

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAVIER BALBUENA,

Petitioner,

No. 2: 11-cv-0759 JAM KJN P

vs.

M.D. McDONALD, et al.,

Respondents.

ORDER

\_\_\_\_\_ /

Petitioner, a state prisoner proceeding without counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

Petitioner names two respondents, Warden McDonald and the Immigration and Naturalization Service (“INS”). Petitioner alleges that in 1988 he was convicted of second degree murder and sentenced to 16 years to life. In 1989, the INS placed a detainer/immigration hold on petitioner, as a result of which he is subject to deportation to Cuba upon his release from prison.

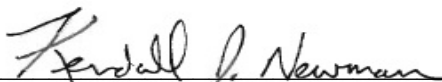
1           Petitioner alleges that the California Board of Parole Hearings (“BPH”) is using  
2 the parole hold as a reason to improperly deny him parole. Petitioner also alleges that the INS  
3 violated his due process rights by imposing the detainer/immigration hold without a hearing.

4           Petitioner’s claims against the INS are not properly raised in a habeas corpus  
5 petition brought pursuant to 28 U.S.C. § 2254. Rather, these claims should be separately raised  
6 in a habeas corpus petition brought pursuant to 28 U.S.C. § 2241. Accordingly, petitioner’s  
7 claims challenging the INS detainer/immigration hold are dismissed. Petitioner is granted  
8 twenty-eight days from the date of this order to file an amended habeas corpus petition raising  
9 only his claims concerning his parole suitability. The amended petition must challenge a  
10 decision made by the BPH following a particular parole suitability hearing. In other words, the  
11 amended petition should not generally challenge decisions by the BPH.

12           Accordingly, IT IS HEREBY ORDERED that:

- 13           1. Petitioner’s application to proceed in forma pauperis (Dkt. No. 2) is granted;  
14           2. The petition is dismissed with twenty-eight days to file an amended petition  
15 challenging a specific decision by the BPH.

16 DATED: April 14, 2011

17  
18   
19 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

20 bal759.100