

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
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

AMINA SALVADOR,
Detainee No. A200968077,

Plaintiff,

vs.

IMMIGRATION CUSTOMS OF
ENFORCEMENT,

Defendant.

Civil No. 12cv1727 JLS (MDD)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
[ECF No. 2];**

**(2) DENYING MOTION TO
APPOINT COUNSEL [ECF No. 3]; and**

**(3) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING
TO STATE A CLAIM**

Amina Salvador (“Plaintiff”), currently detained at the San Diego Correctional Facility located in San Diego, California, and proceeding pro se, has filed a civil action. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, she has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 2], along with a Motion to Appoint Counsel [ECF No. 3].

///
///
///

1 I.

2 MOTION TO PROCEED IFP

3 All parties instituting any civil action, suit or proceeding in a district court of the United
4 States, except an application for writ of habeas corpus must pay a filing fee of \$350. See 28
5 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
6 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See
7 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, “[u]nlike other indigent
8 litigants, prisoners proceeding IFP must pay the full amount of filing fees in civil actions and
9 appeals pursuant to the PLRA [Prison Litigation Reform Act].” *Agyeman v. INS*, 296 F.3d 871,
10 886 (9th Cir. 2002). As defined by the PLRA, a “prisoner” is “any person incarcerated or
11 detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent
12 for, violations of criminal law or the terms and conditions of parole, probation, pretrial release,
13 or diversionary program.” 28 U.S.C. § 1915(h). Under this definition, “an alien detained by the
14 INS pending deportation is not a ‘prisoner’ within the meaning of the PLRA,” because
15 deportation proceedings are civil, rather than criminal in nature, and an alien detained pending
16 deportation has not necessarily been “accused of, convicted of, sentenced or adjudicated
17 delinquent for, a violation of criminal law.” *Agyeman*, 296 F.3d at 886. Thus, because Plaintiff
18 claims she was civilly detained pursuant to immigration or deportation proceedings, and not a
19 “prisoner” as defined by 28 U.S.C. § 1915(h), the filing fee provisions of 28 U.S.C. § 1915(b)
20 do not apply to her.

21 Accordingly, the Court has reviewed Plaintiff’s affidavit of assets, just as it would for any
22 other non-prisoner litigant seeking IFP status, see S.D. CAL. CIVLR 3.2(d), finds it is sufficient
23 to show that Plaintiff is unable to pay the fees or post securities required to maintain this action,
24 and hereby **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF
25 No. 2].

26 ///

27 ///

28 ///

1 **II.**

2 **MOTION FOR APPOINTMENT OF COUNSEL**

3 Plaintiff also requests the appointment of counsel to assist her in prosecuting this civil
4 action. The Constitution provides no right to appointment of counsel in a civil case, however,
5 unless an indigent litigant may lose her physical liberty if she loses the litigation. *Lassiter v.*
6 *Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1),
7 district courts are granted discretion to appoint counsel for indigent persons. This discretion may
8 be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017
9 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the
10 ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se
11 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and
12 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,
13 789 F.2d 1328, 1331 (9th Cir. 1986)).

14 The Court denies Plaintiff’s request without prejudice because, for the reasons set forth
15 below, neither the interests of justice nor exceptional circumstances warrant appointment of
16 counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at
17 1017.

18 **III.**

19 **SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

20 Any complaint filed by a person proceeding IFP is subject to sua sponte dismissal by the
21 Court to the extent it contains claims which are “frivolous, malicious, fail to state a claim upon
22 which relief may be granted, or seek monetary relief from a defendant immune from such relief.”
23 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam)
24 (holding that “the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez*
25 *v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection 1915(e) not only permits,
26 but requires a district court to dismiss an in forma pauperis complaint that fails to state a
27 claim.”). “[W]hen determining whether a complaint states a claim, a court must accept as true
28 all allegations of material fact and must construe those facts in the light most favorable to the

1 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*,
2 152 F.3d 1193, 1194 (9th Cir. 1998) (§ 1915(e)(2) “parallels the language of Federal Rule of
3 Civil Procedure 12(b)(6).”).

4 Plaintiff’s Complaint is mostly illegible and, at times, incoherent. Plaintiff appears to
5 allege that she is currently housed in an immigration detention center. Plaintiff names as the
6 only Defendant, the “Immigration Customs of Enforcement,” and claims that the conditions of
7 her confinement are “dangerous.” (Compl. at 2.) In addition, Plaintiff alleges that she has been
8 denied the right to wear a scarf that is part of her religion as a Muslim. (*Id.*)

9 To the extent that Plaintiff may be alleging facts relating to her confinement in a Federal
10 Immigration center and she may be trying to claim violation of her civil rights by federal actors,
11 the Court construes this matter as arising under *Bivens v. Six Unknown Named Fed. Narcotics*
12 *Agents*, 403 U.S. 388 (1971). *Bivens* established that “compensable injury to a constitutionally
13 protected interest [by federal officials alleged to have acted under color of federal law] could be
14 vindicated by a suit for damages invoking the general federal question jurisdiction of the federal
15 courts [pursuant to 28 U.S.C. § 1331].” *Butz v. Economou*, 438 U.S. 478, 486 (1978). “Actions
16 under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under
17 § 1983 by a federal actor under *Bivens*.” *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

18 To state a private cause of action under *Bivens*, Plaintiff must allege: (1) that a right
19 secured by the Constitution of the United States was violated, and (2) that the violation was
20 committed by a federal actor. *Id.*; *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624
21 (9th Cir. 1988). *Bivens* provides that “federal courts have the inherent authority to award
22 damages against federal officials to compensate plaintiffs for violations of their constitutional
23 rights.” *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000).
24 However, a *Bivens* action may only be brought against the responsible federal official in his or
25 her individual capacity. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1988). *Bivens*
26 does not authorize a suit against the government or its agencies for monetary relief. *FDIC v.*
27 *Meyer*, 510 U.S. 471, 486 (1994); *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1207 (9th Cir. 1988);
28 *Daly- Murphy*, 837 F.2d at 355. Thus, Plaintiff cannot hold an agency of the government, such

1 as “Immigration Customs of Enforcement,” liable for alleged civil rights violations under *Bivens*.
2 Plaintiff must identify the responsible federal official as the defendants in this matter.

3 Nor does *Bivens* provide a remedy for alleged wrongs committed by a private entity
4 alleged to have denied Plaintiff’s constitutional rights under color of federal law. *Correctional*
5 *Services Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (“[T]he purpose of *Bivens* is to deter *the*
6 *officer,*’ not the agency.”) (quoting *Meyer*, 510 U.S. at 485); *Malesko*, 534 U.S. at 66 n.2
7 (holding that *Meyer* “forecloses the extension of *Bivens* to private entities.”).

8 Based on the factual allegations set forth above, the Court simply cannot determine the
9 true nature of her allegations or whether she is attempting to state a claim under the federal law.
10 Some of Plaintiff’s allegations suggest that she is attempting to allege an Eighth Amendment
11 violation. However, the Supreme Court recently held that an inmate cannot bring a *Bivens*
12 action against an employee of a private entity for damages pursuant to alleged Eighth
13 Amendment violations. See *Minneci v. Pollard*, 132 S.Ct. 617, 626 (2012).

14 In *Minneci*, the Supreme Court held that

15 [W]here “a federal prisoner seeks damages from privately employed personnel working
16 at a privately operated federal prison, where the conduct allegedly amounts to a violation
17 of the Eighth Amendment, and where that conduct is a kind that typically falls within the
18 scope of traditional state tort law (such as the conduct involving improper medical care
at issue here), the prisoner must seek a remedy under state tort law. We cannot imply a
Bivens remedy in such a case.”

19 *Id.*

20 Thus, while Plaintiff may be able to raise her Eighth Amendment claims against the
21 private employees as a tort claim in state court, her claim is not cognizable as a *Bivens* action
22 in this Court.

23 For all the reasons set forth above, Plaintiff’s entire action is dismissed for failing to state
24 a claim upon which relief may be granted. Plaintiff will be given the opportunity to file an
25 Amended Complaint in order to correct the deficiencies of pleading identified by the Court.

26 ///

27 ///

28 ///

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
27
28

IV.

CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is **GRANTED**.


2. Plaintiff's Motion to Appoint Counsel [ECF No. 3] is **DENIED** without prejudice.

IT IS FURTHER ORDERED that:

3. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is filed in which to file a First Amended Complaint which cures the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and any claim not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). If Plaintiff fails to file an Amended Complaint within 45 days, this case shall remain dismissed for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2).

4. The Clerk of Court is directed to mail a court approved civil rights complaint to Plaintiff.

DATED: August 7, 2012



Honorable Janis L. Sammartino
United States District Judge