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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FERNANDO MALDONADO,
Petitioner,
v.
JANET NAPOLITANO, et als ,
Respondents.

Civil No. 11cv2341-AJB(BLM)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241**

On October 6, 2011, Petitioner, a detainee in the custody of the Department of Homeland Security (“DHS”), Bureau of Immigration and Customs Enforcement, proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Respondent filed a return to the petition on January 13, 2012. Petitioner filed a reply on February 6, 2012. After a thorough review of the papers and applicable law, the Court DENIES the petition for writ of habeas corpus.

Background

The Court recites the background facts in the order denying Petitioner’s prior petition for writ of habeas corpus in case no. 10cv1014-AJB(BLM).¹ (Dkt. No. 22 at 1-5.)

Petitioner is a native and citizen of Honduras who entered the United States without inspection prior to 1996. (Pet., Ex. C.) On October 4, 1995, he married in the United States. (Pet., Ex. A.) On November 30, 1995, Petitioner was convicted of misdemeanor battery on his spouse and placed on probation for three years. (Pet., Ex. B; Resp’t Ex. 39.) On September 29, 1995, the INS placed Petitioner in deportation proceedings. (Resp’t Ex. 39.) On December 1, 1995, the IJ granted his request to depart the United States voluntarily before June 3,

¹On November 3, 2011, this case was transferred to the undersigned judge under the Low Number Rule as both cases appeared to involve the same or substantially the same parties, legal issues and/or facts. (Dkt. No. 2.)

1 1996 in lieu of an order of deportation. (Resp't Ex. 39.) Petitioner did not appeal
2 to the Board of Immigration Appeals ("BIA") and he did not depart the United
3 States, so his deportation order became effective and final on June 3, 1996.
(Resp't Ex. 37.) On December 13, 1996, Petitioner was deported to Honduras.
(Resp't Ex. 39.)

4 In January 1997, Petitioner unlawfully returned to the United States by entering
5 without inspection. (Pet., Ex. C; Resp't Ex 37.) On March 3, 2003, Petitioner
6 was convicted of a misdemeanor of Driving Under the Influence. (Resp't Ex. 5.)

7 Around June 22, 2001, Petitioner filed an application for temporary protected
8 status ("TPS") which the INS approved. (Pet., Ex. C; Resp't Exs. 1-4.) Because
9 of the two misdemeanor convictions, on April 19, 2007, the DHS withdrew his
10 TPS status. (Pet., Ex. B; Resp't Exs. 5-6.) On August 24, 2007, the superior
11 court vacated Petitioner's plea of his 1995 criminal case as legally invalid. (Pet.,
12 Ex. B; Resp't Exs. 7-8.) Petitioner filed an appeal regarding the withdrawal of his
13 TPS. (Pet., Ex. B.) On October 5, 2007, the DHS denied the appeal. (Pet., Ex.
14 B; Resp't Exs. 10-12.)

15 On July 31, 2008, Petitioner was arrested for disorderly conduct/public
16 intoxication in violation of California Penal Code section 647(f). (Resp't Ex. 37.)
17 He was transferred into the custody of ICE on that same day and placed him in
18 removal proceedings. (Resp't Ex. 37.) On September 18, 2008, the IJ granted
19 DHS's motion and terminated removal proceedings in order for the DHS to
20 reinstate the prior 1995 order of deportation to Honduras. (Resp't Exs. 16, 37.)
21 However, in response to the Court's request for additional documents, it was
22 realized that Respondents have not yet reinstated the 1996 deportation order.
(Gov't Response filed on 7/29/11, Dkt. No. 20.) On July 30, 2011, Respondent
filed a first supplemental lodgment informing the Court that on July 29, 2011,
DHS reinstated the prior deportation order. (Dkt. No. 21; Ex. 58.)

23 On September 26, 2008, Petitioner filed an appeal before the BIA arguing that his
24 prior removal order should not have been reinstated and that he should have been
25 considered for TPS and Adjustment of Status. (Pet. Suppl. Brief at 7; Resp't Ex.
26 37.) On February 10, 2009, the BIA dismissed the appeal. (Resp't Exs. 13, 37.)
27 On February 23, 2009, Petitioner petitioned for review of the BIA's decision and
28 motion for stay before the Ninth Circuit Court of Appeals in Maldonado v.
Holder, No. 09-70515. (Resp't Exs. 13, 27.) The stay of removal was granted.
(Resp't Ex. 37.) On July 1, 2009, the Ninth Circuit dismissed the petition for lack
of subject matter jurisdiction because its direct review of immigration cases is
limited to a review of final orders of removal. (Resp't Exs. 13-14.) A stay of
removal was in effect from February 23, 2009 until August 28, 2009. (Resp't
Exs. 27-28.)

29 In August 2009, Petitioner moved the BIA to reopen his previous 1995
30 deportation proceedings based on ineffective assistance of counsel. (Pet. at 7;
31 Pet. Suppl. Brief at 10.) On September 10, 2009, the BIA denied the August 2009
32 motion to reopen for lack of jurisdiction because jurisdiction to review any such
33 motion remained with the IJ because no appeal was taken from the IJ's December
34 1, 1995 decision finding Petitioner removable. (Resp't Exs. 18, 37.) On
35 September 18, 2009, he filed a petition for review of the BIA's decision and
36 motion for stay with the Ninth Circuit in Maldonado v. Holder, No. 09-72975 to
37 review the BIA's decision. (Resp't Ex. 32.) On April 14, 2010, the Ninth Circuit
38 denied the petition for review upholding the BIA's decision and dismissed the
remaining claims of ineffective assistance of counsel, eligibility for cancellation
of removal, whether petitioner is still a candidate for TPS and whether the prior

1 deportation in 1995 was valid because he failed to exhaust his administrative
2 remedies. (Resp't Exs. 18-19.) A stay of removal was in effect from September
18, 2009 until June 7, 2010. (Resp't Ex. 32.)

3 On September 14, 2009, the IJ held a bond hearing and determined that, because
4 Petitioner was subject to a final order of removal that was not subject to judicial
5 review, there was no jurisdiction to conduct bond review pursuant to Casas-
Castrillon v. DHS, 535 F.3d 942 (9th Cir. 2008) and/or Prieto-Romero v. Clark,
6 534 F.3d 1053 (9th Cir. 2008). (Resp't Ex. 16.) He appealed the IJ's decision.
(Resp't Ex. 16.) On January 27, 2010, the BIA upheld the IJ's decision and
dismissed the appeal. (Resp't Exs. 16-17.)

7 On October 7, 2009, Petitioner moved the IJ to reopen the proceedings. (Pet. at
8 7.) On November 9, 2009, the IJ denied the motion to reopen as untimely. (Pet.
9 at 7; Resp't Ex. 21.) The IJ specifically concluded that Petitioner did not
10 voluntarily depart within the time allowed in December 1, 1995 and the motion
11 was untimely and would not be equitably tolled because he did not show that he
12 acted with due diligence in pursuing his claim regarding ineffective assistance of
13 counsel. (Pet. Suppl. Brief at 11.) He appealed the IJ's decision to the BIA. (Pet.
14 at 7.) On April 13, 2010, the BIA upheld the IJ's decision denying his motion to
15 reopen an order of deportation for failing to show that he exercised due diligence
16 in pursuing his ineffective assistance of counsel claim. (Resp't Exs. 20-22.) On
17 April 21, 2010, Petitioner petitioned for review of the BIA decision and motion
18 for stay before the Ninth Circuit in Maldonado v. Holder, No. 10-71252. (Resp't
Ex. 36.) On June 15, 2010, the Ninth Circuit found the petition for review to be
appropriate for summary dismissal and set a briefing schedule for an order to
show cause why the petition should not be summarily denied. (Resp't Ex. 23.)
On August 26, 2010, the Ninth Circuit granted respondent's motion for summary
disposition. (Resp't Suppl. Brief, Ex. 46-48.) The Court also held that the
agency did not abuse its discretion in denying the untimely motion to reopen
because Petitioner failed to show he acted with due diligence in pursuing his
ineffective assistance of counsel claim. (Id.) Lastly, the Court concluded it
lacked jurisdiction to review the claim that the BIA abused its discretion in
refusing to reopen proceedings *sua sponte*. (Id.) A stay of removal was in effect
from April 21, 2010 until December 30, 2010. (Resp't Suppl. Brief, Exs. 43-44.)

19 In July 2010, Petitioner filed a motion to reopen with the BIA with new evidence
20 and new arguments. (Pet. Suppl. Brief at 13.) On December 13, 2010, the BIA
21 construed Petitioner's motion as one for reconsideration of the BIA's decision on
22 April 13, 2010. (Pet'r Suppl. Brief at Doc. 16-1 at 2-3.) The BIA first stated that
23 the such a motion for reconsideration was untimely and alternatively, that on
24 previously raised issues, Petitioner has not identified any error of fact or law in
25 the BIA's previously detailed decision. (Id.) Further, the BIA concluded the
26 motion to reopen was untimely and he had not presented any exception to the
27 filing requirements imposed on motion to reopen removal proceedings; and has
28 not demonstrated an exception situation for *sua sponte* reopening under 8 C.F.R.
§ 1003.2(a). (Id.) In conclusion, the BIA denied Petitioner's motion to reopen
and a request for a stay of deportation. (Id.)

On December 29, 2010, Petitioner filed another petition for review of the BIA's
denial of a motion to reopen and motion for stay in Maldonado-Aguilar v. Holder,
No. 10-73937. (Id., Ex. 50.) On July 6, 2011, the Ninth Circuit issued an order
similar to the one filed on August 26, 2010. The Court also held that the agency
did not abuse its discretion in denying the untimely motion to reopen because
Petitioner failed to show he acted with due diligence in pursuing his ineffective
assistance of counsel claim. (Ninth Circuit PACER, 10-73937, July 6, 2011.)

1 The Court also held it lacked jurisdiction to review the claim that the BIA abused
2 its discretion in refusing to reopen proceedings *sua sponte*. (Id.) In conclusion,
3 the Ninth Circuit stated, “[t]he temporary stay of removal will terminate upon
4 issuance of the mandate.” (Id.)

5 On May 10, 2010, Petitioner filed a petition for writ of habeas corpus in this Court in case
6 no. 10cv1014-AJB(BLM). (10cv1014-AJB(BLM), Dkt. No. 1.) On August 3, 2011, the Court
7 denied the petition for writ of habeas corpus. (Id., Dkt. No. 22.) On October 6, 2011, Petitioner
8 filed the instant petition for writ of habeas corpus. (Dkt. No. 1.) Respondent filed a return and
9 Petitioner filed a reply. (Dkt. Nos. 4, 5.)

10 Discussion

11 Petitioner alleges three claims in his petition. First, he seeks to challenge the July 29, 2011
12 reinstatement of a previous deportation order by the DHS. Second, he requests that the Court grant
13 him cancellation of removal under INA § 240A(b)(1). Third, he argues that he should be released
14 from detention.

15 A. July 29, 2011 Reinstatement Order

16 Petitioner challenges the July 29, 2011 reinstatement order of his 1996 deportation order.
17 Respondent argues that the Court does not have jurisdiction to address this issue.

18 Pursuant to 28 U.S.C. § 2241, alien detainees can properly challenge “the extent of the
19 Attorney’s General’s authority” to detain a removable alien under the general detention statutes.
20 Zadvydas v. Davis, 533 U.S. 678, 687-88 (2001). The REAL ID Act of 2005 amended the
21 Immigration and Nationality Act (“INA”) and vests jurisdiction over final removal orders with the
22 court of appeals. Nadarajah v. Gonzales, 443 F.3d 1069, 1075-76 (9th Cir. 2006). Reinstatement
23 orders qualify as an order of removal that can only be challenged in a petition for review with the
24 Ninth Circuit. Morales-Izquierdo v. Dept. of Homeland Sec., 600 F.3d 1076, 1082 (9th Cir. 2010);
Gallo-Alvarez v. Ashcroft, 266 F.3d 1123, 1127 (9th Cir. 2001).

25 The Court concludes that it does not have jurisdiction to review the July 29, 2011
26 reinstatement order. It appears that Petitioner has already filed a petition for review before the Ninth
27 Circuit regarding the reinstatement order in Maldonado v. Holder, case no. 11-72492, filed on
28 August 24, 2011. (Resp’t Exs. at 58-61.) Therefore, transfer of this case to the Ninth Circuit is not

1 necessary.

2 **B. Cancellation of Removal**

3 Petitioner asks the Court to grant his request for cancellation of removal pursuant to INA
4 § 240A(b)(1), also known as 28 U.S.C. § 1229b(b)(1), because he meets the standard having
5 accrued more than 10 years of a physical presence since his last entry into the United States. He
6 also claims that since he previously had TPS status for over seven years, he meets the standard for
7 cancellation of removal. Respondent argues that the Court lacks authority to cancel removal and
8 adjust status.

9 The Attorney General, not the district court, has the authority to cancel removal and adjust
10 status in a case. 8 U.S.C. § 1229b(b)(1).² Accordingly, the Court DENIES Petitioner’s request for
11 cancellation of removal.

12 **C. Release from Custody**

13 Petitioner seeks release from custody and cites to Diouf v. Napolitano, 634 F.3d 1081 (9th
14 Cir. 2011). The Ninth Circuit, in Diouf, held that an alien who is facing a prolonged detention under
15 8 U.S.C. § 1231(a)(6) is entitled to a bond hearing before an immigration judge and entitled to be
16 released on bond unless the government establishes that he is a flight risk or a danger to the
17 community. Diouf, 634 F.3d at 1091.

18 On November 29, 2011, Petitioner received a bond hearing and the immigration judge set
19 bond at \$5,000. (Resp’t Exs. at 63.) It does not appear that Petitioner challenges the bond hearing.
20 In his reply, Petitioner acknowledges that he was granted bond pursuant to Diouf. (Reply at 5.)
21 Accordingly, Petitioner has failed to show he is entitled to be released, and the Court DENIES his
22 request to be released from custody.

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26 ²The Court also notes that “[t]he reinstatement of a prior removal order bars an alien from
27 applying for “any relief” from removal for which he or she might previously have been eligible.”
28 Morales-Izquierdo, 600 F.3d at 1080 (citing INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (concluding that
once petitioner’s removal order was reinstated, he was no longer eligible for “relief” in the form of
adjustment of status-even if he could obtain a Form I-212 waiver). Since the reinstatement order was
reinstated and still valid, Petitioner cannot seek a cancellation of removal.

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Conclusion

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Based on the above, the Court DENIES the petition for writ of habeas corpus pursuant to 28

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U.S.C. § 2241.

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DATED: April 17, 2012

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Hon. Anthony J. Battaglia
U.S. District Judge

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