U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Vela III, Jose
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DHS/ICE Office of Chief Counsel - ELP
1545 Hawkins Blvd.
El Paso, TX 79925

Name: RODRIGUEZ-AVILA, RAONEL **A 206-375-387**

Date of this notice: 5/15/2015

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:
Mullane, Hugh G.
Geller, Joan B
Pauley, Roger

Userteam: Docket

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RODRIGUEZ-AVILA, RAONEL
A206-375-387
EL PASO SPC
8915 MONTANA AVE
EL PASO, TX 79925

DHS/ICE Office of Chief Counsel - ELP
1545 Hawkins Blvd.
El Paso, TX 79925

Name: RODRIGUEZ-AVILA, RAONEL **A 206-375-387**

Date of this notice: 5/15/2015

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Mullane, Hugh G.
Geller, Joan B
Pauley, Roger

Userteam:

File: A206 375 387 – El Paso, TX Date: MAY 15 2015

In re: RAONEL RODRIGUEZ-AVILA a.k.a. Rachel Rodriguez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jose Vela III, Esquire

ON BEHALF OF DHS: Meggan G. Johnson
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

Lodged: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Termination

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's December 1, 2014, decision denying the respondent's motion to suppress evidence and terminate proceedings. The Immigration Judge found him removable as charged. The record will be remanded.

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

The respondent moved to suppress all evidence obtained by the Department of Homeland Security ("DHS") because the traffic stop by DHS border patrol officers that resulted in the commencement of removal proceedings was in violation of his Fourth and Fifth Amendment rights (Exh. 5). In his motion, the respondent asserted that he was the passenger in a car driven by a United States citizen, more than 100 miles from the border, and that there was no moving violation charged or other reason given by the officers for stopping the car. The respondent claimed he was questioned even after the driver established his identity and provided his license. Thus, he argued, there was no reasonable suspicion that warranted the stop and it was an egregious violation of his Fourth and Fifth Amendment rights. The respondent further contended that the evidence obtained should be excluded based on the DHS officers' violation of applicable regulations at 8 C.F.R. § 287.8(b)(2). The respondent provided a written statement and affidavits from two other individuals in the car.

The Immigration Judge denied the motion, concluding that the Fourth Amendment exclusionary rule does not apply in removal hearings, and that there was no evidence of duress or coercion that would support a conclusion that the respondent's statements to the DHS officers were involuntary and inadmissible as a violation of the Fifth Amendment. We conclude that further proceedings are necessary, as we are unable to adequately review the Immigration Judge's conclusions based on the reasons she provided. *See Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002).

In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984), the Supreme Court held that the Fourth Amendment exclusionary rule is generally inapplicable to deportation proceedings, but left open the possibility of applying this rule if there are "egregious" Fourth Amendment violations which transgress Fifth Amendment notions of fundamental fairness and undermine the probative value of the evidence. This Board has recognized that although the exclusionary rule is generally inapplicable in removal proceedings, suppression is appropriate where the evidence was obtained in a manner so egregious that its use would violate due process by offending the requirements of fundamental fairness. *See Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

An alien seeking the exclusion of evidence based on the Fourth Amendment bears the burden of establishing a prima facie case that the evidence should be suppressed. *See Matter of Barcenas*, 19 I&N Dec. 609, 611-12 (BIA 1988); *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971). The claim must be supported by specific and detailed statements. *See Matter of Wong*, 13 I&N Dec. 820 (BIA 1971). However, the mere offering of an affidavit is insufficient, even if accepted as true; the claims must be supported by testimony. *Matter of Barcenas, supra*, at 611. When an alien has come forward with adequate evidence in support of suppression, the burden shifts to the Department of Homeland Security (DHS) to justify the manner in which it obtained the evidence. *See Matter of Tang, supra*.

Pursuant to the above analysis, we reject the DHS's argument to the Immigration Judge and on appeal, that the Fourth Amendment exclusionary rule "does not apply" in removal proceedings.[1] We will remand the case for the Immigration Judge to determine whether the respondent presented a prima facie argument that the traffic stop was an egregious violation of the Fourth Amendment, and if so, whether the evidence obtained as a result of that stop should be excluded. The Immigration Judge will make the necessary factual and legal findings in the

[1] Contrary to the DHS's argument, the United States Court of Appeals for the Fifth Circuit has not concluded that the Fourth Amendment's exclusionary rule does not apply in removal proceedings. *See Santos v. Holder*, 506 Fed. App'x 263 (5th Cir. 2013) (holding that the exclusionary rule does not "generally" apply, but ruling that the alien voluntarily consented to the search, and "alternatively, even assuming that a Fourth Amendment violation occurred," the alien did not demonstrate egregious conduct); *Gonzales-Reyes v. Holder*, 313 Fed. App'x 690, 695 (5th Cir. 2009) (analyzing whether the alien's claim fit under the "egregious-violation exception" to the general standard that the exclusionary rule does not apply in civil proceedings).

first instance. *See* 8 C.F.R. § 1003.1(d)(3)(iv).[2] Accordingly, the following order will be entered.

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

FOR THE BOARD

[2] We reject the respondent's claim regarding 8 C.F.R. § 287.8(b)(2) in part because that regulation is only enforceable by the Secretary of Homeland Security. 8 C.F.R. § 287.12 ("The Secretary shall have exclusive authority to enforce these regulations through such administrative and other means as he may deem appropriate."). Moreover, such a violation would not, in itself, warrant suppression. *See United States v. Caceres*, 440 U.S. 741 (1979). The Immigration Judge did not err with respect to this claim.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
8915 MONTANA AVENUE, SUITE 100
EL PASO, TEXAS 79925

IN THE MATTER OF:	**IN REMOVAL PROCEEDINGS**
RODRIGUEZ-Avila, Raonel	**FILE NO.:** A206 375 387
Respondent	**DATE:** DECEMBER 1, 2014

CHARGE: INA § 212(a)(6)(A)(i) (Present without being Admitted or Paroled)

APPLICATIONS: None

On Behalf of the Respondent:
Walker, Gates, Vela, PLLC
Jose "Chito" Vela, Esq.
505 E. Huntland Drive, Ste. 300
Austin, Texas 78752

On Behalf of the Government:
Assistant Chief Counsel
Department of Homeland Security
1545 Hawkins Boulevard, Room 275
El Paso, Texas 79925

WRITTEN DECISION AND ORDER OF THE IMMIGRATION COURT

I. Procedural History

The respondent is a native and citizen of Mexico who illegally entered the United States at or near Sasabe, Arizona, on or about March 25, 2000. He was apprehended by immigration authorities when a vehicle in which he was a passenger was pulled over. The respondent was issued a Notice to Appear (Ex. 1: "NTA") on August 18, 2014, charging him with removability pursuant to § 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended ("INA" or "Act") as an alien present without being admitted or paroled.

An individual hearing was held on November 19, 2014, at which the respondent appeared represented by counsel, was advised of all his rights and entered the following responses to the allegations and charge of removability:

Allegations:

(1) The respondent DENIED that he was not a citizen or national of the United States.
(2) The respondent DENIED that he is a native of Mexico and citizen of Mexico.
(3) The respondent DENIED that he arrived in the United States at or near Sasabe, Arizona, on or about March 25, 2000.

(4) The respondent DENIED that he was not then admitted or paroled after inspection by an Immigration Officer.

Charges:

The respondent DENIED both removal charges:

Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are 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.

Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, as amended, in that you are an alien who has been convicted of, or who admits having committed, or admits committing acts which constitute the essential elements of, a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act [21 U.S.C. 802]).

The respondent refused to answer any questions, from which the Court drew a negative inference.[1] Taking into account this negative inference, and after reviewing all of the evidence, the Court found all allegations to be true and sustained both charges of removability. The Court designated Mexico as the country for removal if it became necessary.

At his individual hearing the respondent filed a Motion to Suppress in an effort to suppress his identity and all evidence submitted by the DHS. The Court denied this Motion and the respondent sought no other form of relief. The Court adjourned the case for issuance of a written decision.

II. Statement of Applicable Law

A. Motions to Suppress and the Applicability of the Fourth and Fifth Amendments

1. Burden of Proof

An alien who seeks to suppress evidence obtained from a Border Patrol stop has the burden of proving a *prima facie* case for suppression. *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988); *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975); *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971).

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[1] Per *Matter of Guevara*, the Board has held that an adverse inference that may be drawn from a respondent who remains silent cannot satisfy the Service's burden to prove alienage "in the absence of any other evidence of record at all." *Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1990). In this case the DHS has submitted other evidence of alienage including the Form I-213, the respondent's Mexican passport, voter registration card and consular identification card.

Where an alien wishes to challenge the admissibility of a document, the mere offering of an affidavit is insufficient to sustain his burden. *Matter of Barcenas*, 19 I&N Dec. at 611. If the Court finds that the facts alleged by the alien in his affidavit could support a finding that suppression is warranted, the alien's claim must also be supported by his testimony. *Id.* If the Court does find that the respondent must testify in order to determine if suppression is warranted, the Court should not allow the respondent to refuse to testify concerning his alienage. See *Matter of Guevara*, "[A] respondent has no right to remain silent at his deportation hearing when he is asked non-incriminating questions. [...][A] respondent is in fact 'under an obligation to answer any questions truthfully or suffer the adverse inferences that could be drawn from his silence.'" *Matter of Guevara*, 20 I&N Dec. 238, 243-44 (BIA 1990)(citing *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984)).

If the Court finds that the respondent has established a prima facie case for suppression, then the burden shifts to the DHS to justify the manner in which the evidence was obtained. *Matter of Burgos*, 15 I&N Dec. 278; *Matter of Wong*, 13 I&N Dec. 820.

2. Fourth Amendment Exclusionary Rule in Removal Proceedings

The Fourth Amendment exclusionary rule is a judicially created rule of criminal procedure that the Supreme Court has stated is confined to the use of a criminal prosecutor's case-in-chief. *Weeks v. U.S.*, 232 U.S. 383 (1914)(overruled on other grounds by *Mapp v. Ohio*, 367 U.S. 643 (1961))(the Supreme Court held the exclusionary rule is applicable to state criminal proceedings, whether the illegal evidence was seized by federal or state agents).

The Fourth Amendment exclusionary rule is not applicable in deportation proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-40 (1984). Similarly, the Fifth Circuit has never affirmatively ruled that there is an exception to the Supreme Court's holding that the exclusionary rule does not apply in removal proceedings. *Santos v. Holder*, 506 F.App'x 263, 264-65 (5th Cir. 2013)(unpublished); *Ali v. Gonzalez*, 440 F.3d 678, 681 (5th Cir. 2006); *Velasquez-Tabir v. INS*, 127 F.3d 456, 459 (5th Cir. 1997); *Mendoza-Solis v. INS*, 36 F.3d 12, 14 (5th Circ. 1994).

3. Fifth Amendment Due Process Clause in Removal Proceedings

Evidence will not be admissible in removal proceedings unless it is probative and its use fundamentally fair so as not to deprive an alien of due process under the Fifth Amendment. *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990); *Matter of Toro*, 17 I&N Dec. at 343. An alien's involuntary statements may not be used against him in removal proceedings, but statements are only involuntary and inadmissible upon a showing of coercion, duress, or improper action on the part of the officers. *Busto-Torres*, 898 F.2d at 1057.

Thus, "[t]he circumstances surrounding an arrest and interrogation...may in some cases render evidence inadmissible under the due process clause of the Fifth Amendment...moreover...cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the Fifth Amendment's due process requirement of

fundamental fairness." *Matter of Toro*, 17 I&N Dec. at 343. But, a Form I-213 is admissible to prove alienage and removability, absent an indication that the form "contains information that is incorrect or was obtained by coercion or duress." *Matter of Barcenas*, 19 I&N Dec. at 611.

III. Evidence Considered

A. Documentary Evidence

The Court carefully considered all the exhibits in the record, and they are as follows:

Exhibit 1 is the NTA.

Exhibit 1A is the Form I-261 Additional Charges of Inadmissibility/Deportability.[2]

Exhibit 2 is the Form I-213.

Exhibit 3 is the respondent's Motion to Permit Telephonic Appearance.

Exhibit 3A is the Court Order Denying the respondent's Motion to Permit Telephonic Appearance.

Exhibit 4 are copies of the respondent's Mexican passport, his Mexican Voter's Registration card and his Mexican Consular Identification card.

Exhibit 5 is the respondent's Motion to Suppress with Supporting Documents.

Exhibit 6 is the respondent's Notice of Filing Supplemental Documents in Support of his Motion to Suppress.

Exhibit 7 is the DHS' Opposition to Motion to Suppress.

Exhibit 8 is the respondent's Reply to DHS' Response to Motion to Suppress.

Exhibit 9 is the Court Order denying the respondent's Motion to Suppress.

B. Testimonial Evidence

The respondent refused to testify or answer questions on his own behalf. The Court drew permissible negative inferences from his refusal to testify and answer questions. *See Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1990).

IV. Findings of the Court Regarding Credibility

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[2] The respondent did not object to or deny the conviction for unlawful possession with intent to deliver cocaine. Thus, the Court will sustain the removal charge based on the conviction.

Before determining whether the respondent meets the statutory criteria for the requested relief, the Court will address the credibility of the respondent. *Chun v. INS*, 40 F.3d 76, 79 (5th Cir. 1994). Due to the fact the respondent refused to testify or answer questions, the Court cannot make a credibility determination, but it will draw permissible negative inferences from the respondent's refusal. *See Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1990).

V. Relevant Factual Findings of the Court

The Court's findings of relevant facts are based on Exhibits 1 through 9 in the record.

The respondent is a fifty-one year old native and citizen of Mexico who illegally entered the United States at or near Sasabe, Arizona on or about March 25, 2000, without being admitted, inspected, or paroled by an immigration officer. The respondent has never possessed lawful status in the United States, nor has he ever possessed or presented any documents that would allow him to lawfully enter or remain in the United States.

The respondent was convicted in the Criminal District Court #2, in Dallas County, Texas, of unlawful possession with intent to deliver a controlled substance, to wit: cocaine for which he was sentenced to 5 years deferred probation.[3]

VI. Findings of the Court Regarding Removability

Based on the documentary evidence of record (Exhs. 1, 1A, 2, 4), the Court finds that the respondent is a fifty-one year old native and citizen of Mexico who illegally entered the United States at or near Sasabe, Arizona on or about March 25, 2000, without being admitted, inspected, or paroled by an immigration officer. The respondent has never possessed lawful status in the United States, nor has he ever possessed or presented any documents that would allow him to lawfully enter or remain in the United States. The respondent desires to remain permanently in the United States and does not want to return to Mexico. Thus, the Court **sustains** the charge of removability under INA § 212(a)(6)(A)(i).

The respondent was convicted in the Criminal District Court #2, in Dallas County, Texas, of unlawful possession with intent to deliver a controlled substance, to wit: cocaine. Thus, the Court **sustains** the charge of removability under INA § 212(a)(2)(A)(i)(II).

VII. Legal Analysis and Findings of Law

The Fourth Amendment exclusionary rule is not applicable in deportation proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-40 (1984). Similarly, the Fifth Circuit has never affirmatively ruled that there is an exception to the Supreme Court's holding that the exclusionary rule does not apply in removal proceedings. *Santos v. Holder*, 506 F.App'x 263, 264-65 (5th Cir. 2013)(unpublished); *Ali v. Gonzalez*, 440 F.3d 678, 681 (5th Cir. 2006); *Velasquez-Tabir v. INS*, 127 F.3d 456, 459 (5th Cir. 1997); *Mendoza-Solis v. INS*, 36 F.3d 12, 14

[3] The respondent did not object to or deny the conviction for unlawful possession with intent to deliver cocaine. Thus, the Court will sustain the removal charge based on the conviction.

(5th Circ. 1994). Thus, the Court finds that there was no violation of the respondent's rights under the Fourth Amendment.

Even though the Court finds that the Fourth Amendment exclusionary rule does not apply in removal proceedings, evidence will be not be admissible unless it is probative and is fundamentally fair so as not to deprive an alien of due process under the Fifth Amendment. *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1979). In this case the respondent is seeking to suppress evidence of his alienage. However, a Form I-213 is admissible to prove alienage and removability absent an indication that the form "contains information that is incorrect or was obtained by coercion or duress." *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).

In this case, the Court finds that there is no evidence that there was *any* coercion or duress when Border Patrol questioned the respondent as to his alienage, and thus the respondent has failed to meet his burden of proof to establish a *prima facie* case for suppression due to a Fifth Amendment violation.

Furthermore, the respondent has not and cannot show that suppression of the evidence of his alienage offered by the DHS would render his proceedings fundamentally unfair.

The respondent applied for no other forms of relief.

The following orders shall be entered:

IT IS ORDERED THAT the respondent's Motion to Suppress be **DENIED**.

IT IS FURTHER ORDERED THAT the respondent be **REMOVED** from the United States to **MEXICO**.

12-1-14
Date

Guadalupe R. Gonzalez
U.S. Immigration Judge