



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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333 South Miami Ave., Suite 200
Miami, FL 33130**

Name: CAO, MARCELO ALEJANDRO

A089-207-044

Date of this notice: 1/31/2012

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:

**Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.**

Immigrant & Refugee Appellate Center | www.irac.net

Falls Church, Virginia 22041

File: A089 207 044 - Miami, FL

Date:

JAN 31 2012

In re: MARCELO ALEJANDRO CAO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Matthew B. Weber, Esquire

ON BEHALF OF DHS: Timothy M. Cole
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: Removability

On September 23, 2009, an Immigration Judge found the respondent removable as charged. The respondent, a native and citizen of Argentina, now appeals. The respondent's request for oral argument is denied pursuant to 8 C.F.R. § 1003.1(e)(7) (2011). The record will be remanded.

We review an Immigration Judge's findings of fact under a "clearly erroneous" standard. 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, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The respondent denied the allegations set forth in the Notice to Appear, and chose not to testify at the master calendar hearing on September 23, 2009, regarding his alienage (I.J. at 2; Tr. at 12-13). On appeal, the respondent argues that the Department of Homeland Security ("DHS") did not meet its burden to show by clear, unequivocal, and convincing evidence that the respondent is an alien subject to removal (Respondent's Br. at 2, 4-7). *See Woodby v. INS*, 385 U.S. 276 (1966). He argues that the Form I-213 (Record of Deportable/Inadmissible Alien), which was the only evidence offered by DHS to show alienage, was insufficient proof of alienage (Respondent's Br. at 4-7). Thus, he argues that the Immigration Judge erred in finding him to be removable as charged.

We conclude that a remand is warranted in this case. In *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999), we held that notwithstanding its lack of detailed information in its narrative portion, or information as to how it was completed, the Form I-213 was sufficient to show alienage because it contained detailed information in its non-narrative portion regarding the names and nationality of the alien's parents, the foreign town where the alien resided before he entered the

United States illegally, as well as the alien's sex, eye color, and hair color. *Id.* at 785, 787. Although the Form I-213 in the instant case indicates that the respondent was born in Buenos Aires, Argentina, and a foreign birth creates a rebuttable presumption of alienage, the form lacks the other details that led us to conclude in *Matter of Ponce-Hernandez*, *supra*, that the Form I-213 sufficed to establish alienage.

We also note that there is reason to believe that the information provided on the instant Form I-213 was obtained from a source other than the respondent. Specifically, the form expressly states in the narrative portion that "All information was taken from the A-file." That A-file information, in turn, appears to have come from a Form I-140 (Petition for Alien Worker), which is not in the record before us. Hence, we cannot assess the reliability of the information provided on the Form I-213. In this respect, the instant case is further distinguishable from *Matter of Ponce-Hernandez*, *supra*, in which we concluded that there was nothing to indicate that the information contained on the Form I-213 came from anyone other than the alien. *Id.* at 785.

For these reasons we conclude that the Form I-213 in this case is not sufficient evidence to prove the respondent's alienage. We further conclude that a remand is warranted for the Immigration Judge to make further findings of fact regarding the respondent's alienage and removability. On remand, the parties shall be given an opportunity to provide further information regarding the respondent's alienage and removability.¹

Accordingly, the following order will be entered.

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


FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents without opinion.

¹ The transcript reflects that the DHS had additional purported evidence of alienage that it was willing to offer, specifically the denial of the Form I-140 (Tr. at 14-15). The Immigration Judge, however, ruled that the Form I-213 was sufficient, and the DHS did not have the opportunity to submit the additional evidence (Tr. at 15-16).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Miami, Florida

File No.: A 089 207 044

September 23, 2009

In the Matter of)
MARCELO ALEJANDRO CAO) IN REMOVAL PROCEEDINGS
Respondent)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and
Nationality Act - alien present without being
admitted or paroled.

APPLICATIONS:

ON BEHALF OF RESPONDENT:

Matthew Weber

ON BEHALF OF DHS:

Marcy L. Sheiman

ORAL DECISION OF THE IMMIGRATION JUDGE

On June 17, 2009, the Court confirmed the respondent received the Notice to Appear, after being served in open Court. The Government alleges that he is not a citizen or national of the United States but a native and citizen of Argentina, who arrived on an unknown date and place, without being admitted or paroled after inspection by an Immigration officer. Based on motion by counsel, the Court had granted a continuance to September 23, 2009. Separate counsel appeared for current counsel on June 17, 2009.

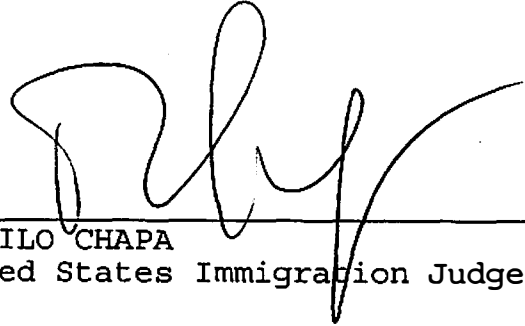
On September 23, 2009, counsel for respondent appeared and has waived a reading of the Notice to Appear and rights in removal. The respondent's counsel indicated that the respondent would stand mute. There was an admission that the respondent is Marcelo Alejandro Cao. The Government has introduced an I-213 filed by the Government. The Court finds there is sufficient information to establish it does pertain to this current respondent before the Court, Marcelo Alejandro Cao. The Court will accept the indication in the I-213 that the respondent is a native and citizen of Argentina.

Under Section 291 of the Immigration and Nationality Act the burden then shifts to the respondent to establish the lawfulness of his presence. Respondent's counsel informed the Court that the respondent would remain mute. I find that the respondent is removable as charged. The respondent, through counsel, refused to seek any relief from removal and asked instead that the matter be terminated for failure of the Government to establish that the respondent is removable. The motion to terminate has been denied.

I find the respondent removable as charged. I find further by failing to proceed with any relief he might have been deemed eligible to file, relief will be deemed and denied for lack of prosecution. Accordingly, the Court will enter the following order.

ORDER

IT IS ORDERED that the respondent be removed from the United States to Argentina based on the charge contained in the Notice to Appear.

A handwritten signature in black ink, appearing to read 'T. Chapa', is written over a horizontal line.

TEOFILO CHAPA
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before
JUDGE TEOFILO CHAPA, in the matter of:

MARCELO ALEJANDRO CAO

A 089 207 044

Miami, Florida

is an accurate, verbatim transcript of the recording as provided by
the Executive Office for Immigration Review and that this is the
original transcript thereof for the file of the Executive Office
for Immigration Review.


Donna Lee M. McGarry, Transcriber

Free State Reporting, Inc.

November 17, 2009
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies
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