U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: NOLASCO-GASPAR, ESTEBAN **A 201-145-750**

Date of this notice: 11/29/2013

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.

Userteam: Docket

File: A201 145 750 – Cleveland, OH Date: NOV 29 2013

In re: ESTEBAN NOLASCO-GASPAR

IN REMOVAL PROCEEDINGS

APPPEAL

ON BEHALF OF RESPONDENT: Matthew L. Benson, Esquire

ON BEHALF OF DHS: Michael A. Tripi
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: Motion to Suppress; terminate

The respondent, a native and citizen of Guatemala, appeals the Immigration Judge's decision of August 28, 2012, ordering him removed from the United States. The appeal will be dismissed.

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 their burden of proof, and issues of discretion. 8 C.F.R. §1003.1(d)(3)(ii).

The respondent argues that the Immigration Judge erred in denying his motion to suppress. He asserts that agents from Immigration Customs and Enforcement ("ICE") violated his Fourth and Fifth Amendment rights when they obtained evidence of his removability. He further requests that, should the Board not set aside the Immigration Judge's motion to suppress and terminate removal proceedings, we should remand the record "to conduct a full scale evidentiary hearing" on his motion to suppress (Resp. Br. at 14).

We affirm the Immigration Judge's decision to deny the respondent's motion to suppress.[1] The facts of this case are not in dispute. On March 20, 2011, the respondent accompanied his friend to a court proceeding in Sharonville, Ohio. The respondent's friend was in court to

[1] The Immigration Judge issued a decision denying the respondent's motion to suppress on June 5, 2012 without hearing testimony on the matter. Subsequently, the Immigration Judge admitted as evidence the respondent's Form I-213, and sustained the allegations and charge of removability (Exhs. 1, 2). The Immigration Judge's decision of August 28, 2012 was based upon the respondent's "Supplemental Submission to Motion to Suppress," that reiterated without significant change his motion to suppress (Exh. 4; I.J. at 1-2).

resolve a pending criminal charge and the respondent was only present for support. After the hearing, the respondent's friend was approached by uniformed ICE agents and told he had a deportation order. After speaking with his friend, ICE agents approached the respondent and asked about his identity and immigration status. The respondent eventually admitted that he did not have legal status in this country. The respondent asserts that he found the ICE agents to be "aggressive" and he did not feel free to leave during the encounter. After admitting his immigration status, the respondent was handcuffed and taken into custody. He further claims that he was targeted by ICE officials because of his Hispanic appearance. *See* I.J. at 4 (June 5, 2012); Resp. Br. at 2-3.

In *INS v. Lopez-Mendoza,* 468 U.S. 1032, 1039 (1984), the Supreme Court held that the exclusionary rule of the Fourth Amendment is generally not considered applicable in immigration proceedings. *See also Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). Even if the Fourth Amendment's protection against unreasonable searches and seizures is violated, the resulting evidence will be suppressed only when the constitutional violations are egregious. The Supreme Court specifically held that "we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing." *INS v. Lopez-Mendoza, supra* at 1050-51.

The Sixth Circuit has held that the suppression of evidence "has always been our last resort, not our first impulse." *United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006) (noting that the plain language of the INA permits immigration agents to make warrantless arrests); *see also* section 287(a)(2) of the Act. In this case, we agree with the Immigration Judge that the respondent has not shown that an egregious violation of his Fourth Amendment rights occurred (I.J. at 2-3 (June 5, 2012)). As admitted by the respondent, he was in a public building accompanying another individual ICE agents knew was not in lawful status. Therefore, the agents had *some* legitimate purpose to approach the respondent and ask him questions. *See United States v. Navarro-Diaz*, 420 F.3d 581, 587-88 (6th Cir. 2005) (finding no egregious violation of the Fourth Amendment where alien's encounter with law enforcement was precipitated by his being present in a hotel room in the middle of the day with four other individuals, one of whom was in violation of the law).[2] Further, although the respondent may have been intimidated by the ICE agents, and characterized their approach as "aggressive," he does not assert that the agent's actions ever went beyond mere questioning, or that he indicated a refusal to answer the questions (Exh. 3, Motion to Suppress, affidavit). *See INS v. Delgado*, 466 U.S. 210 (1984) (police questioning alone is unlikely to result in a Fourth Amendment violation unless the person refused to answer and the police take additional steps to obtain an answer). Because the respondent did not demonstrate that an egregious violation of his Fourth Amendment rights took place, we will not disturb the Immigration Judge's decision to deny the

[2] Thus, based upon the respondent's own version of events, we do not agree with his argument on appeal that officers "blatantly detained and questioned [him] based solely on the fact that he has a Hispanic or Latin appearance" (Resp. Br. at 10).

respondent's motion to suppress. *See INS v. Lopez-Mendoza*, *supra; see also Miguel v. INS*, *supra.*

We also agree with the Immigration Judge that the respondent did not allege any instances of coercion or duress, or other interference with his attempt to exercise his rights (I.J. at 5). As such, the respondent has not established a violation of his Fifth Amendment rights to due process. *See United States v. Sangineto-Miranda*, 859 F.2d 1501, 1517 (6th Cir. 1988) ("Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions") (quoting *United States v. Washington*, 431 U.S. 181, 187, (1977)). The respondent further does not alleged that the information on the Form I-213 regarding his alienage and lack of lawful status is inaccurate or unreliable in any way. In summary, this was a peaceful arrest that produced credible statements establishing the respondent's alienage and unlawful status. Thus, it was appropriate for the Immigration Judge to admit into evidence the Form I-213 (Exh. 2). *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980) (to be admissible in deportation proceedings, evidence must be relevant and probative and its use must not be fundamentally unfair). There being no evidence to suggest that the information contained in the I-213 was obtained through improper means, we conclude that the Immigration Judge's analysis was based on sufficient credible evidence to conclude that the respondent is removable as charged (I.J. at 2).[3]

Accordingly, the following order will be issued.

ORDER: The appeal is dismissed.

FOR THE BOARD

[3] It also follows that since the respondent did not present proof establishing a *prima facie* case of illegality, the Immigration Judge properly denied the respondent's request for an evidentiary hearing pursuant to his motion to suppress. *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988); *Matter of Ramirez*, 17 I&N Dec. 503, 505 (BIA 1980). Separately, contrary to the respondent's argument on appeal, we do not consider the evidence obtained to be in violation of 8 C.F.R. § 287.8(c)(2)(vii), because there is no evidence that the agents used "coercion or physical abuse . . . to induce [the respondent] to waive his or her rights to make a statement" (*Id*; Resp. Br. at 12). As found by the Immigration Judge, the respondent's general assertion that the ICE agents were "aggressive" does not necessarily rise to the level of coercion (I.J. at 6 (June 5, 2012)).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CLEVELAND, OHIO

File: A201-145-750 August 28, 2012

In the Matter of

ESTEBAN NOLASCO-GASPAR	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: INA Section 212(a)(6)(A)(i).

APPLICATIONS:

ON BEHALF OF RESPONDENT: MATTHEW L. BENSON, Attorney At Law

ON BEHALF OF DHS: AMY L. SCHEURMAN, Assistant Chief Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent in this case was placed into removal proceedings with the filing of a Notice to Appear on April 5, 2011. The respondent denied the allegations and charge, asserting DHS's evidence of removability and alienage should be suppressed, and subsequently filed a motion to suppress. The motion to suppress, or the request for the evidentiary hearing pursuant to the motion to suppress, was denied by this Court on

June 5, 2012. Subsequently, the Court admitted the I-213 into evidence as Exhibit 2 and found all four allegations to be established as well as the charge of removability to be established by clear and convincing evidence. Accordingly, the charge was sustained and Guatemala was designated as the country of removal.

The hearing was then continued to allow the respondent to consult with counsel about whether he wanted to seek voluntary departure either pre-hearing or post-hearing or assert any other form of relief. The respondent has chosen to not request any form of relief, including voluntary departure, and instead is seeking the opportunity to appeal the Court's decision on the motion to suppress. The Court will note that the respondent submitted a supplemental submission on July 18, 2012, which has been marked as Exhibit 4; however, it was not submitted in the format of a motion to reconsider the prior motion to suppress decision and the Court has chosen to not reconsider the prior motion to suppress decision.

Accordingly, as the respondent has been found to be removable as charged and requested no relief, the Court must order the respondent's removal to Guatemala.

Accordingly, the Court will hereby enter the following orders:

ORDER

IT IS HEREBY ORDERED that the respondent be removed to Guatemala.

See Signature Next Page

ALISON M. BROWN
Immigration Judge

//s//

Immigration Judge ALISON M. BROWN

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