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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PHAM HUU DUC,
Petitioner,
v.
UNITED STATES OF AMERICA, et
al.,
Respondents.

Case No. CV 14-1273 SS
**MEMORANDUM DECISION AND ORDER
DISMISSING ACTION WITHOUT
PREJUDICE FOR LACK OF
JURISDICTION**

I.

INTRODUCTION

On February 19, 2014, Petitioner Pham Huu Duc, a federal prisoner proceeding pro se, filed a document captioned "Notice of Motion and Motion under [28 U.S.C.] § 2241 for a Habeas Petition to Cancel an Illegal Immigration Detainer that is abrogating the Petitioner's Due Process Constitutional Rights," ("Petition," Dkt. No. 1) and an accompanying memorandum of points and authorities. ("Memo.," Dkt. No. 2). On April 11, Respondents

1 filed a Motion to Dismiss for Lack of Jurisdiction.¹ ("Motion,"

2
3 ¹ The Petition named (1) the United States of America,
4 (2) Department of Homeland Security Secretary, (3) Immigration
5 and Customs Enforcement Agency at Lompoc, (4) Federal Bureau of
6 Prisons, and (5) Federal Correctional Institution Lompoc as
7 respondents. In habeas actions, the prisoner's "immediate
8 custodian," i.e., the warden of the prison where the petitioner
9 is housed, is generally the proper respondent. See Rumsfeld v.
10 Padilla, 542 U.S. 426, 439 (2004) (in section 2241 habeas action
11 challenging physical confinement, "the immediate custodian, not a
12 supervisory official who exercises legal control, is the proper
13 respondent"); Mujahid v. Daniels, 413 F.3d 991, 994 (9th Cir.
14 2005) (section 2241 petitioner properly named as respondent "the
15 warden of the institution where he was imprisoned").

16
17 However, as immigration detainees are often housed in "state,
18 local, and even private facilities," some courts have noted that
19 the "immediate custodian" rule makes "little sense" and may not
20 apply because the immediate custodian does not have authority to
21 release the alien. See, e.g., Sanchez-Penunuri v. Longshore, ___
22 F. Supp. 2d ___, 2013 WL 6881287 at *4 (D. Colo. Dec. 31, 2013)
23 (discussing Armentero v. I.N.S., 340 F.3d 1058, 1059-60 (9th Cir.
24 2003) (Armentero I), reh'g granted, opinion withdrawn, 382 F.3d
25 1153 (9th Cir. 2004), opinion after grant of reh'g, 412 F.3d 1088
26 (9th Cir. 2005) (Armentero II)). The Ninth Circuit in Armentero
27 I concluded that the proper respondents in immigration cases are
28 the Attorney General and the DHS Secretary. Armentero I, 340
F.3d at 1073. However, Armentero I, the only Ninth Circuit
decision addressing this issue, has been withdrawn and is not
citable. See Armentero II, 412 F.3d at 1089 (J. Berzon,
dissenting) (disagreeing with decision to dispose of case on
rehearing on "fugitive disentitlement" rule instead of addressing
who the proper respondent is for immigration habeas cases).

21 Although Richard B. Ives, the Lompoc Warden, was Petitioner's
22 "immediate custodian" when he filed his Petition, (see Motion at
23 3 n.1), it is unnecessary for this Court to determine who is the
24 proper respondent or to make a substitution because Respondents
25 have waived any personal jurisdiction defense by failing to raise
26 it. Objections to a lack of personal jurisdiction, including the
27 requirement of naming the technically correct custodian, may be
28 waived. See, e.g., Padilla, 542 U.S. at 452 (Kennedy, J.,
concurring) ("Because the immediate-custodian and territorial-
jurisdiction rules are like personal jurisdiction or venue rules,
objections to the filing of petitions based on those grounds can
be waived by the Government); Smith v. Idaho, 392 F.3d 350, 355-
56, 356 n.4 (9th Cir. 2004) (where the proper respondent in a

1 Dkt. No. 9). On June 9, 2014, Petitioner filed an Opposition.
2 ("Opp.," Dkt. No. 16). Respondents did not file a Reply.

3
4 All parties have consented to the jurisdiction of the
5 undersigned United States Magistrate Judge pursuant to 28 U.S.C.
6 § 636(c). (See Dkt. Nos. 12 (Petitioner) & 19 (Respondents)).
7 Accordingly, this action is ripe for adjudication. For the
8 reasons stated below, Respondents' Motion is granted and this
9 action is dismissed without prejudice for lack of jurisdiction.

10
11 **II.**

12 **FACTUAL BACKGROUND**

13
14 Petitioner is a citizen of Vietnam who came to the United
15 States in 1975 as an infant and was admitted as a Lawful
16 Permanent Resident. (Memo. at 9 & Exh. A at 2 (Notice to
17 Appear)). On April 16, 2009, Petitioner was convicted of
18 Conspiracy to Possess with Intent to Distribute Methamphetamine.
19 (Id.). Petitioner is currently serving a criminal sentence
20 pursuant to that conviction, with an anticipated release date of
21 June 21, 2019. (Motion, Exh. 1; Memo. at 1).

22
23 On July 17, 2009, approximately three months after
24 Petitioner's conviction, Immigration and Customs Enforcement

25
26
27 habeas action is an agent of the state, the state may waive the
28 lack of personal jurisdiction on the custodian's behalf).
Accordingly, the Court will proceed to the substance of
Respondents' Motion.

1 ("ICE")² issued an immigration detainer against Petitioner.³ (Id.
2 at 4). On May 28, 2013, ICE issued a "Notice to Appear,"
3 charging Petitioner as removable under 8 U.S.C. §§ 1227(a)(2)(A)
4 & (a)(2)(B)(i).⁴ (Id., Exh. A at 2). A final removal order has
5 not yet issued. (See Memo. at 6 (acknowledging that an
6 immigration detainer "is [i]n essence the starting point of the
7 final order of deportation") (emphasis added); Opp. at 2 (arguing
8 that Petitioner is under ICE's jurisdiction "because a final
9 deportation order has been initiated against him with out [sic]
10 due process of law and without a remote chances [sic] that the
11 inmate is going to be deported)).

13 III.

14 PETITIONER'S CLAIMS AND RESPONDENTS' MOTION TO DISMISS

15
16 Petitioner argues that the immigration detainer is unlawful
17 because he is not deportable and the detainer was obtained in
18 violation of due process. (Pet. at 1-2). Petitioner also

19 _____
20 ² "ICE is the investigative arm of the Department of Homeland
21 Security ('DHS'). DHS assumed the responsibilities of the former
22 Immigration and Naturalization Service ('INS') in 2002." Galarza
23 v. Szalczyk, 745 F.3d 634, 637 n.2 (3d Cir. 2014).

24 ³ An immigration detainer notifies a law enforcement agency with
25 custody over an individual that the Department will seek custody
26 of the alien "for the purpose of arresting and removing the
27 alien" upon completion of the alien's criminal sentence.
28 8 C.F.R. § 287.7. "The detainer is a request that such agency
advise the Department, prior to release of the alien, in order
for the Department to arrange to assume custody" Id.

⁴ "DHS usually serves suspected removable aliens with a notice to
appear to commence removal proceedings." Hamazaspyan v. Holder,
590 F.3d 744, 745 n.1 (9th Cir. 2009).

1 contends that the detainer violates his constitutional rights to
2 free speech and due process because it precludes him from
3 participating in the Residential Drug Abuse Program ("RDAP").
4 (Memo. at 5 & 10). Finally, Petitioner argues that his interview
5 with an ICE officer pursuant to the Notice to Appear violated his
6 procedural due process rights because the officer "rushed . . .
7 through the interview" without explaining why the government was
8 not granting Petitioner temporary protected status. (Id. at 9).

9
10 Respondents contend that the Court should dismiss this
11 action for three reasons. First, the Court lacks jurisdiction
12 over the Petition because Petitioner is not "in custody" pursuant
13 to the detainer. (Motion at 3). Second, 8 U.S.C. § 1252(g)
14 prohibits courts from reviewing "what is essentially a preemptive
15 challenge to eventual removal proceedings." (Id.). Third, the
16 Petition fails to state a claim under Rule 12(b)(6) because
17 Petitioner does not explain how his immigration detainer
18 precludes him from participating in RDAP. (Id. at 4).

19
20 **IV.**

21 **DISCUSSION**

22
23 **A. The Court Lacks Jurisdiction To Hear Petitioner's Habeas**
24 **Claims Because Petitioner Is Not "In Custody" Pursuant To**
25 **The Detainer**

26
27 "Section 2241 embodies the traditional writ of habeas
28 corpus, permitting an individual to challenge the legality of his

1
2 custody" Woods v. Carey, 525 F.3d 886, 889 (9th Cir.
3 2008). As the Supreme Court has explained,

4
5 The federal habeas statute gives the United States
6 district courts jurisdiction to entertain petitions
7 for habeas relief only from persons who are "in
8 custody in violation of the Constitution or laws or
9 treaties of the United States." 28 U.S.C.
10 § 2241(c)(3) (emphasis added); see also 28 U.S.C.
11 § 2254(a). We have interpreted the statutory language
12 as requiring that the habeas petitioner be "in
13 custody" under the conviction or sentence under attack
14 at the time his petition is filed.

15
16 Maleng v. Cook, 490 U.S. 488, 490-91 (1989) (emphasis added).
17 The "in custody" requirement is jurisdictional. Wilson v.
18 Belleque, 554 F.3d 816, 821 (9th Cir. 2009) ("The text of the
19 statute makes clear, and the Supreme Court has confirmed, that
20 'custody' is a jurisdictional prerequisite to habeas review under
21 § 2241(c)(3).") (citing Hensley v. Mun. Court, 411 U.S. 345, 351
22 (1973)).

23
24 In this action, Petitioner claims that DHS has "custody"
25 over him based on its issuance of an immigration detainer. (See
26 Memo. at 7 (arguing that ICE "gains immediate technical custody"
27 over an alien once a detainer issues); id. at 8 (contending that
28 "the immigration detainer has placed [Petitioner] under ICE

1 jurisdiction")). However, Petitioner is "in custody" pursuant to
2 his criminal conviction, not the immigration detainer.

3
4 As noted above, an immigration detainer is merely a request
5 to a law enforcement agency or prison to notify DHS before it
6 releases an alien upon completion of his criminal sentence so
7 that DHS may take custody of the alien for removal proceedings.
8 8 C.F.R. § 287.7; see also Galaviz-Medina v. Wooten, 27 F.3d 487,
9 493 (10th Cir. 1994) ("A detainer usually serves only as a notice
10 to federal prison authorities that the INS is going to be making
11 a decision about the deportability of the alien in the future.").
12 Accordingly, as the Ninth Circuit has explained, "the bare
13 detainer letter alone does not sufficiently place an alien in INS
14 custody to make habeas corpus available." Campos v. I.N.S., 62
15 F.3d 311, 314 (9th Cir. 1995) (quoting Garcia v. Taylor, 40 F.3d
16 299, 303 (9th Cir. 1994) (superseded by statute on other grounds,
17 as recognized in Campos)); United States v. Female Juvenile,
18 A.F.S., 377 F.3d 27, 35 (1st Cir. 2004) ("[A]n INS detainer is
19 not, standing alone, an order of custody. Rather, it serves as a
20 request that another law enforcement agency notify the
21 [Immigration and Naturalization Service] before releasing an
22 alien from detention so that the INS may arrange to assume
23 custody over the alien."); Zolicoffer v. United States Dep't of
24 Justice, 315 F.3d 538, 540 (5th Cir. 2003) (collecting cases,
25 including Campos, and agreeing that absent an order of removal,
26 "prisoners are not 'in custody' for purposes of 28 U.S.C. § 2241
27 simply because the INS has lodged a detainer against them").
28 Because Petitioner is not in DHS custody and is not challenging

1 the conviction for which he is currently incarcerated, the Court
2 lacks jurisdiction to hear Petitioner's habeas claims.⁵

3
4 **B. The Court Lacks Jurisdiction To Hear Challenges To The**
5 **Attorney General's Decision To Initiate Removal Proceedings**

6
7 Throughout the Petition, Petitioner attempts to equate an
8 immigration detainer with a final order of removal and improperly
9 relies on cases, statutes and regulations that apply only when a
10 final order of removal has issued. (See, e.g., Memo. at 5
11 (discussing prohibition on indefinite detention announced in
12 Zadvydas v. Davis, 533 U.S. 678 (2001), when the final order of
13 removal cannot be executed within a reasonable time)). In
14 particular, Petitioner's due process arguments rest largely on
15 DHS's "failure" to follow procedures codified at 8 C.F.R.
16 §§ 241.13-14. (See, e.g., Memo. at 2-4, 8-9, 12-13). However,
17 those regulations apply only to aliens subject to a final order
18 of removal and are therefore not applicable here. Stripped of

19 _____
20 ⁵ The Court notes that, in addition to misunderstanding federal
21 law, Petitioner also misquotes it. Petitioner states that "[h]e
22 is the subject of a final order of deportation proceeding because
23 'an alien is deemed to be 'in custody' when a final order of
24 deportation proceeding has been initiated against him.'" (Memo.
25 at 8) (purporting to quote Nakaranurack v. United States, 68 F.3d
26 290, 293 (9th Cir. 1995)). However, the Nakaranurack court did
27 not state that an alien is "in custody" at the initiation of a
28 final order proceeding. Rather, the court explained that whether
or not an alien is in physical custody, "so long as he is subject
to a final order of deportation, an alien is deemed to be 'in
custody' for purposes of the [Immigration and Nationality Act],
and therefore may petition a district court for habeas review of
that deportation order." Id. (emphasis added). Nakaranurack has
no bearing on Petitioner's case because Petitioner is not yet
subject to a final removal order.

1 these claims, the Petition is essentially an objection, based on
2 Petitioner's contention that he is not deportable, to DHS's
3 decision to initiate proceedings that may eventually result in
4 Petitioner's removal.⁶ As such, the Court lacks jurisdiction
5 because Congress has barred courts from hearing claims
6 challenging the Attorney General's decision to initiate removal
7 proceedings.

8
9 8 U.S.C. § 1252(g) provides:

10
11 Except as provided in this section and notwithstanding
12 any other provision of law (statutory or
13 nonstatutory), including section 2241 of Title 28, or
14 any other habeas corpus provision, . . . no court
15 shall have jurisdiction to hear any cause or claim by
16 or on behalf of any alien arising from the decision or
17 action by the Attorney General to commence

18
19 ⁶ For example, Petitioner appears to argue that he is eligible
20 for Temporary Protective Status ("TPS") pursuant to 8 C.F.R.
21 § 244.7. (See Memo. at 2-3). Congress created TPS "in
22 recognition of the fact that armed conflicts were ongoing and
23 might erupt in various parts of the world, making it
24 inappropriate to return foreign nationals to these areas." Rodas
25 v. Chertoff, 399 F. Supp. 2d 697, 704 (E.D. Va. 2005). "In
26 essence, TPS permits eligible aliens from designated countries to
27 obtain temporary immigration status and protection from removal
28 because they are unable to return to their homeland." Id.
(citing 8 U.S.C. § 1254(a)). However, because "Congress has
plainly committed the initial decision to grant or deny TPS to
the unreviewable discretion of the Secretary of DHS, there is no
jurisdiction in this or any court to review the merits of the
Secretary's denial of TPS" Id. at 705 (citing 8 U.S.C.
§ 1252(a)(2)(B)). Accordingly, even if DHS decided to deny TPS
to Petitioner, this Court would lack jurisdiction to review that
decision.

1 proceedings, adjudicate cases, or execute removal
2 orders against any alien under this chapter.

3
4 8 U.S.C. § 1252(g) (emphasis added). While section 1252(g) does
5 not preclude federal courts from hearing any habeas claim
6 involving immigration matters, it does strip the courts of
7 jurisdiction to hear claims based on the government's decision to
8 commence removal proceedings and its adjudication of removal
9 cases. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S.
10 471, 482 (1999); see also Jimenez-Angeles v. Ashcroft, 291 F.3d
11 594, 599 (9th Cir. 2002) (court lacks jurisdiction pursuant to
12 section 1252(g) to adjudicate claims based on the Attorney
13 General's decision not only "whether to commence, but also when
14 to commence, a [removal] proceeding") (emphasis in original).
15 Accordingly, to the extent that the Petition can be construed as
16 a preemptive challenge to DHS's decision to initiate removal
17 proceedings, the Court lacks jurisdiction over its claims.⁷

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⁷ The Court further notes that even if removal proceedings had
25 concluded and Petitioner were subject to a final removal order,
26 review of the final order of removal would proceed before the
27 Ninth Circuit, not this Court. See 8 U.S.C. § 1252(a)(5) ("[A]
28 petition for review filed with an appropriate court of appeals
... shall be the sole and exclusive means for judicial review
of an order of removal entered or issued under any provision of
this chapter").

1 **C. The Court Lacks Jurisdiction To Hear Petitioner's RDAP**
2 **Claims Because The BOP's Individualized Housing Decisions**
3 **Are Exempt From Judicial Review**
4

5 Finally, Petitioner argues that the detainer violates his
6 constitutional rights because it allegedly precludes him from
7 participating in RDAP. According to the Ninth Circuit,
8

9 RDAP is an intensive drug treatment program for
10 federal inmates with documented substance abuse
11 problems. . . . Treatment is conducted in a unit set
12 apart from the general prison population and is
13 followed by institutional and/or community-based
14 transitional programs. Successful completion of RDAP
15 can result in up to a one-year reduction in a
16 prisoner's sentence.
17

18 Reeb v. Thomas, 636 F.3d 1224, 1225 (9th Cir. 2011) (internal
19 citations and footnote omitted); cf. Close v. Thomas, 653 F.3d
20 970, 972-3 (9th Cir. 2011) (district court has jurisdiction for
21 challenge to system-wide RDAP policy for ranking eligible
22 inmates). However, the Court lacks jurisdiction to hear
23 Petitioner's individualized RDAP claim.
24

25 Federal inmates do not have a due process liberty interest
26 in their eligibility for rehabilitative programs. See Moody v.
27 Daggett, 429 U.S. 78, 88 (1976); Reeb, 636 F.3d at 1228 n.4
28 ("[I]nmates do not have a protected liberty interest in either

1 RDAP participation or in the associated discretionary early
2 release benefit."). Instead, Congress has given federal prison
3 officials "full discretion to control . . . prisoner
4 classification and eligibility for rehabilitative programs in the
5 federal system." Moody, 429 U.S. at 88 n.9; see also 18 U.S.C.
6 §§ 3621(b), 4042(a)(1); Reeb, 636 F.3d at 1226. "Determining
7 which prisoners are eligible to participate in RDAP is within the
8 discretion of the BOP, as is the decision to grant or deny
9 eligible prisoners sentence reductions upon successful completion
10 of the program." Reeb, 636 F.3d at 1226 (internal citations
11 omitted); see also Williams-El v. Carlson, 712 F.2d 685, 686
12 (D.C. Cir. 1983) (per curiam) (as amended) ("[P]rison officials
13 have the discretion reasonably to restrict the privileges of
14 prisoners subject to detainers.").

15
16 Under 18 U.S.C. § 3625, Congress explicitly precluded
17 judicial review of the BOP's individualized RDAP determinations.
18 Section 3625 specifically excludes any "determination, decision,
19 or order," including any decisions about an inmate's eligibility
20 for rehabilitative programs, made by the BOP pursuant to 18
21 U.S.C. §§ 3621-3624 from the provisions of the Administrative
22 Procedure Act, which authorizes federal courts to hear actions
23 involving a "legal wrong" suffered because of an agency action.
24 Reeb, 636 F.3d at 1226-27; see also 18 U.S.C. § 3625; 5 U.S.C.
25 § 702. Petitioner does not explain why he believes that the
26 detainer makes him ineligible for RDAP or show that he has ever
27 applied to participate in the program and been refused. However,
28 to the extent that Petition is challenging the BOP's

