U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: CABRERA-CARILLO, SILVIA **A089-168-827**

Date of this notice: 4/30/2012

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:
Donovan, Teresa L.
Greer, Anne J.
Pauley, Roger

File: A089 168 827 - San Diego, CA Date: APR 30 2012

In re: SILVIA CABRERA-CARILLO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Barbara Strickland, Esquire

ON BEHALF OF DHS: Scott Simpson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Suppression; termination

The respondent appeals from an Immigration Judge's decision dated May 24, 2010, finding her removable as charged and granting voluntary departure.[1] The Department of Homeland Security (DHS) opposes the respondent's appeal. The record will be remanded for further consideration.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

The dispositive issues in this matter are (1) whether the circumstances of the respondent's contact with DHS officers on December 27, 2008, constitute an egregious violation of the Fourth Amendment; (2) if so, whether the respondent's statement to the officers at that time, wherein she admitted to being a native and citizen of Mexico who was present in the United States without authorization, should be suppressed as the fruit of this unlawful conduct; and (3) assuming that the respondent's statement is subject to suppression, whether the respondent's birth certificate which was obtained and proffered as evidence by the DHS, and indicates she was born in Mexico, is admissible.

A review of the procedural and factual history helps elucidate the issues. On December 27, 2008, the respondent was a passenger in a vehicle being driven by her lawful permanent resident husband.

[1] We also consider interim orders issued in this matter by the Immigration Judge dated October 16, 2009, January 7, 2010, and April 21, 2010.

The respondent was traveling from her home in Oceanside, California to Encinitas, California to visit her husband's family. The vehicle was traveling south on I-5 when it was pulled over by two DHS officers. The DHS officers indicated they pulled over the vehicle in which the respondent was traveling because the respondent's husband "turned away and immediately looked straight forward to avoid eye contact with the agents" upon seeing their vehicle (Exh. 5 (for identification) at 2). The DHS officers indicated that due to this "nervous behavior" they decided to conduct an immigration inspection on the occupants of the vehicle (Exh. 5 (for identification) at 2). Subsequent to stopping the vehicle the DHS officers interviewed the respondent. The respondent told the DHS officers that she was a Mexican citizen and that she did not have authorization to be present in the United States (Exhibit 5 (for identification) at 2). Based on the information gleaned from this interview, the DHS issued a form I-862 (Notice to Appear), charging the respondent with being present in the United States without having been admitted or paroled (*see* Exh. 1). The Notice to Appear was filed with the Immigration Court on January 5, 2009, initiating the instant removal proceedings. On March 27, 2009, the DHS filed a form I-213 (Record of Deportable /Inadmissible Alien) which purports to memorialize the circumstances of the respondent's encounter with the DHS officers and her subsequent statement (Exh. 5 (for identification).

On May 26, 2009, the respondent filed a motion to suppress evidence and terminate proceedings (Exh. 6). The respondent's motion alleges that the respondent's encounter with DHS officers under these circumstances constituted an egregious violation of the Fourth Amendment and therefore the respondent's statement, and the I-213 memorializing that statement, should be suppressed. The respondent also filed evidence in support of this motion, including a sworn statement from her husband (Exh. 7). In this statement the respondent's husband claims that he did not even see the DHS officers until they activated the lights on their vehicle behind him and even at that point he thought they were police and he was being pulled over for a traffic violation (Exh. 7 at 2). The respondent's husband denied acting nervous or avoiding eye contact with the DHS officers. Instead, he claimed that he and his wife were stopped "because we look like people from Mexico or Central America" (Exh. 7 at unnumbered page 3).

The DHS filed an opposition to the respondent's motion to suppress and terminate proceedings on June 25, 2009 (Exh. 8). Along with that opposition the DHS submitted a birth certificate that purported to relate to the respondent's son and the respondent's marriage certificate, which both indicate the respondent was born in Mexico (Exh. 8 at unnumbered page 17-18). These documents were apparently gleaned directly from the respondent's own filing in bond proceedings. In the opposition the DHS argued that the respondent had not set forth a prima facie showing that the DHS engaged in egregious conduct during its encounter with the respondent; that the DHS was therefore under no obligation to demonstrate how it obtained the evidence contained in the I-213; that even assuming arguendo there was an egregious violation of the Fourth Amendment, the identity of the respondent is always admissible, as well as any evidence independently obtained based on that identity; and that the evidence was admissible because its discovery was inevitable (Exh. 8). Finally, the DHS requested that in the event of the Immigration Judge determining the respondent made a prima facie showing of an egregious violation of the Fourth Amendment, the Immigration Judge should schedule "a *full* suppression hearing, where the Department will present documents and/or witnesses and other evidence to justify the means by which it obtained its evidence" (Exh. 8 at 15) (emphasis in original).

On August 13, 2008, the DHS filed a Mexican National Population Registry (*see* Exh. 11 (for identification). The respondent objected to this evidence by way of an October 13, 2009, filing (Exh. 12). The respondent argued that this document should be excluded because it was not authenticated; it was a protected personal document; it had no indicia of reliability; and because it had no probative value. On October 16, 2009, the Immigration Judge issued an interim order regarding the respondent's motion to suppress and terminate proceedings (Exh. 14). The Immigration Judge first "tentatively" found that the respondent established the circumstances of her encounter with the DHS officers constituted an egregious violation of the respondent's Fourth Amendment rights and that the I-213 was therefore suppressible (Exh. 14 at 4). Next, the Immigration Judge concluded that the marriage certificate of the respondent and her husband and the birth certificate of their child were part of the bond record and could not be considered in the removal proceedings. Finally, the Immigration Judge indicated that he would give no evidentiary weight to the Mexican National Population Registry form because it was not authenticated, there was no way to determine whether the person referenced in the form was actually the respondent, and the form did not establish the alienage of the person referenced in the form. Based on these conclusions, the Immigration Judge determined that the DHS had not met its initial burden of proving the respondent's alienage. The Immigration Judge gave the DHS until December 16, 2009, to submit evidence of the respondent's alienage and indicated that if no such evidence was submitted, removal proceedings against the respondent would be terminated (Exh. 14 at 4). The Immigration Judge did not schedule an evidentiary hearing on issues related to the respondent's motion to suppress evidence and terminate proceedings.

On December 15, 2009, the DHS filed a copy of a document it represented as the respondent's Mexican birth certificate, a certified translation of that document, and a motion requesting the admission of these documents into evidence (Exh. 15). On January 7, 2010, the Immigration Judge issued a short form order granting the DHS motion to admit the birth certificate into evidence (Exh 16). The Immigration Judge checked the boxes indicating that the motion was granted because a response to the motion had not been filed by the respondent and because good cause had been established. Also on January 7, 2010, the respondent filed an opposition to the DHS motion to admit the birth certificate into evidence (Exh. 17). In this opposition the respondent argued that the birth certificate should be excluded from evidence because it is the fruit of an unlawful arrest (Exh. 17 at 2-3). Additionally, the respondent argued that the document should not be considered probative of the respondent's alienage because it was not authenticated and because a similarity between the respondent's name and the name on the birth certificate is insufficient to establish the birth certificate relates to the respondent. On January 20, 2010, the respondent filed a motion to reconsider the Immigration Judge's decision admitting the birth certificate into evidence. In this motion the respondent requested that the Immigration Judge consider the arguments she presented in her January 7, 2010, filing, and indicated her objections to the DHS were filed late because respondent's counsel was in the hospital between December 17, 2009, and January 4, 2010. On April, 21, 2010, the Immigration Judge issued a decision denying the respondent's motion to reconsider (Exh 22). The Immigration Judge denied the motion because the respondent failed to allege any errors of fact or law in the Immigration Judge's January 7, 2010, order admitting the birth certificate into evidence and because the hospitalization of the respondent's counsel did not excuse the late filed opposition because the respondent could have filed for an extension (Exh. 22 at 3-4).

On May 24, 2010, the Immigration Judge issued an oral decision concluding that the birth certificate submitted by the DHS on December 15, 2009, and admitted into evidence on January 7, 2010, related to the respondent based on the similarity of the names and established the respondent's alienage (I.J. at 3-4). The Immigration Judge further concluded that the respondent had not presented any evidence of a lawful entry to the United States. The Immigration Judge therefore found the charges of removability had been established by clear and convincing evidence. The respondent requested and received post-hearing voluntary departure. The instant appeal followed.

Upon de novo review, we conclude that the Immigration Judge committed two reversible errors in these proceedings. First, the Immigration Judge erred by failing to follow the procedural requirements for adjudicating a motion to suppress evidence based upon an alleged egregious violation of the Fourth Amendment.[2] Specifically, once the Immigration Judge determined that the respondent had submitted sufficient evidence to establish a prima facie case of an egregious Fourth Amendment violation, a hearing should have been scheduled to permit the DHS to present evidence that respondent's statement and the resultant I-213 were obtained by legal means. *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975); *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505-06 (BIA 1980); *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). Instead, the Immigration Judge excluded the I-213 and ordered the DHS to submit independent evidence of the respondent's alienage based solely on the respondent's motion and the I-213 without holding an evidentiary hearing. We note in this regard that the DHS requested such a hearing before the Immigration Judge and before this Board (Exh. 9 at 15; DHS Br. at 5-6). We conclude that the Immigration Judge committed reversible error by excluding the I-213 without first giving the DHS an opportunity to present evidence demonstrating the information therein was obtained legally.

Second, assuming arguendo that the Immigration Judge properly determined that the DHS committed an egregious violation of the respondent's Fourth Amendment rights and therefore the I-213 is inadmissible, we conclude that the Immigration Judge provided insufficient findings of fact and legal analysis for us to determine on appeal the admissibility of the document that the DHS

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[2] It is well-established that the exclusionary rule is generally not applicable in deportation (or removal) proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *See also Matter of Sandoval*, 17 I&N Dec. 70, 77-83 (BIA 1979). The exclusionary rule arose in the context of criminal proceedings and requires the suppression in such proceedings of evidence that is the fruit of an unlawful arrest, or of other official conduct which violates the Fourth Amendment. In *INS v. Lopez-Mendoza*, *supra*, the Supreme Court left open the possibility that the exclusionary rule might also apply in immigration proceedings involving egregious violations that transgress notions of fundamental fairness. 468 U.S. at 1050. Moreover, the United States Court of Appeals for the Ninth Circuit, the law of which controls here, has specifically held that the exclusionary rule does apply in immigration proceedings, to the extent of requiring the exclusion of any evidence that has been obtained as the result of a deliberate violation of the Fourth Amendment, or as the result of conduct that a reasonable officer should have known is in violation of the Constitution. *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008), *reh'g en banc denied sub nom. Lopez-Rodriguez v. Holder*, 560 F.3d 1098 (9th Cir. 2009); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994); *Adamson v. C.I.R.*, 745 F.2d 541 (9th Cir. 1984).

claims is the respondent's Mexican birth certificate. The record does not reflect that the Immigration Judge adequately considered the admissibility of the birth certificate in light of his previous finding that the respondent's statement to DHS is suppressible due to the egregious violation of the Fourth Amendment. Our review of the record indicates that the birth certificate was admitted for "good cause" and based upon the similarity of the names on the birth certificate and the respondent's name (Exh 16; I.J. Dec. at 3-4). The record does not reflect that the Immigration Judge specifically made any determination regarding whether the birth certificate is the fruit of an illegal search. On appeal, the respondent contends that but for the illegally obtained statement, the DHS would not have been able to locate the birth certificate, and argues therefore that it should be excluded as the fruit of an illegal search (Respondent's Br. at 11-12). The DHS contends that the birth certificate is admissible because the respondent's identity is never suppressible (DHS Brief at 6-7).

We conclude that remand is warranted for additional consideration of whether, upon a finding of an egregious violation of the respondent's Fourth Amendment rights, the birth certificate is admissible under the circumstances present in this case. We agree with the DHS that the respondent's identity is not subject to suppression and that independent evidence obtained based on the respondent's identity is admissible (DHS Br. at 6-7). *See INS v. Lopez-Mendoza*, *supra*, at 1039-40 (stating "The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."); *U.S. v. Del Toro Gudino*, 376 F.3d 997 (9th Cir. 2004); *United States v. Orozco-Rico*, 589 F.2d 433, 435 (9th Cir.1978); *See Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978), modified by, 586 F.2d 755 (9th Cir.1978) (holding that a Fourth Amendment violation does not require exclusion of evidence independently obtained from agency administrative records); *Matter of Sandoval, supra*, at 79 (stating "Once an alien's identity is learned, the Service can entirely avoid triggering the exclusionary rule in all cases where documents lawfully in the Service's possession evidence unlawful presence.").

However, this appeal does not present a situation where the DHS learned the respondent's identity and queried its electronic databases or reviewed a file associated with respondent to find evidence of alienage already lawfully in its possession. Instead, the birth certificate was acquired by the DHS after proceedings in this matter commenced and well after the alleged Fourth Amendment violation occurred. It appears the DHS used the specific information regarding the respondent's place and date of birth, acquired during the alleged illegal interrogation of the respondent, to locate the birth certificate. It is not self-evident to us that these types of facts are the equivalent of the respondent's "identity" as the DHS argument assumes. Moreover, while the act of obtaining the birth certificate was "independent" of the Fourth Amendment violation in the sense that birth certificate was not directly obtained during the illegal stop and subsequent interrogation, it is dependent upon that conduct because without the detailed biographical information obtained during the interrogation, locating the birth certificate would have been extremely unlikely. *See Wong Sun v. U.S.*, 371 U.S. 471, 487-88 (1963) (stating that consideration of evidence obtained both directly and indirectly from conduct that violated the Fourth Amendment is barred by operation of the exclusionary rule). Given these considerations, we find that the Immigration Judge's decision, which admitted into evidence the document purported to be the respondent's birth certificate for "good cause shown" without analysis of the issues relating to the applicability of the exclusionary rule, does not provide a sufficient basis for appellate review. *See*

U.S. v. Ramirez-Sandoval, 872 F.2d 1392, 1396 (9th Cir. 1989) (discussing the three exceptions to the exclusionary rule: independent source, attenuated basis, and inevitable discovery).

In light of the foregoing, we conclude that remand is required. On remand, the Immigration Judge should provide the opportunity for the DHS to submit additional evidence that the circumstances of the DHS officers' encounter with the respondent was not an egregious violation of the Fourth Amendment. If the evidence submitted by the DHS establishes this encounter was not an egregious violation or was lawful, the Immigration Judge should consider any evidence obtained during the encounter, including the I-213. However, if the Immigration Judge determines the encounter constitutes an egregious violation of the Fourth Amendment, the Immigration Judge should determine whether the birth certificate submitted by the DHS is inadmissible as the fruit of this violation, and whether any of the exceptions to the exclusionary rule apply to that document under the circumstances present in this case. Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

San Diego, California

File A 89 168 827 Date: May 24, 2010

In the Matter of

SILVIA CABRERA-CARRILLO	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act - present without admission or parole

APPLICATION: Termination of proceedings; post-conclusion voluntary departure

APPEARANCES:

ON BEHALF OF RESPONDENT:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Barbara A. Strickland, Esquire 110 Juniper Street San Diego, California 92101	J. Scott Simpson, Assistant Chief Counsel San Diego, California

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent herein is alleged to be a native and citizen of Mexico. She was placed into removal proceedings on December 27, 2008, with the issuance of a Notice to Appear (Exhibit 1). In this document the government alleges that Respondent is not a

citizen or a national of the United States, but is a native and citizen of Mexico who arrived in the United States at or near San Ysidro, California, on or about November 28, 2006. The government alleges that Respondent was not then admitted or paroled after inspection by an Immigration Officer and Respondent is charged with removability under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

During the course of these proceedings Respondent, through counsel, denied the truth of the factual allegations contained in the Notice to Appear and contested removability.

Respondent declined to designate a country for removal purposes if necessary and this Court, at the suggestion of the Department of Homeland Security, designated Mexico for such purposes.

Respondent indicated at the Master Calendar session conducted before the undersigned on March 27, 2009, that she would be seeking termination of proceedings but, if removable, would seek pre-conclusion voluntary departure under Section 240B(a) of the Act.

At the Individual Calendar session conducted this date, Respondent indicated that she would not be seeking pre-conclusion voluntary departure but was requesting post-conclusion voluntary

departure pursuant to Section 240B(b) of the Act.

The burden is on the Department of Homeland Security to establish Respondent's removability by clear and convincing evidence.

The government has submitted to this Court certain documentation in support of its obligation to establish Respondent's removability.

On December 15, 2009, the government submitted to this Court a birth certificate and translation in the name of Silvia Cabrera-Carrillo. This documentation establishes that on March 24, 1990, Silvia Cabrera-Carrillo was born in Ensenada, Baja California, Mexico.

Although Respondent has objected to this documentation and certain other evidence, the Court has admitted the birth certificate into the Record of Proceedings by virtue of its order dated January 7, 2010 (see Exhibit 16).

Although Respondent requested reconsideration of the Court's order admitting such evidence, this request to reconsider was denied for the reasons set forth in this Court's order dated April 21, 2010 (see Exhibit 22) which sets forth the entire history of this case.

This Court has admitted into the record the birth certificate based upon the similarity of names. There is no indication in the record that Respondent denies that this documentation relates to her. As the government has pointed out

in its motion to admit the birth certificate where a charge of removability is based on documentary evidence bearing a name identical to that of the Respondent, the Immigration Judge may reasonably infer that such evidence relates to the Respondent in the absence of evidence that it does not relate to the Respondent. See United States v. Rebon-Delgado, 467 F2.d 11 (9th Cir. 1972); Matter of Li, Interim Dec. 2451 (BIA 1975).

The Court concluded on the basis of the submission of the birth certificate that the government had established that Respondent was born abroad and is therefore an alien.

The Court pointed out that under Section 291 of the Immigration and Nationality Act, once alienage has been established, the burden shifts to the Respondent to show the time, place, and manner of her entry into the United States. In the absence of any such evidence, Respondent is presumed to be in the United States in violation of the law.

Although afforded the opportunity to submit evidence related to the time, place, and manner of entry, the Respondent had presented no such documentation or evidence to the Court. That being the case, Respondent is presumed to be in the United States in violation of the law.

On the basis of the entire record before me and for the reasons stated in the record and in this oral decision, the Court concludes that the government has established by clear and convincing evidence the Respondent's removability.

Respondent has, as earlier noted, declined to designate a country for removal purposes if necessary and this Court has designated Mexico. At the Master Calendar session conducted before the undersigned on March 27, 2009, Respondent indicated that although the Court was designating Mexico she had no fear of returning to that country and would not be seeking asylum, withholding of removal, and/or relief under Article III under the United Nations Convention Against Torture.

Insofar as this Court has concluded that Respondent's removability has been properly established, her request for termination of proceedings must be denied.

Respondent has requested voluntary departure at the conclusion of proceedings under Section 240B(b) of the Act and the government has indicated that it is not opposed to a grant of this relief. The request for voluntary departure will be granted and the maximum period of time that may be granted for relief is 60 days. As a condition to this grant of voluntary departure, Respondent is required to post a voluntary departure bond in the sum of $500 within five business days. Should Respondent fail to timely post said bond and/or timely depart the United States in the course of this Court's order, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and Respondent shall thereupon be ordered remove from the United States to Mexico on the basis of the charge contained in the Notice to Appear.

Should Respondent fail to timely depart the United States she shall be subjected to a civil penalty which this Court sets at $3,000 and she will be ineligible for a period of 10 years for cancellation of removal, voluntary departure, adjustment of status, change of status, and registry.

If Respondent appeals this decision to the Board of Immigration Appeals she must, within 30 days of filing the appeal, provide sufficient proof of having timely posted the voluntary departure bond since the Board will not reinstate the voluntary departure period in its final order if such timely proof is not submitted. If Respondent reserves her right to appeal but does not appeal and instead files a post-decision Motion to Reopen or reconsider during the voluntary departure period, the grant of voluntary departure will be terminated automatically and the alternate Order of Removal will take effect immediately.

IT IS HEREBY ORDERED that Respondent's request for termination of proceedings be denied.

IT IS FURTHER ORDERED the Respondent be granted, in lieu of an Order of Removal, the privilege of departing the United States voluntarily at her own expense, such departure to occur on or before July 23, 2010.

IT IS FURTHER ORDERED that as a condition of this grant of voluntary departure Respondent must post a voluntary departure bond in the sum of $500 no later than close of business on June 1, 2010.

IT IS FURTHER ORDERED that should Respondent fail to timely post said bond and/or timely depart the United States, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and Respondent shall thereupon be ordered removed from the United States to Mexico on the basis of the charge contained in the Notice to Appear.

Kenneth A Bagley

KENNETH A. BAGLEY
Immigration Judge

RECEIVED AND REVIEWED
ON 8/3/10
WITHOUT BENEFIT OF
RECORD OF PROCEEDINGS

CERTIFICATE PAGE

I hereby certify that the attached proceeding before KENNETH A. BAGLEY, in the matter of:

SILVIA CABRERA-CARRILLO

A 89 168 827

San Diego, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Christy Davis

Christy Davis, Transcriber

YORK STENOGRAPHIC SERVICES, INC.
34 North George Street
York, Pennsylvania 17401-1266
(717) 854-0077

July 15, 2010

Completion Date

ced/bjn