U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: VELAZCO CASTELLANO, IVAN **A 205-056-436**

Date of this notice: 3/8/2016

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:
Wendtland, Linda S.
Pauley, Roger
O'Herron, Margaret M

Userteam: Docket

File: A205 056 436 – San Diego, CA

Date: MAR - 8 2016

In re: IVAN VELAZCO CASTELLANO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Murray D. Hilts, Esquire

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: Motion to suppress; termination

The respondent appeals from the Immigration Judge's December 6, 2013, decision finding him removable as charged and granting him voluntary departure under section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b). The record will be remanded.

Under 8 C.F.R. § 1003.1(d)(3), the Board defers to factual findings unless they are clearly erroneous, but it conducts de novo review of all remaining issues including questions of law, judgment and discretion.

The Notice to Appear (Form I-862) (NTA) alleges that the respondent is not a citizen or national of the United States and that he is a native and citizen of Mexico, and charges him with inadmissibility under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without admission or parole (I.J. at 1; Exh. 1). In support of the allegations and charge, the Department of Homeland Security (DHS) filed a Record of Deportable/Inadmissible Alien (Form I-213) as evidence of alienage and removability (I.J. at 2; Exh. 3).

The respondent filed a motion to suppress evidence (in particular, the Form I-213 and the NTA) and to terminate proceedings with the Immigration Judge, arguing that the DHS's evidence was obtained in violation of the Fourth Amendment to the U.S. Constitution (I.J. at 2; Exh. 10). The DHS filed a brief opposing the respondent's motion to suppress and also submitting documentation purporting to be independent evidence of alienage (Exh. 11, Tab A). The Immigration Judge denied the respondent's motion to suppress and terminate proceedings, sustained the charge of removability, and granted the respondent's request for voluntary departure with an alternate order of removal to Mexico (I.J. at 3-8; Exh. 12).

In sworn declarations submitted with his motion, the respondent and his friend state that on or about April 25, 2012, they crossed a street at a stop sign on foot and were approached by a police officer, who indicated that he stopped them because the respondent and his friend did not allow a vehicle to pass through the intersection before they entered (I.J. at 2; Exh. 10, Tabs A-B).

According to the declarations, the police officer asked the respondent if he was a gang member and asked for his identification (I.J. at 4-5; Exh. 10, Tab A). The respondent and his friend further state that an immigration officer arrived on the scene, talked to the respondent, and took him into custody (I.J. at 2; Exh. 10, Tabs A-B).

When a respondent challenges the legality of evidence, he or she bears the burden of establishing a prima facie case that the DHS's evidence was unlawfully obtained before the burden will shift to the DHS to justify the manner in which it obtained the evidence. *Matter of Barcenas,* 19 I&N Dec. 609, 611 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980). 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. However, 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 of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *INS v. Lopez-Mendoza*, *supra*, at 1050-51. Subsequently, the Ninth Circuit specifically held that the exclusionary rule sometimes 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, 1018 (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, 501 (9th Cir. 1994).

In his motion and on appeal, the respondent contends that the stop was initiated based on his ethnic appearance (Resp. Br. at 6-7; Resp. Mot. at 7). *See Gonzales-Rivera v. INS*, 22 F.3d 1441, 1446, 1450-52 (9th Cir. 1994) (holding that an agent committed an egregious Fourth Amendment violation when he stopped an alien's vehicle based solely on the alien's Hispanic appearance).

We conclude that a remand is appropriate for further fact-finding and analysis regarding the basis for the respondent's stop and seizure and to give the respondent an opportunity to develop the record as to the allegations of "egregious" conduct. In finding insufficient evidence that the stop was based on the respondent's ethnic appearance, the Immigration Judge appears to have relied principally on what the respondent indicated the police officer told him regarding the reasons for the stop (namely that the respondent and his friend did not allow a car to pass through the intersection prior to crossing the street) and the fact that the respondent's friend was told she could leave (I.J. at 2-5). The Immigration Judge also found that the Form I-213 indicates that the police officer made contact with the respondent as the result of a routine radio call regarding a "suspicious person" and that the police officer recognized the respondent as a gang member. However, there are no findings of fact regarding why the respondent was determined to be suspicious, whether the officer recognized the respondent as a gang member at the time of the stop, or how any such membership would raise a reasonable suspicion of unlawful immigration status (I.J. at 5; Exh. 3).

Unlike in *Gonzales-Rivera v. INS*, *supra*, and *Orhorhaghe v. INS*, *supra*, the police officer did not testify regarding the decision to stop the respondent. Further, even if the stop itself was valid, the Immigration Judge did not address whether police or DHS officers had a sufficient articulable basis for subsequently effecting a seizure, and he should do so on remand. *See* section 287(a)(2) of the Act; *see also Orhorhaghe v. INS*, *supra*, at 497 (explaining that "to justify the seizure, an agent must 'articulate objective facts providing a reasonable suspicion that [the subject of the seizure] was an alien illegally in this country.'"), quoting *Benitez-Mendez v. INS*, 760 F.2d 907, 909 (9th Cir. 1985); *cf. Martinez-Medina v. Holder*, 673 F.3d 1029, 1037 (9th Cir. 2011) (finding no egregious violation where sheriff knew that aliens were unlawfully present in the United States by virtue of their acknowledgment at the time he seized them).

We note that the record contains a Deferred Action for Childhood Arrivals (DACA) application and a U.S. Visit printout (I.J. at 2; Exhs. 6, 11-A). In its opposition to the respondent's motion to suppress and terminate proceedings, the DHS offered the U.S. Visit printout as purportedly "independent evidence" of the respondent's alienage (Exh. 11 at 4). *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) (holding that "the 'body' or identity of a defendant or respondent in criminal or civil proceedings is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."); *see also Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996) ("[O]nce the respondent has been placed in deportation proceedings, any evidence which is independently obtained may be relied upon, regardless of the alleged illegal arrest.").

On appeal, the respondent appears to argue that his DACA application was not properly authenticated under the Federal Rules of Evidence and therefore cannot support an alternative finding of independent evidence of alienage (Resp. Br. at 4; Exh. 6). The Immigration Judge did not in fact make an alternative finding regarding independent evidence of alienage in his oral decision, and he should consider this issue on remand. To the extent the respondent argues more broadly that his DACA application was improperly admitted, he submitted a "courtesy copy" of his DACA application into evidence (Tr. at 8-9, 13; Exh. 6). Further, in immigration proceedings, "the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011). The Federal Rules of Evidence are not binding in immigration proceedings and "Immigration Judges have broad discretion to admit and consider relevant and probative evidence." *Id.* (internal citations omitted); *see also Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986) ("[D]ocumentary evidence in deportation proceedings need not comport with the strict judicial rules of evidence"). Therefore, we find no error by the Immigration Judge in admitting the DACA application into evidence. Accordingly, the following order will be entered.

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

FOR THE BOARD

File: A205 056 436 – San Diego, CA

Date: MAR - 8 2016

In re: IVAN VELAZCO CASTELLANO

DISSENTING OPINION: Roger A. Pauley

I respectfully dissent. I would affirm the Immigration Judge's conclusion that the respondent failed to establish a prima facie egregious violation of the Fourth Amendment. Furthermore, the respondent's DACA application, which he submitted for the record and of which we can take administrative notice, *see* 8 C.F.R. §1003.1(d)(3)(iv), provides an independent ground for establishing his alienage. *See* Tr. at 24.

Roger A. Pauley
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
SAN DIEGO, CALIFORNIA

File: A205-056-436 December 6, 2013

In the Matter of

IVAN VELAZCO CASTELLANO	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration & Nationality Act.

APPLICATIONS: Termination; voluntary departure at conclusion of proceedings.

ON BEHALF OF RESPONDENT: MURRAY D. HILTS
3020 Mead Avenue
San Diego, California 92116

ON BEHALF OF DHS: RHANA ISHIMOTO
San Diego, California

ORAL DECISION OF THE IMMIGRATION JUDGE

The Court has jurisdiction in this case by the Government's filing of a Notice to Appear dated April 25, 2012, which reflects that it was personally served on the respondent on even date. During these proceedings, the Court notes that the respondent has been represented by current counsel, and through counsel, denied all allegations and the charge under Section 212(a)(6)(A)(i) of the Immigration & Nationality Act.

The respondent was also provided an opportunity to file for prosecutorial discretion and an application for deferred adjudication for childhood arrivals commonly referred as DACA but both were denied by the Department of Homeland Security.

At the hearing on August 28, 2012, the Government filed form I-213 based upon respondent's denial of all the allegations and charge. The respondent initially did not file any objection or motions in relation to the Government's evidence. The Court deemed that the respondent had abandoned such challenge and admitted the form I-213 into the record. The Court notes that the respondent, through counsel, filed a late motion for leave to file his motions to suppress and terminate and objection to the Government's evidence. Because the Government's response did not address respondent's motion for leave at the hearing on December 6, 2013, the Court granted the respondent's motion for ~~relief, filed~~ leave to file those motions sua sponte.

In support of his motions to suppress and terminate and his objections to the Government's evidence, the respondent filed sworn declarations of himself, a friend, and his counsel of record (with regard to the motion for leave to file). Respondent and his friend claim that on or about April 25, 2012, after they allegedly lawfully crossed a street at a stop sign, they were stopped by a Carlsbad police, allegedly for not allowing a car to pass through the intersection prior to entering and crossing the street. Their declaration further indicates that after an Immigration officer arrived and talked with the respondent, he was taken into Immigration custody.

In this case, the respondent, through his counsel, denied all allegations and charge. The Government has the initial burden to establish that the respondent is an alien, therefore subject to these proceedings. See Woodby v. INS, 385 U.S. 276 (1966). Then, for a charge of removability pursuant to Section 212(a)(6)(A)(i) of the Immigration & Nationality Act, the respondent must prove either that he has clear and

convincing evidence that he is lawfully admitted in the United States, or ~~two~~, he is clearly and beyond a doubt entitled to be admitted into the United States and is not inadmissible as charged. See 8 C.F.R. 1240.8(c).

In INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), the Supreme Court has focused directly on the admissibility of evidence establishing identity. In that case, an illegal alien, objected to his deportation hearing solely on the ground that he had been arrested illegally, that is, by INS agents ~~blanking~~ lacking a "warrant to search the premises [where Lopez-Mendoza was apprehended] or to arrest any of its occupants." The Supreme Court, in that case, rejected Lopez-Mendoza's arguments, stating: "The body or identity of a defendant or respondent in criminal or civil proceedings is never itself suppressible as fruit of unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." Id. at 1039. In essence, the Supreme Court declined to hold that the consequences of an illegal arrest, search, or interrogation is to let the defendant go free because of the unlawfulness of the arrest, search, or interrogation. Instead, Lopez-Mendoza established that a defendant, including his identity, is properly before a court in a criminal or civil proceeding despite the initial illegal police action. The Ninth Circuit Court of Appeals has consistently held that evidence concerning the identity of a defendant obtained after an illegal police action, is not suppressible as "fruit of the poisonous tree." U.S. v. Garcia-Beltran, 443 F.3d 1126 (9th Cir. 2006).

In this case, respondent's evidence fails to establish any Fourth amendment violation when he was stopped by the Carlsbad police. His declaration and his friend's declaration both indicate that after they crossed Eureka Place from Basswood Avenue, a police officer approached them. There is no evidence that the stop was initiated based upon their Hispanic appearance. According to his friend, Ms.

Pantoja's declaration, the police approached them and told her she could leave if she wanted to. The Court finds that the respondent's motion fails to distinguish the case between respondent and Ms. Pantoja and that Ms. Pantoja was allowed to leave but the police, apparently, wanted to question the respondent. Although Ms. Pantoja's declaration indicates that she is a United States citizen, there is no evidence presented that the police officer knew she was a United States citizen and, therefore, would not question her and did not question her. The evidence presented undermines any claim that the stop relates to their status in the United States or any claim that it was based solely on their ethnic appearance.

The evidence presented also fails to establish that the circumstances, as described, was not a consensual encounter. As argued by the Government, the evidence indicates, instead, a consensual encounter by the police. There is no evidence of force, hostile environment, or threats made or used during this encounter with the Carlsbad police. According to the respondent's declaration, this police officer stopped him for crossing a street without allowing a car to first "pass through the intersection prior to entering" it. Further, the police questioned the respondent whether he was a gang member before proceeding to ask him for his identification. Although the respondent may disagree with the officer questioning him, there is no evidence that the officer's motive was based solely upon an illicit one. The police may ask a person who has legitimately been stopped for identification without conducting a Fourth Amendment search or seizure. See Hiibel v. Sixth Judicial District Court of Nev. Humboldt County, 542 U.S. 177, 185 (2004) ("in the ordinary course, a police officer is free to ask questions for identification without implicating the Fourth Amendment."); INS v. Delgado, 466 U.S. 210, 216 (1984) ("interrogation relating to one's identity or a request for identification by police does not, by itself, constitute a Fourth Amendment seizure.").

See also U.S. v. Diaz-Castaneda, 494 F.3d 1146 (9th Cir. 2007).

Furthermore, the Court notes that in the body of respondent's motion, it indicates that this case "involved a roving patrol ... the CBP agents were, therefore, required to have a probable cause to effect the stop ... the CBP agents had absolutely no probable [cause] to unnecessarily prolong the stop to eventually seize [respondent]'s person as a passenger in the vehicle ... and offer [ ] as the main reason for effecting the stop of the vehicle ... ran a red light. See I-213 ... what this means is the only real basis for the stop was CBP agent looking at respondent's appearance and suspecting him to be illegal ... . This case, therefore, is nothing more than a deliberate 'egregious violation' of the Fourth Amendment making the Notice to Appear, I-213, and any produced evidence thereafter in support of alienate subject to exclusion." Pages 7 to 8, OBJECTIONS AND MOTIONS.

These statements clearly reflect that the present objections and motions are based on erroneous factual consideration. The motion falls short of establishing that the form I-213 is, therefore, suppressible or inadmissible. Accordingly, the respondent's application for suppression must be denied.

As to the respondent's objections to the form I-213, the present motion fails to identify any error in the form I-213. Respondent's declarations indicate that the Carlsbad police asked him if he were a member of a gang to which he denied. The form I-213 indicates that the Carlsbad police, Corporal Golanos, made contact with the respondent as the result of a routine call regarding a suspicious person and Golanos recognized the respondent as a "documented gang member." There is nothing presented that would call into question the veracity of the information in the form I-213.

The motion also failed to provide legal authority to support the claim that the respondent is entitled to confront and cross-examine the maker of the form I-213.

The case cited in his motion, Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674 (9th Cir. 2005), relates to an affidavit instead of a ~~form~~ Form I-213. The Ninth Circuit Court of Appeals has held in Cruz-Espinoza v. INS, 45 F.3d 308, 309 (9th Cir. 1995), that an authenticated form I-213 was probative on the issue of illegal entry. It specifically noted, though, that the information on a form I-213 could not be presumed true when the source of that information was neither a Governmental official nor the subject of the report, or where there was evidence of unreliability. In this case, however, the information in the form I-213 were not based upon extraneous evidence, but rather based on the respondent's statements made to the maker of the document, and information from police officers involved in the case. Hernandez-Guadarrama is, therefore, inapposite in this case. Furthermore, the declarations provided failed to establish that the information in the form I-213 is unreliable under Cruz-Espinoza v. INS, supra, the form I-213 is therefore properly admissible because it is probative on the issue of removability and is fair, absent evidence of coercion. The present objections are, therefore, without merit or legal basis and overruled, and the form I-213 is admitted as it is inherently trustworthy~~, and the objections were overruled~~. The Court finds that the objections relating to the admission of this form I-213 fail to establish a sufficient legal basis for which to exclude this document.

Having admitted the Government's form I-213, the Court sustained the allegations that the respondent is not a citizen or national of the United States but instead he is an alien based upon his status of being a native and citizen of Mexico. The burden then shifts, under Section 291 of the Act, to the respondent to establish by clear and convincing evidence relating to his time, place, and manner of entry. In that regard, the Court notes that respondent, through counsel, advised the Court that he has no evidence to present in terms of his time, place, and manner of entry. Accordingly,

the Government is entitled to the charge and the charge, therefore, must be sustained.

Respondent declined to designate a country of removal in this case. The Government in this case recommended respondent's native country of Mexico as the country of removal. As to relief, the only relief applied for or otherwise established by the respondent is for voluntary departure at the conclusion of the proceedings. Considering the evidence presented that there is no statutory bar for voluntary departure and the Government's non-opposition to grant of this minimal form of discretionary relief, the Court finds that it is appropriate under the totality of circumstances to grant him this opportunity, despite apparently that he had had more than one illegal entry into the United States. There is no other application applied for or otherwise established by the respondent. The record does not contain any other pending relief applications upon which the Court could adjudicate on the merits. Based upon the foregoing, the following orders shall therefore be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent be granted voluntary departure in lieu of an order of removal, such departure to take place without expense to the United States Government on or before February 4, 2014.

IT IS FURTHER ORDERED that the respondent shall pay a $500 voluntary departure bond to the Immigration and Customs Enforcement field office director within five business days of today's date.

IT IS FURTHER ORDERED that the respondent shall present to the Department of Homeland Security on or before January 6, 2014, all necessary travel documents for voluntary departure.

IT IS FURTHER ORDERED that should the respondent fail to abide by any of the foregoing orders or should he withdraw his request for voluntary departure,

then these voluntary departure orders shall without further notice or proceedings vacate and the alternate order of removal shall become effective the following day: the respondent shall be removed from the United States to Mexico on the charge contained in the Notice to Appear.

THIS TRANSCRIPT OF THE ORAL DECISION WAS REVIEWED ON FEBRUARY 6, 2014, WITHOUT THE BENEFIT OF THE RECORD OF PROCEEDINGS.

Please see the next page for electronic signature

December 6, 2013

PHILIP S. LAW
Immigration Judge

//s//

Immigration Judge PHILIP S. LAW

lawp on February 6, 2014 at 10:57 PM GMT