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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FREDYS SOLORZANO,

1:09-cv-01240-DLB (HC)

Petitioner,

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS WITHOUT PREJUDICE AND DIRECTING CLERK OF COURT TO TERMINATE ACTION

v.

ATTORNEY GENERAL, et.al.,

[Doc. 1]

Respondents.

Petitioner is detained by the Immigration and Customs Enforcement (“ICE”) and is proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner has consented to the jurisdiction of the United States Magistrate Judge. (Court Doc. 4.)

The petition alleges that the continued detention of Petitioner violates Petitioner’s substantive and procedural due process rights under the Due Process Clause of the Fifth Amendment to the Constitution and is a violation of Respondent’s statutory authority.

FACTUAL SUMMARY¹

Petitioner is a native of Nicaragua. Petitioner is currently being detained at the Kern County Jail in Bakersfield, California.

In July 10, 2009, an Immigration Judge ordered Petitioner removed from the United States. Petitioner did not appeal the order and he is therefore now subject to a final order of

¹This information is derived from Petitioner's petition for writ of habeas corpus.

1 removal. Petitioner entered the custody of ICE on March 25, 2009, and has been detained
2 continuously by ICE since then.

3 DISCUSSION

4 A federal court may only grant a petition for writ of habeas corpus if the petitioner can
5 show that “he is in custody in violation of the Constitution” 28 U.S.C. § 2241(c)(3). A
6 habeas corpus petition is the correct method for a prisoner to challenge the “legality or duration”
7 of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir.1991), *quoting*, Preiser v.
8 Rodriguez, 411 U.S. 475, 485 (1973); Advisory Committee Notes to Rule 1 of the Rules
9 Governing Section 2254 Cases. However, the petition must “allege facts concerning the
10 applicant’s commitment or detention,” 28 U.S.C. § 2242, and the Petitioner must make specific
11 factual allegations that would entitle him to habeas corpus relief if they are true. O’Bremski v.
12 Maass, 915 F.2d 418, 420 (9th Cir.1990); United States v. Poopola, 881 F.2d 811, 812 (9th
13 Cir.1989).

14 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the Court is required to
15 make a preliminary review of each petition for writ of habeas corpus.² “If it plainly appears from
16 the petition and any attached exhibits that the petitioner is not entitled to relief in the district
17 court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” Rule 4 of
18 the Rules Governing § 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990).

19 In the instant case, Petitioner states that he is being mandatorily and indefinitely detained
20 by ICE in violation of the Fifth Amendment of the U.S. Constitution and in violation of
21 Respondent’s statutory authority and Petitioner’s substantive and procedural due process rights
22 under the Fifth Amendment. This issue was addressed by the Supreme Court in Zadvydas v.
23 Davis, 533 U.S. 678 (2001).

24 In Zadvydas, the U.S. Supreme Court found that the habeas corpus statute grants federal
25 courts the authority to determine whether post-removal-period detention is pursuant to statutory
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28 ²The Rules Governing § 2254 Cases can be applied to petitions other than those brought under § 2254 at the Court’s discretion. See, Rule 1(b) of the Rules Governing § 2254 Cases.

1 authority.³ Id. In addition, the Court held that the Immigration and Nationality Act’s (INA) post-
2 removal-period detention statute does not permit indefinite detention but “implicitly limits an
3 alien’s detention to a period reasonably necessary to bring about that alien’s removal from the
4 United States.” Id. at 689. When faced with making such a determination, the Court must
5 consider “the basic purpose of the statute, namely, assuring the alien’s presence at the moment of
6 removal.” Id. at 699. In addition, the Court must take appropriate account of the Executive
7 Branch’s “greater immigration related expertise,” the Bureau’s “administrative needs and
8 concerns,” and the “Nation’s need to speak with one voice on immigration.” Id. The Supreme
9 Court attempted to limit those occasions when the federal court would need to make such
10 “difficult judgments” by setting a “presumptively reasonable period of *detention*” of *six months*.
11 Id. at 701 (italics added). The burden is on the alien to show that there is no reasonable
12 likelihood of repatriation. Id. (“This 6-month presumption, of course, does not mean that every
13 alien not removed must be released after six months. To the contrary, an alien may be held in
14 confinement until it has been determined that there is no significant likelihood of removal in the
15 reasonably foreseeable future.”). After six months and once an alien makes a showing that there
16 is no “significant likelihood of removal in the reasonably foreseeable future, the Government
17 must respond with evidence sufficient to rebut that showing.” Id. However, where an alien
18 seeks release prior to the expiration of the presumptive six-month period, his claims are unripe
19 for federal review. See Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 148- 49, 87 S.Ct.
20 1507 (1967) (“[The ripeness doctrine’s] basic rationale is to prevent the courts, through
21 avoidance of premature adjudication, from entangling themselves in abstract disagreements over
22 administrative policies, and also to protect the agencies from judicial interference until an
23 administrative decision has been formalized and its effects felt in a concrete way by the
24 challenging parties.”).

25 In this case, as previously stated, Petitioner has remained in the custody of the ICE
26 following an order of removal since March 25, 2009. Petitioner’s current detention is still within

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28 ³The Supreme Court analyzed the constitutionality of the period of post-removal-*detention*, not the period
of post-removal. See Zadvydas, 533 U.S. at 699.

1 the six month “presumptively reasonable period of detention.” Zadvydas, 533 U.S. at 701.
2 Petitioner's allegation alone is, therefore, insufficient to overcome the presumption of
3 reasonableness of the six month period and his claims of constitutional violations are not ripe for
4 review. Should Petitioner’s detention continue past the six month presumptive period, he may
5 re-file the instant federal action and obtain review. At that time, however, Petitioner must
6 provide "good reason to believe that there is no significant likelihood of removal in the
7 reasonably foreseeable future." Id.

8 **ORDER**

9 Accordingly, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is
10 DISMISSED WITHOUT PREJUDICE as the claims raised are not ripe for federal review. IT IS
11 FURTHER ORDERED that the Clerk of Court ENTER judgment and terminate this action.

12
13 IT IS SO ORDERED.

14 **Dated: July 21, 2009**

/s/ **Dennis L. Beck**
UNITED STATES MAGISTRATE JUDGE