 Habeas Corpus Under 28 U.S.C. § 2241 will be granted accordingly.

5 **V. Preliminary Injunction**

6 In his Motion for Preliminary Injunction and/or Temporary Restraining Order,
7 Petitioner seeks the same relief requested in the Petition, namely, an order requiring
8 Respondents to provide him with an individualized bond hearing. In light of the Court's
9 ruling on the Petition, those motions will be denied as moot. The Court will also deny
10 Petitioner's two motions for expedited ruling as moot in light of this order.

11 **IT IS ORDERED:**

12 (1) Petitioner's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241
13 (Doc. 1) is **granted**.

14 (2) Petitioner's Motion for Preliminary Injunction and/or Temporary
15 Restraining Order (Doc. 3), and two Motions to Expedite Ruling (Docs. 16 and 18) are
16 **denied** as moot.

17 (3) Within **20 days** of the date of this Order, Respondents must provide
18 Petitioner with a hearing before an Immigration Judge with the power to grant his release
19 on bond if the Immigration Judge determines that he qualifies for release under
20 applicable law.

21 (4) The Clerk of Court must terminate this action and enter judgment
22 accordingly.

23 Dated this 1st day of September, 2017.

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27 _____
28 David G. Campbell
United States District Judge