U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: RAYMUNDO-VELASQUEZ, GAS...

A 205-854-679

Date of this notice: 12/10/2015

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:
Holmes, David B.

Userteam: Docket

File: A205 854 679 – Miami, FL

Date: DEC 10 2015

In re: GASPAR RAYMUNDO-VELASQUEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Edward F. Ramos, Esquire

ON BEHALF OF DHS: Jannell Leal Garcia
Assistant Chief Counsel

APPLICATION: Suppression of evidence

The respondent has appealed from the Immigration Judge's decision dated August 19, 2014, finding the respondent removable and ordering him removed to Guatemala. The Department of Homeland Security has filed a motion for summary affirmance, which is denied. The record will be remanded to the Immigration Judge for further proceedings as discussed below.

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

The respondent argues on appeal that the Immigration Judge erred by denying the respondent's motion to suppress Form I-213 and other evidence. This matter concerns the circumstances surrounding the respondent's arrest by Immigration and Customs Enforcement ("ICE") agents on May 1, 2013. The Immigration Judge sustained the charges of removability based on a Form I-213 dated May 1, 2013, and other documents. The respondent argues that the Immigration Judge's denial of his motion to suppress and the admission of these documents violated several provisions of the regulation as well as his Fourth Amendment rights.

As a general matter, evidence obtained through an egregious violation of the Fourth Amendment may be suppressed in immigration proceedings. *See, e.g., Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994). In the motion to suppress filed before the Immigration Judge, the respondent submitted an affidavit describing the circumstances surrounding his arrest, and he argued that the Form I-213 and other evidence, prepared or obtained as a result of this arrest, should be suppressed due to the egregious circumstances surrounding its source and preparation. The Immigration Judge denied this motion in an "Interim Order" dated January 27, 2014, finding that the respondent's affidavit was "uncorroborated," that the Form I-213 was inherently reliable, and that the ICE officers did not violate any agency regulations (I.J. Interim Order at 2). Thereafter, at a hearing on August 19, 2014, the Immigration Judge found that the respondent's request to testify in corroboration of his affidavit was untimely, sustained the charges of removability based on the Form I-213, and ordered the respondent removed.

On appeal, the respondent makes similar arguments to those he made in his motion to suppress. He argues, first, that ICE's decision to target him without any reasonable basis to

believe that he was an alien, coupled with a warrantless raid of his home without his consent, constitutes the type of egregious violation warranting suppression of the Form I-213. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). The respondent also argues that ICE officials violated a number of regulations, including 8 C.F.R. §§ 287.5(a)(1), 287.8(b) (involving warrantless questioning); 8 C.F.R. § 287.3(a) (involving warrantless arrests and examination of aliens arrested without warrants); and 8 C.F.R. § 287.8(f)(2) (involving warrants and consent).

We find that further proceedings are warranted based on the respondent's arguments. As an initial matter, the Board held in *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988), that, where a party wishes to challenge the admissibility of a document, the mere offering of an affidavit is not sufficient to sustain his burden. However, if the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported by testimony. The Immigration Judge, while finding that the respondent's affidavit was "uncorroborated," did not determine whether the facts alleged, if true, would support the suppression of the Form I-213. As such, we will remand the record for a determination regarding whether the respondent's allegations, if true, would be egregious under *INS v. Lopez-Mendoza*, *supra*. The respondent should be afforded an opportunity to testify regarding the circumstances of his arrest, in support of the statements made in his affidavit. *Matter of Barcenas*, *supra*.

In addition, we find that further proceedings are necessary to allow the DHS to explain the circumstances surrounding the various regulatory violations alleged by the respondent, and for a further determination regarding the reliability of the Form I-213 in this case. We note that the Board employs a two-prong test, first enunciated by the United States Court of Appeals for the Ninth Circuit in *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979), to determine whether a regulatory violation should result in the exclusion of evidence or the invalidation of the proceedings. *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980). First, the regulation at issue must bestow a procedural or substantive benefit on the alien. Second, the violation of the regulation must have prejudiced the alien's interests that were protected by the regulation. Further, "where compliance with the regulation is mandated by the Constitution, prejudice may be presumed." *Id.* at 329.

To summarize, we find that further fact-finding is necessary to determine whether the Form I-213 should be suppressed, given the respondent's constitutional and regulatory challenges. Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's January 27, 2014, Interim Order is vacated.

FURTHER ORDER: The Immigration Judge's August 19, 2014, decision is vacated.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with this order, and for the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MIAMI, FLORIDA

File: A205-854-679 August 19, 2014

In the Matter of

GASPAR RAYMUNDO-VELASQUEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration & Nationality Act -- present in the United States without being admitted or paroled and Section 212(a)(7)(A)(i)(I) of the Immigration & Nationality Act -- no valid immigrant visa.

APPLICATIONS: Suppression and termination of the proceedings and voluntary departure.

ON BEHALF OF RESPONDENT: EDWARD RAMOS, Esquire

ON BEHALF OF DHS: JANNELL LEAL GARCIA, Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a male native and citizen of Guatemala who was issued a Notice to Appear by the Department of Homeland Security (DHS) which charged him with removability under Section 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) of the Immigration & Nationality Act (the Act). Exhibit 1.

The respondent denied all of the factual allegations in the Notice to Appear and filed a motion to suppress evidence and terminate proceedings asserting that he was

the victim of egregious violations under the Fourth Amendment on the part of the DHS agents who arrested him.

The DHS submitted its opposition to respondent's motion to suppress.

In an interim order dated January 27, 2014, this Court concluded that the respondent did not meet his burden to establish a prima facie case, that the Government's evidence was unlawfully obtained.

Subsequently at a Master Calendar hearing the Court relying on the I-213 submitted by the DHS (Exhibit 2) sustained the two charges of removability which had been lodged against the respondent.

The respondent has applied for post-conclusion voluntary departure in this case.

After listening to the testimony the Court is satisfied that the respondent has satisfied all of the statutory prerequisites to be granted voluntary departure. In addition the Court finds that the respondent should be granted this relief in the exercise of discretion.

Finally the Court will adopt and incorporate by reference herein its interim order dated January 27, 2014, denying the respondent's motion to suppress and terminate proceedings.

ORDER

IT IS HEREBY ORDERED that the respondent's application for post-conclusion voluntary departure is granted.

IT IS FURTHER ORDERED that the respondent be permitted to voluntarily depart the United States at his own expense within 60 days of this order in lieu of removal.

IT IS FURTHER ORDERED that the respondent shall be required to post a voluntary departure bond in the amount of $500 payable to the DHS within five business

days of receipt of this order and that in the event that the respondent fails to post the bond, as required by the Act, the voluntary departure order shall vacate automatically and the respondent shall be removed to Guatemala as set forth in the Notice to Appear.

Notice: If the respondent fails voluntarily to depart within the time period specified, he shall be subject to a civil penalty of not less than $1,000 and not more than $5,000 and be ineligible for a period of ten years for any further relief including voluntary departure, cancellation of removal, adjustment of status and change of status.

Further notice: In the event that the respondent files an appeal, he is required to submit proof to the Board of Immigration Appeals of having posted the required voluntary departure bond within 30 days of filing his appeal. If the respondent does not provide timely proof to the Board of Immigration Appeals that the required bond has been posted, the Board of Immigration Appeals will not reinstate the period of voluntary departure in its final order.

Warning: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, hold, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart shall not apply.

Dated this 19th day of August 2014.

Please see the next page for electronic signature

SCOTT G. ALEXANDER
Immigration Judge

//s//

Immigration Judge SCOTT G. ALEXANDER

alexands on December 1, 2014 at 3:30 PM GMT