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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LETITIA GONZALEZ JIMENEZ,

Case No. C-12-03558-RMW

Petitioner,

**ORDER STAYING PETITION FOR
HABEAS CORPUS**

v.

JANET NAPOLITANO, Secretary,
Department of Homeland Security, TIMOTHY
AIKEN, Field Office Director, Immigration
and Customs Enforcement, Department of
Homeland Security, JUAN OSUNA, Director,
Executive Office for Immigration Review, and
ERIC HOLDER, JR., Attorney General of the
United States,

[Re Docket No. 1]

Respondents.

Petitioner Letitia Gonzalez Jimenez seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241. She claims that she received ineffective assistance of counsel and that her constructive detention by respondents is in violation of her Fifth Amendment right to due process. For the reasons set forth below, the court will stay the petition pending administrative review.

I. BACKGROUND

A. Facts

Jimenez was born in Mexico and entered the United States without inspection on February 24, 1990. Pet. ¶ 1, Dkt. No. 1. In 1996, Jimenez consulted attorney Miguel Gadda about obtaining

1 lawful permanent residency. *Id.* ¶ 9. Gadda eventually filed an I-589 application for asylum, but
2 did so without informing Jimenez about the details or purpose of the application, without
3 interviewing her about potential asylum claims she might have, and without informing her about the
4 changes in the law resulting from the passage of the Immigration Reform and Immigrant
5 Responsibility Act of 1996 (IRIRA) and the impact of those changes on her case. *Id.* ¶ 11. Gadda
6 allegedly failed to prepare Jimenez for her final deportation hearing in February 1998, and her
7 asylum application was consequently denied. *Id.* ¶ 14. Gadda continued to represent Jimenez in
8 subsequent appeals before the Board of Immigration Appeals (BIA) and the Ninth Circuit Court of
9 Appeals. However, unbeknownst to Jimenez, Gadda was suspended by the California State Bar in
10 August 2001, and by the BIA in October of that same year. *Id.* ¶ 16.

11 On September 23, 2002, the BIA dismissed Jimenez's administrative appeal, and Gadda
12 informed her that he would file a petition for review with the court of appeals, which he
13 subsequently did on October 21, 2002. *Id.* ¶¶ 17-18. Jimenez next received a letter from Gadda
14 dated December 12, 2002, with a case status update, after which Jimenez heard nothing from Gadda
15 through June 2004, although Gadda filed a brief with the court of appeals in May 2003, without
16 informing her. *Id.* ¶¶ 19-20. After repeated failed attempts to contact Gadda, Jimenez reached an
17 individual in Gadda's office in June 2004 who informed her that Gadda could no longer represent
18 her, and Jimenez was referred to an attorney named Bruce Wong. *Id.* ¶ 20.

19 Wong agreed to represent Jimenez and stated that he would file a motion to reopen the BIA
20 proceeding based on the ineffective assistance of Gadda, in addition to pursuing the petition for
21 review in the court of appeals. *Id.* ¶ 21. Wong, however, failed to file the motion to reopen until
22 February 2005, some seven months later, and the BIA denied the motion for untimeliness in April
23 2005. *Id.* ¶¶ 26-27. The court of appeals declined to review this decision in March 2007, after
24 having denied the initial petition for review in January 2005. *Id.* ¶¶ 25, 30.

25 On December 9, 2011, Jimenez was arrested by agents of the Department of Homeland
26 Security, placed on an order of supervision, and ordered to report on July 10, 2012. *Id.* ¶ 34. In the
27 interim, Jimenez retained new counsel, who attempted to obtain a copy of her administrative record.
28 As neither Wong nor the court of appeals had retained a copy of the record, and Gadda's

1 whereabouts were unknown, counsel filed a Freedom of Information Act (FOIA) request with
2 respondents Holder and Osuna, and on March 12, 2012, was told to expect a response within 30
3 days. *Id.* ¶ 36. At the time this petition was filed on July 9, 2012, Jimenez still had not received a
4 response to her request. On October 11, 2012, the government responded to the FOIA request,
5 providing Jimenez with her administrative record. Reply 3, Dkt. No. 23.

6 **B. Procedural History**

7 Jimenez filed this petition on July 9, 2012, as well as a motion to stay the execution of the
8 removal order pending disposition of this case. Dkt. Nos. 1, 4. On August 1, 2012, this court
9 granted the motion to stay, and the government filed an opposition to the habeas petition on
10 September 28, 2012. Dkt. Nos. 15, 17. Jimenez filed a response on November 11, 2012. Dkt. No.
11 23.

12 Jimenez claims her constructive detention is unlawful in violation of her Fifth Amendment
13 right to due process, for ineffective assistance of counsel, based on the following:

14 (1) Failure of Wong to file a timely motion to reopen with the BIA raising Jimenez's
15 ineffective assistance of counsel claims against Gadda;

16 (2) Failure of Wong to assert Jimenez's claim for economic asylum under *Beballah v.*
17 *Ashcroft*, 367 F.3d 1067 (9th Cir. 2004); and

18 (3) Failure of respondents Holder and Osuna to comply with 5 U.S.C. § 552 *et seq.*, as to the
19 FOIA request for Jimenez's administrative record.

20 Jimenez has withdrawn her alternative claim for relief based on the BIA's failure to inform
21 her of Gadda's suspension, conceding that the BIA in fact had no duty to inform her of Gadda's
22 status. Reply 9. However, Jimenez requests that, if the court is inclined to dismiss this petition as
23 moot in light of the government's FOIA response, the court stay this petition while she pursues an
24 administrative motion to reopen her case before the BIA, now that a complete administrative record
25 is available. *Id.*

1 **II. ANALYSIS**

2 Jimenez seeks habeas relief from this court. Although, as explained below, the court finds
3 that it would otherwise have subject matter jurisdiction, Jimenez has not exhausted her claims and
4 thus the court will stay the action pending exhaustion of her administrative remedies.

5 **A. Subject Matter Jurisdiction**

6 This court may consider a petition for a writ of habeas corpus on behalf of "a prisoner...in
7 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
8 2241(c)(3). Although there is no right to counsel in deportation proceedings, an alien still has a
9 right to due process. *Dearinger v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000). Ineffective
10 assistance of counsel violates due process when "the proceeding [is] so fundamentally unfair that
11 [the] alien [is] prevented from reasonably presenting his case." *Lopez v. INS*, 775 F.2d 1015, 1017
12 (9th Cir. 1985). Failure to timely file an appeal because of ineffective assistance of counsel makes
13 the proceeding "presumptively unreliable" because it deprives the alien of the appellate proceeding.
14 *Dearinger*, 232 F.3d at 1045.

15 The REAL ID Act of 2005 deprives district courts of jurisdiction over claims that attack a
16 final order of removal. 8 U.S.C. § 1259(b). However, where, as here, the petitioner is claiming
17 ineffective assistance of counsel and seeking only to restart or toll procedural deadlines, the petition
18 is not considered an attack on the final order of removal, and the jurisdiction-stripping provisions of
19 the REAL ID Act do not apply. *See A. Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007).

20 Finally, an alien subject to a final order of removal is considered "in custody" for the
21 purposes of § 2241(c)(3), even if, as here, the alien is not actually physically confined.
22 *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995). Since Jimenez is still subject to
23 the final order of removal pending the disposition of this case, she satisfies the "in custody"
24 requirement.

25 Accordingly, this court has subject matter jurisdiction.

26 **B. Exhaustion**

27 The government argues that Jimenez has failed to exhaust her administrative remedies, and
28 that therefore the court should dismiss her petition. Opp'n 2. Before a habeas petition may be

1 properly brought before the court under § 2241, a petitioner must first exhaust available
2 administrative and judicial remedies. *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004). This is
3 not a jurisdictional requirement, as § 2241 does not require exhaustion, but the Ninth Circuit has
4 imposed an exhaustion requirement "as a prudential matter." *Castro-Cortez v. INS*, 239 F.3d 1037,
5 1047 (9th Cir. 2001), *overruled on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30
6 (2006). "[L]ower courts are not free...to address the underlying merits [of a case] without first
7 determining the exhaustion requirement has been satisfied or properly waived." *Laing*, 370 F.3d at
8 998.

9 **1. Whether exhaustion should be required**

10 Prudential exhaustion should be imposed where: 1) "agency expertise makes agency
11 consideration necessary to generate a proper record and reach a proper decision; 2) relaxation of the
12 requirement would encourage the deliberate bypass of the administrative scheme; and 3)
13 administrative review is likely to allow the agency to correct its own mistakes and to preclude the
14 need for judicial review." *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003). The
15 parties do not dispute that, under ordinary circumstances, Jimenez's failure to bring her ineffective
16 assistance of counsel claims against Wong before the BIA would constitute a failure to exhaust.
17 The BIA has the authority to reopen removal proceedings in order to hear ineffective assistance of
18 counsel claims, and if necessary, reissue the final order of removal in order to restart or toll
19 procedural deadlines. *Matter of Compean (Compean II)*, 25 I. & N. Dec. 1, 3 (BIA 2009). The
20 court finds that the prudential exhaustion factors weigh in favor of requiring exhaustion.

21 First, the BIA has a well-developed set of procedures and standards by which to evaluate
22 ineffective assistance of counsel claims, weighing the first factor in favor of exhaustion. *See Lata v.*
23 *INS*, 204 F.3d 1241, 1246 (9th Cir. 2000); *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988).
24 Second, allowing Jimenez to bypass this procedure and present her ineffective assistance of counsel
25 claim for the first time before this court might encourage other petitioners to try the same, weighing
26 the second factor in favor of exhaustion. The third factor is neutral because Jimenez is not asserting
27 error on the agency's part, but rather on the part of her attorney Wong. However, if the BIA has the
28 opportunity to review Jimenez's claim against Wong, it is likely that further judicial review will not

1 be necessary, given that the BIA is well-suited to consider the claim and order a remedy. Thus,
2 requiring Jimenez to exhaust administrative remedies for her ineffective assistance of counsel claim
3 is appropriate.

4 **2. Whether exhaustion may be waived**

5 However, because the exhaustion requirement is prudential, rather than jurisdictional, it can
6 be waived in certain instances. These exceptions include situations where administrative remedies
7 are inadequate, pursuit of administrative remedies would be futile, the petitioner raises a substantial
8 constitutional question, or the petitioner would suffer irreparable injury if not granted immediate
9 judicial relief. *Laing*, 370 F.3d at 1000-01.

10 Jimenez does not assert any of these four exceptions to support her claim for waiver. She
11 argues instead that while exhaustion would otherwise be appropriate, the government's failure to
12 produce her administrative record pursuant to her FOIA request constituted a second due process
13 violation that interfered with her right to effective assistance of counsel and precluded her from
14 exhausting administrative remedies. She therefore argues that the failure to turn over her
15 administrative record should excuse her failure to exhaust.

16 Jimenez relies on *P. Singh v. Waters*, 87 F.3d 346, 349 (9th Cir. 1996), in which Singh's
17 counsel had requested his administrative record from the INS a full year before his deportation, but
18 was told that his file could not be found. *Id.* at 347. When Singh's file was finally located, the
19 government neglected to timely inform Singh or his counsel that it had been found, preventing
20 counsel from seeking a stay of deportation that would have prevented Singh's removal from the
21 United States. *Id.* at 349. The Ninth Circuit found that the government's failure to turn over the file
22 had "effectively scuttled [Singh's] right to counsel," and that Singh's removal was therefore
23 unlawful. *Id.* Furthermore, the court found that Singh could not be charged with failing to exhaust
24 his administrative remedies when it was the government's own actions in withholding the
25 administrative record and then deporting Singh that "[had] made the full reopening of his case
26 impossible." *Id.* at 349-50.

27 This case, however, is distinguishable from *Singh v. Waters*. This court has already noted
28 that Jimenez did have access to some of the relevant documents, as she submitted them with her

1 petition. Order re Mot. to Stay 8, Dkt. No. 15; *see also* Dkt. Nos. 2-3. Thus Jimenez may have
2 been able to move the BIA to reopen her case without her full administrative record, although she
3 was clearly entitled to the full record. Jimenez, furthermore, has not yet been removed from the
4 United States. However, whether or not *Singh v. Waters* might have excused a failure to exhaust
5 had the government not complied with Jimenez's FOIA request, the issue is moot, as the
6 government *has* now complied, giving Jimenez access to her full administrative record. Thus,
7 Jimenez's failure to exhaust may not be excused.

8 3. Stay

9 Jimenez has also requested that the court stay her petition, should the court be inclined to
10 dismiss for failure to exhaust. "When a petitioner does not exhaust administrative remedies, a
11 district court...should either dismiss the petition without prejudice or stay the proceedings until the
12 petitioner has exhausted [administrative] remedies." *Leonardo v. Crawford*, 646 F.3d 1157, 1160
13 (9th Cir. 2011). The decision whether to stay or dismiss the petition is discretionary, but in
14 exercising its discretion, "the district court must balance the agency's interest in applying its
15 expertise...and making a proper record, against the interests of private parties in finding adequate
16 redress." *Morrison-Knudsen Co. v. CHG Int'l*, 811 F.2d 1209, 1223 (9th Cir. 1987).¹ In many
17 cases, issuing a stay rather than an outright dismissal for failure to exhaust "may represent the best
18 accommodation of the competing interests." *Id.*

19 That is the case here. Issuing a stay is the most effective way of balancing both the
20 government's interest in maintaining the proper administrative procedure and Jimenez's interest in
21 procuring relief. The court will retain jurisdiction and stay the proceedings in this court pending
22 administrative review.

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25 ¹ Although *Morrison-Knudsen* is not a § 2241 case, the *Leonardo* court cited *Morrison-Knudsen* to
26 support its conclusion that the court had discretion to either stay a § 2241 petition or dismiss for
27 failure to exhaust. The *Leonardo* court did not specify how a court should determine whether a stay
28 should be granted. The court dismissed the case because the petitioner had not requested a stay.
Subsequent cases follow *Leonardo* in dismissing a petition for failure to exhaust where the
petitioner did not request a stay. *See e.g., Radojkovic v. Napolitano*, No. 2:10-cv-00579, 2012 WL
5900543, at *1-2 (D. Nev. Nov. 20, 2012); *Sakhon v. ICE Field Office Dir.*, No. C11-2107, 2012
WL 1557269, at *3-4 (W.D. Wash. Apr. 5, 2012). Here, the petitioner has requested a stay, and
thus these cases are not directly applicable.

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III. ORDER

For the foregoing reasons, the court GRANTS the motion to stay the petition for habeas corpus pending exhaustion of Jimenez's administrative remedies. The court's order staying deportation will remain in effect pending administrative resolution of this case or the court orders otherwise, whichever comes first. The parties are to keep the court informed as to the status of Jimenez's administrative motion to reopen her case before the BIA.

Dated: September 30, 2013


RONALD M. WHYTE
United States District Judge