

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 LE HUA WU,

No. C 09-4802 CW (PR)

5 Petitioner,

6 v.

7 RANDY TEWS, Warden,

8 Respondent.
9 _____/

ORDER DENYING
PETITION FOR WRIT OF
HABEAS CORPUS;
DENYING CERTIFICATE
OF APPEALABILITY

10 Petitioner Le Hua Wu brings this action seeking a writ of
11 habeas corpus under 28 U.S.C. § 2241. In opposing the petition,
12 Respondent Randy Tews¹ argues, among other things, that it should
13 be denied because Petitioner has not exhausted her administrative
14 remedies. Petitioner has submitted a response to this argument.
15 The matter was taken under submission on the papers. Having
16 considered all of the papers submitted by the parties, the Court
17 denies the petition.

18 BACKGROUND

19 Petitioner is serving a ninety-seven month sentence for
20 conspiracy to distribute and possess with intent to distribute
21 controlled substances, conspiracy to launder money and possession
22 with intent to distribute methamphetamine. She is incarcerated at
23 the satellite Federal Prison Camp at Camp Parks (SCP) in Dublin,
24 California, where Respondent is warden. Petitioner's projected
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27 ¹In accordance with Rule 2(a) of the Rules Governing § 2254
28 Proceedings and Rule 25(d)(1) of the Federal Rules of Civil
Procedure, the Court substitutes Randy Tews as Respondent because
he is now Petitioner's custodian.

1 The BOP has established procedures by which inmates can seek
2 review of "an issue relating to any aspect" of an inmate's
3 confinement. 28 C.F.R. § 542.10. The procedures apply to all
4 inmates in programs operated by the BOP. Id. The inmate first
5 must attempt informal resolution of the issue with prison staff.
6 28 C.F.R. § 542.13(a). If the inmate is unable to resolve the
7 issue informally, the inmate must submit a written administrative
8 appeal to the warden. 28 C.F.R. § 542.14(d). An inmate who is not
9 satisfied with the warden's response at the institutional level may
10 then submit an appeal to the Regional Director. 28 C.F.R.
11 § 542.15(a). Finally, an inmate who is not satisfied with the
12 Regional Director's response may submit an appeal to the General
13 Counsel of the BOP. Id.

14 Here, the parties' undisputed evidence shows that Petitioner
15 has not exhausted the her administrative remedies. Specifically,
16 in her petition, which was filed on October 19, 2009, Petitioner
17 states that she is in the process of exhausting her administrative
18 remedies but she provides no additional facts to support her
19 assertion. Pet. at 3 ¶ 5. By contrast, Respondent has submitted
20 in support of the Answer a declaration from Bobbi Butler, a
21 Correctional Program Specialist employed by the BOP, who attests
22 that Petitioner has not yet been considered for RRC placement, and
23 that under BOP policy Petitioner will not be considered for such
24 placement until seventeen to nineteen months before her projected
25 release date. Dec. Bobbi Butler Supp. Answer (Butler Dec.) ¶ 4.
26 Additionally, Butler states that she has reviewed the
27 administrative remedy logs maintained on the BOP computerized
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1 record-keeping database called SENTRY, and based on her review she
2 has found no administrative remedy requests filed by Petitioner on
3 this matter. Butler Dec. ¶¶ 1-3, 7.

4 In support of her traverse to the Answer, Petitioner presents
5 evidence that on June 23, 2010, after Respondent's Answer was
6 filed, Petitioner submitted to the Administrative Remedy
7 Coordinator at FCI Dublin a request that she be approved for RRC
8 placement twelve months prior to her release date. Pet'r's
9 Response, Ex. "Request for Administrative Remedy" dated June 23,
10 2010. Petitioner also presents evidence that her request was
11 rejected on June 24, 2010, for the reason that she did not first
12 attempt informal resolution in accordance with BOP administrative
13 remedy procedures. Pet'r's Response, Ex. "Rejection Notice -
14 Administrative Remedy" dated June 24, 2010. The rejection notice
15 expressly informs Petitioner that she may resubmit her appeal in
16 proper form within fifteen days of the date of the rejection
17 notice. Id. Petitioner does not contend or present evidence that
18 shows she resubmitted her administrative request or otherwise
19 pursued her claim through the administrative remedy process.

20 Rather, Petitioner argues that pursuing administrative
21 remedies would be futile because BOP staff have stated publicly at
22 meetings with SCP inmates that it would be a waste of inmates' time
23 to pursue administrative remedies regarding RRC decisions.
24 Respondent, however, submits persuasive evidence that, even if BOP
25 staff did tell Petitioner and other inmates that administrative
26 requests for relief concerning RRC decisions would be denied
27 categorically, such a statement is contrary to established BOP
28

1 policy and cannot be relied upon by Petitioner to avoid exhaustion
2 by assuming her request for RRC placement would be denied by the
3 BOP. In particular, Respondent has submitted two BOP policy
4 statements relevant to the BOP's consideration of inmates for RRC
5 placement. Both statements were issued in response to
6 implementation of the Second Chance Act of 2007.

7 The first statement, issued on April 14, 2008, concerns the
8 consideration of inmates for pre-release RRC placement during their
9 last twelve months of incarceration and explains that
10 individualized placement decisions are required:

11 The Act requires that pre-release RRC placement decisions
12 be made on an individual basis in every inmate's case,
13 according to new criteria in the Act, as well as the
14 criteria in 18 U.S.C. § 3621(b). See 18 U.S.C.
15 § 3624(c)(6) (amended). As a result, the Bureau's categorical
16 timeframe limitations on pre-release community confinement,
17 found at 28 C.F.R. §§ 570.20 and 570.21, are no longer
18 applicable, and must no longer be followed.

19 Butler Dec., Ex. 1 at 2 ¶ I(B) (emphasis in original).

20 Similarly, the second statement, issued on November 14, 2008,
21 concerns the consideration of inmates for pre-release RRC placement
22 when more than twelve months remain from their projected release
23 date and explains that individualized consideration must be given
24 to each inmate's request for RRC placement:

25 Inmates are legally eligible to be placed in an RRC at
26 any time during their prison sentence. Federal Courts
27 have made clear that RRCs are penal or correctional
28 facilities within the meaning of the applicable statutes.
Staff cannot, therefore, automatically deny an inmate's
request for transfer to a[n] RRC. Rather, inmate
requests for RRC placement must receive individualized
consideration. In other words, staff cannot say that an
inmate, whatever the circumstances, is automatically
ineligible for transfer to a[n] RRC. Rather, staff must
first review the inmate's request on its individual
merits, in accordance with policy, and as explained in
this guidance.

1 Butler Dec., Ex. 2 at 1-2 (emphasis in original).

2 Petitioner also argues that the exhaustion of administrative
3 remedies would be futile because the Deputy Director of the BOP,
4 Audrey Gill, is married to Warden Paul Copenhaver, who was warden
5 at SCP when Petitioner filed the instant petition. This argument
6 is without merit because it is purely speculative and unsupported
7 by any evidence. Additionally, Copenhaver no longer is warden at
8 SCP.

9 Finally, Petitioner claims that the exhaustion of
10 administrative remedies would be futile because by the time her
11 assessment for RRC placement takes place seventeen to nineteen
12 months before her projected release date, she will not be able to
13 complete the administrative remedy process in time to receive
14 twelve months of RRC placement. Again, however, Petitioner has
15 presented an argument that is purely speculative and without
16 evidentiary support.

17 In sum, the Court finds that the undisputed evidence presented
18 by the parties in this matter shows that Petitioner has not yet
19 been considered for RRC placement and, consequently, she has not
20 pursued administrative relief for having been denied such
21 placement. Additionally, the Court finds that Petitioner's
22 exhaustion of the administrative remedy process would not be futile
23 because BOP policy requires the individualized consideration of
24 each inmate's request for RRC placement and Petitioner has not
25 presented evidence that, should she be denied such placement, she
26 will not receive unbiased review of her request for administrative
27 relief or that she will not have time to complete the
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1 administrative remedy process before her projected release date.

2 Accordingly, the petition for a writ of habeas corpus will be
3 DENIED for failure to exhaust administrative remedies.³

4 CERTIFICATE OF APPEALABILITY

5 A petitioner may not appeal a final order in a federal habeas
6 corpus proceeding without first obtaining a certificate of
7 appealability (COA). See 28 U.S.C. § 2253(c); Fed. R. App. P.
8 22(b). Section 2253(c)(1) applies to an appeal of a final order
9 entered on a procedural question antecedent to the merits. See
10 Slack v. McDaniel, 529 U.S. 473, 483 (2000).

11 "Determining whether a COA should issue where the petition was
12 dismissed on procedural grounds has two components, one directed at
13 the underlying constitutional claims and one directed at the
14 district court's procedural holding." Id. at 484-85. "When the
15 district court denies a habeas petition on procedural grounds
16 without reaching the prisoner's underlying constitutional claim, a
17 COA should issue when the prisoner shows, at least, that jurists of
18 reason would find it debatable whether the petition states a valid
19 claim of the denial of a constitutional right and that jurists of
20 reason would find it debatable whether the district court was
21 correct in its procedural ruling." Id. at 484.

22 Here, jurists of reason would not find it debatable whether
23 the Court was correct in its procedural ruling. Accordingly, a COA
24 will not issue. Petitioner may seek a COA from the Court of
25 Appeals.

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27 ³Because the Court has denied the petition for failure to
28 exhaust, the Court does not reach Respondent's other arguments
raised in opposition to the petition.

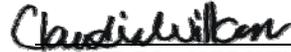
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CONCLUSION

For the foregoing reasons, the Court DENIES the petition for a writ of habeas corpus without prejudice to Petitioner filing a new one after exhausting the BOP's administrative appeals process. The Clerk of the Court shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: 9/12/2011



CLAUDIA WILKEN
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 LE HA WU,

5 Plaintiff,

6 v.

7 PAUL COPENHAVER et al,

8 Defendant.

Case Number: CV09-04802 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
10 Northern District of California.

11 That on September 12, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 Le Ha Wu 27718-112
16 Satellite Prison Camp
17 5675 8th St., Camp Parks
18 Dublin, CA 94568

19 Dated: September 12, 2011

20 Richard W. Wieking, Clerk
21 By: Nikki Riley, Deputy Clerk
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