

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ALEXANDER LORA,	:	
	:	
Petitioner,	:	14 Civ. 2140 (AJP)
	:	
-against-	:	<b><u>OPINION &amp; ORDER</u></b>
	:	
CHRISTOPHER SHANAHAN, et al.,	:	
	:	
Respondents.	:	

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**ANDREW J. PECK, United States Magistrate Judge:**

Petitioner Alexander Lora seeks a writ of habeas corpus from his November 22, 2013 detention by the United States Department of Homeland Security ("DHS"), Bureau of Immigration and Customs Enforcement ("ICE"). (See Dkt. No. 2: Pet. ¶¶ 2-5.) Lora is being detained pursuant to Section 236(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), which requires mandatory detention of certain criminal aliens for the duration of their removal proceedings. 8 U.S.C. § 1226(c)(1). Lora argues that his detention is not authorized by § 1226(c) and seeks an order directing the government to provide him with an individualized bond hearing. (See Pet. ¶¶ 6-11, Wherefore ¶ 3.) This case requires the Court to interpret the meaning of the phrase "when the alien is released," an issue that has split the courts. The parties have consented to my decision of this case pursuant to 28 U.S.C. § 636(c). (Dkt. No. 9: 4/10/14 Consent to Magistrate Judge Jurisdiction.)

For the reasons set forth below, Lora's petition is GRANTED and the government is directed to provide Lora with an individualized bond hearing by May 15, 2014 (when he already is scheduled for a conference before an Immigration Judge).

## FACTS

Lora came to the United States from the Dominican Republic in May 1990 at the age of seven, and has been a lawful permanent resident since that time. (Dkt. No. 2: Pet. ¶¶ 1-2, 24-25; Pet. Ex. A: Peleg 3/26/14 Aff. ¶ 2; Pet. Ex. B: Lora Aff. ¶¶ 2-3.) Lora grew up in New York City and has worked steadily as an adult. (Pet. ¶¶ 25-26, 36; Lora Aff. ¶¶ 11, 15.) Lora has a large network of family in the New York area, including his fiancé, chronically-ill mother and two-year-old son. (Pet. ¶¶ 27-33; Lora Aff. ¶¶ 3-8, 10; Pet. Ex. C: Ramirez Aff. ¶¶ 3-10; Pet. Ex. D: Rankl Aff. ¶¶ 1, 3-7.) Since Lora's detention, his sister takes care of his two-year-old. (Pet. ¶ 32; Lora Aff. ¶¶ 8-9; Ramirez Aff. ¶ 7; Rankl Aff. ¶¶ 14-15.)

### Lora's Criminal History

On July 10, 2009, Lora was arrested on drug related charges while at work. (Dkt. No. 2: Pet. ¶ 34 & Ex. B: Lora Aff. ¶¶ 13-14.) Lora posted bail and was released on July 12, 2009. (Lora Aff. ¶ 14; Dkt. No. 6: Peleg 4/7/14 Aff. ¶ 3 & Ex. A: Bail Receipt.)

On July 21, 2010, Lora pleaded guilty and was convicted of third degree possession of a controlled substance, third degree possession of a controlled substance with intent to distribute, and third degree use of paraphernalia suitable for packing controlled substances. (Pet. ¶ 35; Lora Aff. ¶ 14.) Lora was sentenced to probation; he was not sentenced to any period of incarceration, was never taken into custody and never violated any terms of his probation. (Pet. ¶¶ 35-36; Lora Aff. ¶¶ 14-15.)<sup>1/</sup>

Lora's motion for post-conviction relief based on violations of his state and federal constitutional rights was granted on consent. (Pet. ¶¶ 43-44; Pet. Ex. A: Peleg 3/26/14 Aff. ¶ 5; Pet.

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<sup>1/</sup> Lora was sentenced to three years probation on the paraphernalia conviction and five years probation on each of the two possession convictions. (Pet. ¶ 35; Lora Aff. ¶ 14.)

Ex. I: 3/14/14 Stip. & Waiver.) Lora's July 2010 conviction was vacated and, on March 14, 2014, Lora pleaded guilty and was convicted of third degree possession of a controlled substance. (Pet. ¶ 44; Peleg 3/26/14 Aff. ¶ 5; Lora Aff. ¶ 21; Pet. Ex. I: 3/14/14 Stip. & Waiver.)<sup>2/</sup> Lora was sentenced to a conditional discharge imposed nunc pro tunc to July 21, 2010. (Pet. ¶ 44; Peleg 3/26/14 Aff. ¶ 5; Pet. Ex. I: 3/14/14 Stip. & Waiver.)

### **Lora's ICE Detention and Removal Proceedings**

On November 22, 2013, over three years into his probation term, ICE agents took Lora into custody on the street corner in front of his girlfriend's house. (Dkt. No. 2: Pet. ¶¶ 37-39; Pet. Ex. B: Lora Aff. ¶¶ 15-20; Pet. Ex. D: Rankl Aff. ¶¶ 8-11.) ICE charged Lora with being deportable under 8 U.S.C. § 1227(a)(2)(B)(i) for his conviction of any law relating to a controlled substance, and preliminarily determined that he was subject to mandatory detention. (Pet. ¶¶ 40-41; Pet. Ex. F: Notice to Appear; Pet. Ex. G: 11/22/13 Notice of Custody Determination.)<sup>3/</sup>

Lora appeared with counsel at his initial immigration court hearing on December 3, 2013, during which ICE took the position that Lora was subject to mandatory detention and was not eligible for a bond hearing. (Pet. ¶ 42 & Ex. A: Peleg 3/26/14 Aff. ¶ 4.) After the initial hearing,

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<sup>2/</sup> "A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses . . . one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-half ounce or more . . . . Criminal possession of a controlled substance in the third degree is a class B felony." Penal Law § 220.16(12).

<sup>3/</sup> DHS originally charged Lora with being deportable on a second basis, namely, his possession with intent to distribute conviction, an aggravated felony under INA § 237(a)(2)(A)(iii). (Pet. ¶ 40 & Ex. F: Notice to Appear at 3.) ICE later amended Lora's deportation grounds to eliminate the aggravated felony charge as a result of the vacatur of that conviction. (Dkt. No. 6: Peleg 4/7/14 Aff. ¶ 5.)

Lora's counsel successfully moved to vacate Lora's prior convictions in state court, as described above. (See pages 2-3 above.)

Based on the vacatur of his prior convictions, Lora's counsel contends that Lora is now eligible for discretionary relief in the form of cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a). (Peleg 3/26/14 Aff. ¶ 6; Peleg 4/7/14 Aff. ¶ 5.)<sup>4/</sup> On March 18, 2014, Lora's counsel wrote to ICE describing the changed circumstances and requesting prosecutorial discretion, which was denied on April 4, 2014. (Pet. ¶ 45; Peleg 3/26/14 Aff. ¶ 7; Pet. Ex. E: 3/18/14 Letter Request; Peleg 4/7/14 Aff. ¶ 7 & Ex. C: 4/4/14 ICE Letter.)

At an immigration court hearing on March 26, 2014, Lora's counsel argued that Lora was not subject to mandatory detention because he was not taken into custody "when" he was "released," as required under 8 U.S.C. § 1226(c)(1). (Pet. ¶ 46; Peleg 3/26/14 Aff. ¶ 10.) ICE maintained that Lora was subject to mandatory detention based on his possession conviction. (Pet. ¶ 46; Peleg 3/26/14 Aff. ¶ 10.) Relying on Board of Immigration Appeals ("BIA") binding precedent, Immigration Judge ("IJ") Alan Page ruled that Lora is subject to mandatory detention and ineligible for a bond hearing. (Pet. ¶ 46; Peleg 3/26/14 Aff. ¶ 10; Peleg 4/7/14 Aff. ¶ 4 & Ex. B: IJ Page's Custody Order.) IJ Page agreed that Lora is now eligible to apply for cancellation of removal under 8 U.S.C. § 1229b(a), but has not yet scheduled a hearing to consider the merits of Lora's application. (Peleg 4/7/14 Aff. ¶¶ 5-6.)

To date, Lora remains in ICE custody. (Pet. ¶ 47.) His next immigration court status hearing is scheduled for May 15, 2014. (Peleg 4/7/14 Aff. ¶ 6.)

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<sup>4/</sup> Under INA § 240A(a), DHS has the discretion to cancel an alien's removal if, inter alia, he "has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

### **Lora's Federal Habeas Corpus Petition**

Lora, represented by counsel, filed this federal habeas corpus petition on March 26, 2014, the same day IJ Page ruled in immigration court that Lora was subject to mandatory detention. (See Dkt. No. 2: Pet.; see also page 4 above.) Lora seeks an order directing ICE to, inter alia, provide him with an individualized bond hearing pursuant to 8 U.S.C. § 1226(a). (Pet. Wherefore ¶ 3.) Lora argues that his detention is not authorized under 8 U.S.C. § 1226(c)(1), which requires an alien to be taken into ICE custody "when the alien is released" in order to be mandatorily detained. (Pet. ¶¶ 48, 50-51.) Specifically, Lora argues he was not detained "when" he was released since he was not taken into ICE custody until over three years after his conviction (Pet. ¶¶ 52-57), and that he could not have been detained when he was "released" since he was never imprisoned following the possession conviction that rendered him deportable (Pet. ¶¶ 58-68). Additionally, Lora asserts that he is entitled to relief based on various constitutional violations resulting from his detention. (Pet. ¶¶ 69-82.)

On April 7, 2014, Lora's counsel filed an Order to Show Cause and supporting brief. (Dkt. No. 5: Application for Order to Show Cause; Dkt. No. 7: Lora Br.) On April 9, 2014, I held a telephone conference with counsel and ordered the government to submit its opposition by April 28, 2014, and Lora to submit any reply within five days of the government's filing. (Dkt. No. 8: 4/9/14 Order.) The government's opposition was received and has been considered. (Dkt. No. 12: Gov't Opp. Br.)

### **ANALYSIS**

#### **I. JURISDICTION**

This Court has subject matter jurisdiction over Lora's habeas corpus petition under 28 U.S.C. § 2241(c)(3). See, e.g., Louisaire v. Muller, 758 F. Supp. 2d 229, 234 (S.D.N.Y. 2010)

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