U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: F[redacted]-G[redacted], F[redacted] D[redacted] **A[redacted]-910**

Date of this notice: 1/18/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Mann, Ana
Grant, Edward R.

Userteam: Docket

File: [redacted] 910 – Florence, AZ

Date: JAN 18 2018

In re: F[redacted] D[redacted] F[redacted]-G[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Mac Nayeri, Esquire

ON BEHALF OF DHS: Nelson Echevarria-Tolentino
Assistant Chief Counsel

APPLICATION: Change in custody status

The applicant, a native and citizen of Mexico, appeals the May 5, 2017, bond order of the Immigration Judge denying the request for a redetermination of custody status based on a lack of jurisdiction. The record will be remanded for further proceedings.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The issue in this case is whether the applicant is entitled to a bond hearing before an Immigration Judge. The Immigration Judge concluded that she did not have jurisdiction to conduct a bond hearing in the instant matter because the applicant was in withholding-only proceedings. The Immigration Judge concluded that she had no authority over the applicant's custody because the applicant had not been issued a Notice to Appear and was not in removal proceedings pursuant to section 240 of the Immigration and Nationality Act, 8 U.S.C. § 1229a. Moreover, the Immigration Judge did not find that any of the applicable caselaw of the United States Court of Appeals for the Ninth Circuit conferred jurisdiction upon an Immigration Judge over the custody status of an applicant in withholding-only proceedings.

Subsequent to the Immigration Judge's bond order, the Ninth Circuit issued *Padilla-Ramirez v. Bible*, 862 F.3d 881 (9th Cir. 2017), which held that applicants in withholding-only proceedings are being detained pursuant to section 241(a) of the Act, 8 U.S.C. § 1231(a), and are thus not

entitled to an initial bond hearing before an Immigration Judge under 8 C.F.R. § 236.1.[1] However, the issue remains as to whether an applicant in withholding-only proceedings is entitled to a bond hearing before an Immigration Judge after prolonged detention.

The *Padilla-Ramirez v. Bible* court stated that "[w]e do not address Padilla-Ramirez's entitlement to a bond hearing after prolonged detention. We previously have held that 'individuals detained under § 1231(a)(6) are entitled to the same procedural safeguards against prolonged detention as individuals detained under § 1226(a).'" *Id.* at 884 (quoting *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011) (*Diouf II*)).

The Department of Homeland Security (DHS) acknowledges that applicants such as the one in the instant case are being detained pursuant to section 241(a)(6) of the Act once the initial 90-day removal period outlined in section 241(a)(1) of the Act elapses. However, the DHS argues that *Diouf II* does not grant an Immigration Judge the authority to hold a bond hearing for an applicant in withholding-only proceedings, even when detention exceeds 180 days. The applicant, who has been detained for over 180 days, argues that he is entitled to a bond hearing before an Immigration Judge pursuant to *Diouf II*.

The DHS argues that *Diouf II* should be distinguished because the applicant is subject to an unreviewable reinstated removal order after leaving the United States and reentering, whereas the alien in *Diouf II*, who had not departed the United States, had the potential to undo his administratively final order through a motion to reopen. However, the holding in *Diouf II*, by its clear language, applies to all aliens detained pursuant to section 241(a)(6) of the Act. Moreover, the Ninth Circuit, in *Diouf II*, was aware that section 241(a)(6) of the Act included "aliens who have exhausted all direct and collateral review of their removal orders but who, for one reason or another, have not yet been removed from the United States." *Id.* at 1085.

In the instant case, where the Ninth Circuit in *Padilla-Ramirez v. Bible* has found that applicants in withholding-only proceedings are detained pursuant to section 241(a) of the Act, where DHS has not disputed that the applicant is being detained pursuant to section 241(a)(6) of the Act, and where the Ninth Circuit in *Diouf II* has held that aliens detained pursuant to section 241(a)(6) of the Act who are facing prolonged detention are entitled to a bond hearing before an Immigration Judge, we will remand the record for the Immigration Judge to provide the applicant with a bond hearing.

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[1] In a previous decision, the Ninth Circuit addressed the issue of which aliens are entitled to a custody redetermination hearing every 6 months to determine if they remain a danger to the community or a flight risk. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) (*Rodriguez III*), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). That decision left ambiguity about the statute under which withholding-only applicants were detained and whether they were subject to administratively final orders. The Ninth Circuit in *Padilla-Ramirez v. Bible*, however, clearly stated that withholding-only applicants are being detained pursuant to section 241(a) of the Act and that reinstated removal orders – such as the one to which the applicant is subject – are administratively final. *Id.* at 885.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for a new bond hearing in accordance with the above decision and for the issuance of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
FLORENCE IMMIGRATION COURT
3260 NORTH PINAL PARKWAY
FLORENCE, AZ 85132

IN THE MATTER OF:	)	**WITHHOLDING ONLY PROCEEDINGS**
	)	
F[redacted]-G[redacted], F[redacted] D[redacted]	)	**BOND HEARING DENIED**
	)	
	)	**FILE NO.:** A-[redacted]910
	)	
APPLICANT	)	**DATE:** May 5, 2017

FOR THE APPLICANT:
Mac Nayeri, Esq.
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20 East Thomas Road, Suite 2200
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FOR THE DEPARTMENT:
Assistant Chief Counsel
Dep't. of Homeland Security
3250 North Pinal Parkway
Florence, Arizona 85132

MEMORANDUM AND ORDER OF THE IMMIGRATION JUDGE
Denying Bond Hearing for Lack of Jurisdiction

The Applicant's Motion to hold a bond hearing, filed on May 1, 2017, is denied because the Immigration Court and Immigration Judges have no jurisdiction, under statutes, regulations, or case law, to consider Applicant's request for a custody redetermination hearing.

Procedurally, this Court only has jurisdiction to hold bond hearings when it is given such jurisdiction by statute, or where Congress has provided such jurisdiction to the Attorney General of the United States and the regulations delegate such authority of the Attorney General to the Immigration Judges. Authority will also exist where a decision of the Ninth Circuit, a U.S. District Judge in Arizona, the Attorney General, or the Board of Immigration Appeals ("BIA"), has ordered or extended to this Immigration Court a Federal Court mandate to hold a bond hearing.

An Immigration Judge's authority to redetermine custody conditions is limited to aliens who have been issued a Notice to Appear and placed in removal proceedings under section 240 of the Immigration and Nationality Act ("INA" or "the Act"), 8 U.S.C. § 129a. *See Matter of A-W-*, 25 I&N Dec. 45, 46-47 (BIA 2009); 8 C.F.R. §§ 1003.19, 1236.1(d)(1). Applicant is not in removal proceedings under section 240, but instead is in Withholding-Only proceedings following reinstatement of a prior removal order, pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), and issuance of a Notice of Referral. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006) (section 241(a)(5) of the Act "explicitly insulates the removal orders from review, and generally forecloses discretionary

relief from the terms of the reinstated order"); *see also Morales Izquierdo v. Gonzales*, 486 F.3d 484, 491 (9th Cir. 2007) (Congress intended reinstatement under section 241(a)(5) "to be a different and far more summary procedure than removal" under section 240 of the Act).

Importantly, the detention authority of the Department of Homeland Security ("the Department") in this case stems from section 241(a) of the Act, not section 236(a), because Applicant is subject to an administratively final removal order that has been reinstated. *See* sections 241(a)(1)(B)(i), 241(a)(5) of the Act; 8 C.F.R. § 1208.31. Consequently, Applicant's request for a bond hearing falls outside of the authority given to the Immigration Courts.

Furthermore, even where there is extended detention, relevant case law does not give this Court jurisdiction over such a custody redetermination request. *Diouf v. Napolitano* holds that an alien who has a pending judicial petition for collateral review of a final removal order and who has been detained for 6 months or longer under section 241(a)(6) of the Act is entitled to a bond hearing. 634 F.3d 1081, 1085-86 (9th Cir. 2011). However, an applicant in Withholding-Only proceedings is not in removal proceedings under section 240 of the Act and is not seeking direct or collateral review of a final removal order. Instead, such an applicant is in Withholding-Only proceedings after reinstatement of a final removal order under section 241(a)(5) of the Act, and will remain subject to the reinstated removal order even if withholding of removal is ultimately granted. *See* 8 C.F.R. § 1208.16(f); *Fernandez-Vargas v. Gonzales*, *supra*, at 35; *see also Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004) (a grant of withholding of removal only prohibits removal to the country of risk, but does not prohibit removal to a non-risk country).

Finally, while the United States Court of Appeals for the Ninth Circuit has held that certain aliens are required to be provided custody redetermination hearings after 180 days in detention, aliens detained under section 241(a) of the Act are specifically excluded from that class. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, No. 15-1204, --- S. Ct. ---, 2016 WL 1182403 (Mem) (U.S. June 20, 2016). Hence an applicant whose detention is authorized by section 241(a) of the Act is not a part of the certified class in *Rodriguez v. Robbins*, *supra*, and would not be eligible for a custody redetermination hearing pursuant to the permanent injunction issued in that case.

Thus even if Applicant had been in detention for six months or more, this Court would still lack jurisdiction, absent a Federal Court mandate or a change in the relevant laws, regulations, or case law.

Therefore, since this Court does not have authority to conduct a bond hearing under the Act, and no other order or mandate of the U.S. Court of Appeals for the Ninth Circuit or a U.S. District Court provides a mandate or authorization for the Immigration Courts or Immigration Judges to redetermine custody in Withholding-Only proceedings, this Court concludes that it does not have the authority to conduct a bond hearing for Applicant.

Accordingly, the Court will enter the following order:

F[redacted]-G[redacted]
A-[redacted]910

ORDER: **IT IS HEREBY ORDERED THAT** the Applicant's request for a bond hearing must be **DENIED.**

May 5, 2017
Date

Molly S. Frazer
Immigration Judge

RIGHT OF APPEAL PRESERVED: Any right of appeal is preserved to both parties, Respondent and DHS, with any Notice of Appeal due to be filed with and received at the Board of Immigration Appeals (BIA), in Virginia, within 30 days of this Order.

CERTIFICATE OF SERVICE

THIS DOCUMENT SERVED BY: ( )MAIL ( )PERSONAL SERVICE
TO: ( )ALIEN (M)ALIEN c/o Custodial Officer ( )ALIEN'S ATTY (M)DHS
DATE: 5-11-17 **BY COURT STAFF:** [redacted]
Attachments: ( )EOIR-33 ( )EOIR-28 ( )Legal Services List ( )Other