



U.S. Department of Justice

Executive Office for Immigration Review

**Board of Immigration Appeals
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**Name: ORTIZ-MEJIA, MARIA DE JESUS A 093-138-113
Riders:093-138-114**

Date of this notice: 3/7/2013

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:
Wendtland, Linda S.
Donovan, Teresa L.
Pauley, Roger**

**schwarzA
Userteam: Docket**

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Falls Church, Virginia 22041

Files: A093 138 113 – San Francisco, CA
A093 138 114

Date:

MAR -7 2013

**In re: MARIA DE JESUS ORTIZ-MEJIA a.k.a. Maria Ortiz
FELIPE DE JESUS SOLIS-MIAM**

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Katie Roney, Esquire

ON BEHALF OF DHS: Scott A. Eash
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 (both respondents)**

APPLICATION: Suppression; termination

The respondents¹ appeal from the decision of the Immigration Judge dated November 22, 2011, denying their motion to suppress evidence and terminate proceedings, finding them removable as charged under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i), and ordering their removal to Mexico.² The appeal will be sustained in part and the record will be remanded.³

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

¹ The respondents' motions to suppress evidence and terminate proceedings are based on similar facts and their removal proceedings have been joined for administrative convenience.

² In the November 22, 2011, decision the Immigration Judge indicated that within 15 days of the issuance of that decision the respondents should, if they wished to do so, submit a written statement indicating a country of removal and what forms of relief, if any, they would be seeking (November 22, 2011 I.J. Dec. at 26). The respondents did not submit any such statement. On December 20, 2011, based on the findings and analysis in the November 22, 2011, decision, the Immigration Judge issued a decision ordering the respondents removed to Mexico. All references in this decision to "I.J. Dec." refer to the November 22, 2011, decision.

³ We accept the respondents' reply brief filed on June 13, 2012.

We affirm the Immigration Judge's decision admitting the search warrant into evidence (I.J. at 15). The respondents' statement on appeal does not convince us of any reversible error in the Immigration Judge's determination that the warrant is probative as it relates to whether the Department of Homeland Security (DHS) officers' interaction with the respondents was lawful and that the admission of the warrant is fundamentally fair (Respondents' Br. at 24-25). *Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999). As noted by the Immigration Judge, the warrant was under seal during the initial 2 years the respondents were in proceedings and the DHS appears to have acted diligently in proffering the warrant once it was unsealed. Additionally, the respondents have not established they were prejudiced by the delay in the warrant being entered into evidence. See *Lacsina Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (stating, "[a] due process violation occurs where (1) the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case, and (2) the alien demonstrates prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation" (citation and internal quotation marks omitted)). The respondents' speculation that the DHS officers may have remembered their encounters with the respondents more clearly and that this enhanced memory may have inured to the respondents' benefit is insufficient to establish the outcome of the proceedings may have been affected by the delay. Accordingly, we find no basis to reverse the Immigration Judge with respect to the admission of the search warrant into evidence.

With respect to the respondents' motion to suppress evidence we consider: (1) whether the circumstances of the respondents' contact with DHS officers on May 2, 2008, constitute an egregious violation of the Fourth Amendment; and (2) if so, whether the evidence obtained during that encounter, including the respondents' statements to the officers at that time wherein they admitted to being natives and citizens of Mexico present in the United States without authorization, should be suppressed as the fruit of this unlawful conduct.⁴

We begin our analysis of these issues by observing that 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. 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 that transgress notions of fundamental fairness. *INS v. Lopez-Mendoza*, *supra*, at 1050. Moreover, the United States Court of Appeals for the Ninth Circuit, the law of which controls here, has 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 (9th Cir. 2008), *reh'g en banc denied sub nom. Lopez-Rodriguez v. Holder*, 560 F.3d 1098 (9th Cir. 2009); *Orhoraghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994); *Adamson v. C.I.R.*, 745 F.2d 541 (9th Cir. 1984).

⁴ We assume the parties' familiarity with the facts and decline to recite them at length here.

We affirm the Immigration Judge's determination that the DHS entry into and search of the premises of the El Balazo Restaurant on Haight Street was lawful. The DHS submitted evidence that establishes the officers who conducted the raid and searched the restaurant did so under the authority of a facially valid search warrant issued by a neutral magistrate (I.J. at 22; Exh 8 (113); Exh. 3 (114)). There is no evidence in the record suggesting either that the search warrant was not supported by probable cause or that the officers executing the warrant did not reasonably believe that it was so supported. *United States v. Leon*, 468 U.S. 897 (1984). Thus, the raid was conducted under lawful authority, and the DHS submitted sufficient evidence to overcome the respondents' *prima facie* showing of an egregious violation of their Fourth Amendment Rights with respect to the entry into and search of the restaurant.

We also affirm the Immigration Judge's determination that the brief detention of the respondents incident to that search was lawful. See *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (holding that placing the occupant of a residence in handcuffs at gun point, and detaining her for three hours while executing a search warrant, was a reasonable use of force and represented a marginal intrusion into her constitutional rights). Considering all circumstances, detainment of the respondents was reasonable, given that the search area included a kitchen environment which presents unique factors related to officer safety and the need to prevent the possible destruction of evidence. See *Muehler v. Mena*, *supra*, at 98-99; *Michigan v. Summers*, 452 U.S. 692, 702 (1981) (recognizing that the execution of a warrant to search for drugs "may give rise to sudden violence or frantic efforts to conceal or destroy evidence," and holding that officers executing a search warrant for contraband may use reasonable force to detain persons within a residence to prevent flight and "minimiz[e] the risk of harm to the officers.").

However, we conclude that the Immigration Judge committed reversible error in relation to the analysis of the search of the respondents' personal property. In this regard, the respondents assert that the DHS officers searched their personal property, including the female respondent's purse and the male respondent's wallet, outside the scope of the warrant and without their consent, in violation of the Fourth Amendment. The respondents claim that these searches took place prior to their being interviewed by DHS officers, but that they were aware the officers had searched their personal property and likely obtained evidence of their alienage at the time of the interview. The respondents claim further that the information gleaned from these post-search interviews, memorialized in the forms I-213 (Record of Deportable/Inadmissible Alien) proffered by the DHS, should be suppressed as fruit of the illegal search.

First, we agree with the respondents that the Immigration Judge erroneously allocated the burden of proof to them instead of the DHS after they had established a *prima facie* case that they had suffered an egregious violation of their Fourth Amendment rights. In removal proceedings, an alien seeking the exclusion of evidence based on the Fourth Amendment bears the burden of establishing a *prima facie* case that evidence should be suppressed. *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971). The request to exclude evidence should be made via a motion to suppress that is supported by an affidavit or other objective evidence that explains why suppression is appropriate. *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). The affidavit must contain specific, detailed statements based on the personal knowledge of the affiant. *Matter of Tang*, *supra*; *Matter of Barcenas*, 19 I&N Dec. 609, 611-612 (BIA 1988). Only when an alien has come forward with adequate evidence in support of suppression will the burden shift

to the DHS to justify the manner in which it obtained the evidence. *Matter of Barcenas, supra*, at 611.

By way of an interlocutory decision dated July 30, 2009, the Immigration Judge determined that the respondents established a *prima facie* case that they had suffered an egregious violation of their Fourth Amendment rights. Upon respondents' establishment of this *prima facie* case, the burden of proof should have shifted to the DHS to establish that the evidence proffered in these proceedings is admissible. See *Matter of Barcenas, supra*, at 611-612; *Matter of Wong, supra*, at 822. However, the Immigration Judge's decision reflects that the Immigration Judge assigned the burden of proof to the respondents (see, e.g., I.J. at 23 (stating in reference to the respondents, “[t]hey did not establish that they *would not have* answered the questions but for the search, nor did they show that the officers would not have questioned them but for the search” (emphasis in original))). Thus, we conclude that the Immigration Judge committed reversible error.

Second, we conclude that the Immigration Judge applied the wrong legal standard in analyzing the legal significance of the DHS search of the respondents' personal property. The Immigration Judge determined that even assuming this search was unlawful, it is not a basis to suppress the respondents' statements because the respondents did not establish that “but for” the illegal search they would not have admitted alienage in their statement to the DHS officers (I.J. at 23). The Immigration Judge did not provide authority for the proposition that a statement obtained following a Fourth Amendment violation is admissible unless the party seeking suppression can establish that “but for” the violation the statement would not have been made. We agree with the respondents that this “but for” test is incorrect as a matter of law. In order for the causal chain between a Fourth Amendment violation and a defendant's statement made subsequent thereto to be broken, the statement must “be sufficiently an act of free will to purge the primary taint.” *Brown v. Illinois*, 422 U.S. 590, 602 (1975) (*quoting Wong Sun v. United States*, 371 U.S. 471, 476 (1963)). The Court identified three factors for analysis: (1) the temporal proximity of the illegality and the statement; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Id.* at 603-04. The government bears the burden of proving that the taint of illegality was purged. *Id.* at 604. The Immigration Judge did not apply these factors in assessing the admissibility of the statements the respondents made to DHS officers.⁵ Thus, we agree with the respondents that the Immigration Judge's “but for” test was erroneous as a matter of law.

Third, the Immigration Judge erred in not specifically making findings of fact related to whether the respondents' personal property was searched prior to their interview and subsequent arrest by DHS officers. The Immigration Judge elected not to make specific findings related to this issue, but instead indicated that even assuming respondents' version of events was true, they had not shown a basis to suppress the statements they made to DHS officers. However, as we have indicated, in doing so the Immigration Judge misallocated the burden of proof to the

⁵ To clarify, we do not hold that the search of the respondent's personal property occurred prior to the respondents making statements to DHS officers; that if the search occurred prior to making the statements, the search violated the Fourth Amendment; or that if it did violate the Fourth Amendment, such violation was egregious. Rather, we hold only that inasmuch as the Immigration Judge assumed arguendo that the respondents' version of events was true, the correct legal standard must be applied to these assumed facts.

respondents and misstated the law with respect to what the DHS must establish in order to demonstrate that the respondents' statements are admissible. Thus, we conclude that the Immigration Judge erred by not making specific findings of fact determining which version of the events, the respondents' or the DHS officers', is accurate.⁶

In light of the foregoing, we conclude that remand for additional consideration of the respondents' motion to suppress is appropriate. On remand: (1) the Immigration Judge should determine whether the DHS search of the respondents' personal property occurred before or after the respondents were questioned by DHS officers; (2) if the search occurred prior to this questioning, the Immigration Judge should determine whether the search violated the Fourth Amendment; (3) if so, the Immigration Judge should evaluate whether the statements are nevertheless admissible under the factors set forth in *Brown v. Illinois*, *supra*, at 603-04; and (4) if the Immigration Judge determines that these factors otherwise point to suppressing the respondents' statements, the Immigration Judge should determine whether the Fourth Amendment violation was egregious under the standards of the United States Court of Appeals for the Ninth Circuit, such that suppression is warranted in these civil removal proceedings. Accordingly, the following order will be entered.⁷

ORDER: The respondents' appeal is sustained in part.

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



FOR THE BOARD

⁶ We agree with the Immigration Judge that under the DHS's version of events, no violation of the Fourth Amendment took place, much less an egregious violation. The DHS officers were authorized to conduct brief investigatory interviews of the respondents, including querying them about their immigration status, pursuant to the authority of the search warrant. *Muehler v. Mena*, *supra*, at 100-01. Once these interviews established probable cause that the respondents were unlawfully present in the United States, the officers were empowered to arrest them and search their personal property incident to this arrest. See 8 C.F.R. § 287.8(c)(2)(i); *United States v. Robinson*, 414 U.S. 218 (1973) (permitting officers to conduct a contemporaneous "full field search" incident to a lawful custodial arrest). However, if the DHS officers illegally searched the respondents' personal property prior to engaging in what otherwise would have been lawful questioning of the respondents pursuant to the search warrant, such illegal conduct may render the evidence subsequently inadmissible. *Brown v. Illinois*, *supra*.

⁷ In light of our decision to remand for further consideration we decline to address at this time the other issues raised by the parties on appeal.

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

Matters of)	Date:	NOV 22 2011
Maria de Jesus ORTIZ-Mejia, and)	File Numbers:	A093-138-113
Felipe de Jesus SOLIS Miam,)		A093-138-114
Respondents)	<u>In Removal Proceedings</u>	

Charge: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, as 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.

Application: Motion to Suppress, Motion to Terminate

On Behalf of Respondents:

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On Behalf of the DHS:

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DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL BACKGROUND

On May 9, 2008, and May 12, 2008, the Department of Homeland Security ("DHS") filed Notices to Appear ("NTA") with this Court regarding Respondents Maria de Jesus ORTIZ-MEJIA and Felipe de Jesus SOLIS MIAM, respectively. Exh. 1 (A093-138-113); Exh. 1 (A093-138-114). The NTAs alleged that Respondents are not natives and citizens of the United States, but are natives and citizens of Mexico who entered the United States without inspection by an immigration officer. *Id.* The NTAs charged Respondents with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act, ("Act" or "INA") as amended, as aliens 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. *Id.* Respondents denied all allegations and the charge of removability.

To support the allegations and charge, the DHS filed Forms I-213, Record of Deportable/Inadmissible Alien, for each Respondent. Exh. 2 (for identification) (113); Exh. 2 (for identification) (114). Respondents moved to suppress the Forms I-213 on the basis that the

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information contained within them was gathered in violation of the United States Constitution and the Federal Regulations. Resp't's Mot. to Suppress (Feb. 6, 2009).

On May 18, 2009, the DHS moved to pretermit Respondents' motions on the basis that it had obtained independent evidence of alienage of both Respondents, rendering their suppression motion moot. The Court denied the DHS's motion on July 30, 2009. Decision of the Immigration Judge (Jun. 30, 2009). On the same date, the Court found that both Respondents had established a *prima facie* case for suppression. *Id.*; see also *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).

Respondents testified in support of their motions to suppress on October 31, 2008, and October 12, 2010, pursuant to *Barcenas*. 19 I&N Dec. at 611. Following Respondents' testimony, and in the absence of convincing evidence in the record that the information contained in the I-213s was obtained pursuant to a search warrant, the Court found that Respondents' declarations and testimony established a *prima facie* case for suppression under *Barcenas*; therefore, the Court shifted the burden of proof to the DHS to justify the manner in which it obtained the evidence. See *id.* at 611.

Respondents' case came to the Court following a coordinated Immigration and Customs Enforcement ("ICE") operation at various El Balazo restaurants throughout the San Francisco, California, Bay Area. Throughout the proceedings, the DHS maintained that the ICE operation at Respondent's place of employment—the El Balazo restaurant on Haight Street in San Francisco, California—was conducted pursuant to a federal search warrant. However, the DHS stated that the warrant had been sealed by the Federal District Court and it would be a violation of the sealing order to disclose its contents. To support its representation that the search was valid because it was conducted pursuant to a warrant, the DHS presented the testimony of Agent Ryan Maclean on December 10, 2009. As explained in the Court's previous order, Order of the Immigration Judge (Apr. 29, 2010), Agent Maclean lacked the individualized knowledge of the El Balazo operation to testify in a manner that sufficiently established that the operation was conducted pursuant to a valid search warrant. On September 2, 2010, the DHS submitted a copy of a criminal search warrant for a number of El Balazo restaurants, including the Haight Street location.

II. EVIDENCE PRESENTED

A. Documentary Evidence

Although Respondents' cases have remained consolidated throughout these proceedings, the Court has maintained separate evidentiary records for each of their cases. The documentary evidence consists of:

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Exhibits filed regarding Respondent Ortiz

- Exhibit 1: NTA;
Exhibit 2 (for identification): I-213 regarding Respondent Ortiz;
Exhibit 3: Declaration of Respondent Ortiz;
Exhibit 4 (for identification): Photocopies of social security and lawful permanent residency cards bearing the name and photograph of Respondent Ortiz;
Exhibit 5: Photocopies of Mexican identification cards bearing the name and photograph of Respondent Ortiz;
Exhibit 6: Hand-drawn map of the El Balazo Haight Street restaurant;
Exhibit 7 (for identification): Scratch I-213 regarding Respondent Ortiz;
Exhibit 8: Warrant issued by United States Magistrate Judge James Larson;
Exhibit 9: Photograph of the kitchen area of the El Balazo Haight Street restaurant;
Exhibit 10: Photograph of the hallway of the El Balazo Haight Street restaurant;
Exhibit 11: Photograph of the hallway of the El Balazo Haight Street restaurant;
Exhibit 12: Photograph of the dining area of the El Balazo Haight Street restaurant; and
Exhibit 13: Photograph of the dining area of the El Balazo Haight Street restaurant.

Exhibits filed regarding Respondent Solis

- Exhibit 1: NTA;
Exhibit 2 (for identification): I-213 regarding Respondent Solis;
Exhibit 3: Warrant (duplicate of Exhibit 8 in record of Respondent Ortiz);
Exhibit 4: Letter from Bruce Smith regarding Respondent Solis;
Exhibit 5: Declaration of Respondent Solis;
Exhibit 6 (for identification): Scratch I-213 regarding Respondent Solis;
Exhibit 7: Article, "Owners of El Balazo Restaurant Chain Charged with Tax Fraud, Hiring Illegal Aliens," U.S. Dep't of Justice (Dec. 6, 2010);
Exhibit 8 (for identification): Scratch I-213 regarding Respondent Solis, partially highlighted;
Exhibit 9 (for identification): Detention Form/Field Interview Form regarding Respondent Solis;
Exhibit 10: Declaration of Cristoval Gonzalez-Hernandez;
Exhibit 11: Declaration of Daniel Garfias;
Exhibit 12: Scratch I-213 regarding Cristoval Gonzalez-Hernandez; and
Exhibit 14:¹ Series of time-stamped photographs (duplicates of Exhibits 9 through 13 in record of Respondent Ortiz).

¹ The Court did not mark any document as Exhibit 13 in Respondent Solis's record to avoid confusion between Exhibit 14 (114) and Exhibit 13 (113), one of the photographs in Exhibit 14 (114).

B. Testimony and Declaration of Respondent Ortiz and Officer Szeto

1. Testimony of Respondent Ortiz

Respondent Ortiz testified in support of her declaration on February 8, 2010. Her declaration appears at Exhibit 3 (113).

Respondent Ortiz testified that she has a clear memory of the events of May 2, 2008. That day, she was working at the Haight Street El Balazo restaurant, preparing for the restaurant to open around 10:00 or 10:30 a.m. Respondent Ortiz worked as a cashier, and she had been working at the restaurant for about three or three-and-one-half years. Approximately five other workers were also present, and they were preparing food for the day. Respondent Ortiz stated that, at around 10:30 a.m., she was standing near the cash register preparing fruit cups. Around that time, a group of approximately seven people dressed in blue² came into the restaurant carrying weapons in their hands. These people, whom Respondent Ortiz later identified as ICE agents, "surrounded" her and her coworkers in the kitchen. They told the workers to stop what they were doing in loud and threatening voices, and someone told a worker to turn off the stove. Someone also asked another employee, whom Respondent Ortiz later identified as Respondent Solis, for the keys to the restaurant office.³

The agents gathered the workers from the kitchen and led them to the upstairs dining area, where they frisked them and ordered them to put their belongings on a table. Respondent Ortiz testified that the agent who led her from the kitchen to the dining area "grabbed" her shoulder to bring her upstairs. When the workers were asked to place their belongings on the table, Respondent Ortiz's things were downstairs in the kitchen area where she had been working. Respondent Ortiz's testimony regarding which agent retrieved and searched her backpack was unclear. Her declaration states that a male agent led her downstairs to retrieve her backpack, and that she did not interact with a female agent until questioned a few minutes later. Exh. 3 (113) at 2. However, on direct examination, she testified that a female agent asked her to show her where her things were, took Respondent Ortiz downstairs to retrieve her backpack, and grabbed the pack, refusing to let Respondent Ortiz carry it. Respondent Ortiz described this female agent as Asian, slightly taller than her, and with dark hair that came to her shoulders. On cross-examination, Respondent Ortiz stated both the female agent and a male agent searched her backpack together. On cross-examination, she also stated that the officers kept their weapons drawn while they gathered the employees in the dining area.

Next, the same female agent led Respondent Ortiz back upstairs and told her to sit at a

² Respondent Ortiz's declaration states that the agents were wearing "dark colored vests." Exh. 3 (113) at 2.

³ Respondent Ortiz also testified that the owner of the El Balazo restaurants is a man named Mr. Sandoval. She stated that Mr. Sandoval keeps an office at the Haight Street restaurant, to which Respondent Ortiz had access. However, Respondent Ortiz did not have the keys to the office on the day of the ICE operation.

table. Without her permission, this agent began looking through the backpack, which contained Respondent Ortiz's identification cards and money. Respondent Ortiz testified that she did not give the agent permission to search her backpack. The agents pulled out her belongings in front of her and counted her money. Respondent Ortiz stated that she did not feel free to leave the restaurant at this point because there were agents guarding the main door, which she could see from the table where she was seated. She testified that, at some point, the female agent told her she could not talk on her cell phone, which Respondent Ortiz had in the pocket of her apron.

Shortly after being seated at the table, Respondent Ortiz was questioned by the same female agent. Respondent stated that the agent asked her questions in both Spanish and English in a demanding voice; she asked her for identifying information, where she was from, how long she had been in the United States, and other questions.⁴ Respondent Ortiz estimated that the female officer questioned her for approximately 20 or 30 minutes. Exh. 3 (113) at 2. She testified that she did not feel she had a right to remain silent because of the agent's demanding tone of voice. She maintained that the agent did not ask her any questions until after searching her backpack without permission. The agent did not tell her she had a right to an attorney or to refuse to answer. Respondent Ortiz also stated that she tried to stand up several times, but the female agent always "grabbed" her and guided her where she needed to go. On direct and cross-examination, Respondent Ortiz did not testify whether she would have answered the agent's questions but for the pre-interview search of her belongings.

Respondent Ortiz testified that, at some point, she asked the female agent if she could use a restroom. The agent escorted her to the restroom, but she did not let her close the door, even though there were no windows or other doors in the restroom. After Respondent Ortiz finished using the restroom, the agent placed her in handcuffs and put a sweater over her hands. She led her downstairs, out the door of the restaurant, and into a vehicle that was parked outside. The officer did not tell Respondent Ortiz where they were going, despite her asking. Respondent Ortiz stated that she never asked the female agent, or any other agent, if she could leave the restaurant. She stated that she did not feel free to do so because the doors were blocked and because the female agent always maintained physical contact with her when they moved around.

Respondent Ortiz testified that she was transferred to a "detention center" on Sansome Street in San Francisco, California.⁵ On cross-examination, she testified that the female agent who had questioned her earlier accompanied her to Sansome Street. She stated that she was the only worker in the vehicle. She estimated that she arrived at Sansome Street around 11:30 a.m.

⁴ On cross-examination, Respondent Ortiz was asked whether she answered the female agent's questions truthfully. Respondent Ortiz testified that she answered the agent's questions; however, she elected not to state whether her answers were truthful, in exercise of her rights under the Fifth Amendment. The Court allowed Respondent Ortiz to exercise this right.

⁵ The Court notes that all of the El Balazo employees were taken to the ICE District Office at 630 Sansome Street in San Francisco, California. Although Respondent Ortiz referred to it as such, this facility is not a "detention center"; there is, however, a holding cell on the premises. The Court will refer to this location as "Sansome Street."

She testified that no one explained why she and the other workers were taken there, and she was not provided an attorney. Agents took her picture and fingerprints and put her in a holding cell with about 20 other women whom she recognized as workers from other El Balazo restaurants. Exh. 3 (113) at 3. Respondent Ortiz testified that she was eventually taken to an interrogation room where an agent began questioning her with the help of an interpreter. *Id.* She stated that the agents asked her similar questions about her identity, background, and residences. Respondent Ortiz answered these questions truthfully. Respondent Ortiz asked for an attorney, but the agent responded that "they were the only people who could help [her.] If [she] did not cooperate with them, they would keep [her] locked up in jail."

Respondent Ortiz testified that she was released from Sansome Street around eight or nine hours after her initial detention. She did not receive her backpack until she was released; the agents had held it all day. Respondent Ortiz testified that, when she received her backpack, all of her belongings were still inside except her identification card.

On cross-examination, Respondent Ortiz stated that Respondent Solis was also at the restaurant on the morning of the ICE operation. She stated that she remembered seeing Respondent Solis in handcuffs as she was leaving the restaurant, and she recalled that he had a very frightened expression on his face. She also maintained that no agents ever asked her about the owners of the El Balazo restaurants. In response to questions posed by the DHS, Respondent Ortiz denied telling the agents that she had purchased a social security card for \$50.00; that Mr. Sandoval had promised her a job if she came to the United States; or that Mr. Sandoval had instructed her to destroy the original social security card (Exh. 4) (113).

2. Testimony of Officer Katy Szeto

Officer Szeto testified on March 29, 2011. On the date of her testimony, Officer Szeto was a Supervisory Detention and Deportation Officer for ICE. She had worked at ICE since 2006, and prior to that she was an officer for Customs and Border Protection ("CBP"). She attended the Federal Law Enforcement Training Center academy in 2000, during which she received three months' training in immigration law and one month of Spanish-language instruction. Since becoming an ICE officer she has received periodic training in various issues that arise in her work, including the Fourth Amendment. Officer Szeto participated in the ICE operation at the Haight Street El Balazo on May 2, 2008, but she testified that she did not specifically recall many of the details of that day, and much of her testimony was based upon events that usually happen during the course of an operation. She also stated that she was transferred to a different office in November 2008, and since that time she had not participated in any other workplace operations.

In May 2008, Officer Szeto worked primarily in Sacramento, but she was asked to assist the San Francisco Homeland Security Operations ("HSI") team in their execution of the El Balazo search warrant. She first stated that she was not involved in any of the planning stages of the operation, and she only attended one meeting on the morning of the operation to be briefed

before executing it. However, on cross-examination, she stated that she attended a briefing a day or two before the operation. She recalled that many agents first met as a large group before splitting into smaller groups by location. She did not remember the specific details of this meeting.

Officer Szeto testified that her role in the operation was merely to assist the primary officers by filling out Forms I-213, conducting interviews, helping to secure the area for officer safety, and performing additional tasks as needed. She did not review the warrant prior to the operation, but she testified that she recalled the Team Leader showing the team a packet which he told them was the warrant during the morning meeting. She stated that the warrant was a criminal search warrant, which authorized the agents to search for evidence at the restaurant. She understood that the warrant was issued in connection with a criminal investigation into the owners of the El Balazo restaurant chain, who were suspected of hiring and harboring undocumented workers. She did not recall if the warrant itself was displayed anywhere in the restaurant during the operation.

Officer Szeto stated that she was armed that day, but she did not recall ever drawing her weapon. She stated that it is not unusual for agents to be armed when executing a search warrant due to officer safety concerns. She testified that she entered the restaurant toward the end of the group of agents, and she characterized the entry as "safe" and "not chaotic." She stated that she did not recall seeing or hearing any improper actions on the part of any of the ICE agents, such as yelling or screaming. She stated that she has a duty to report any such actions that she observes. When she entered, agents were already on the side of the restaurant near the cashier, and she moved past them toward the back of the restaurant. She testified that, in her understanding, the existence of a criminal search warrant authorized her to gather everyone present at the site into a central area, to detain them, and to question them regarding their status in the United States. She stated that these actions are justified by the interests in officer safety and preserving evidence. For example, she explained that the officers removed those present, who appeared to be employees, from the kitchen area because kitchens frequently contain many items that can be used as weapons.

Officer Szeto confirmed that ICE agents blocked the restaurant doors after the operation began. She testified that they did this to prevent occupants of the site from leaving. Again, she stated that this action was justified because it prevented occupants from leaving with evidence or causing harm to the agents by returning or sending others to the site. She cited the possibility of gang affiliation as one possible reason to keep all of the occupants of the restaurant present during the operation.

Officer Szeto's testimony regarding her interactions with Respondent Ortiz was aided by

several photographs taken on the day of the raid. See Exhs. 9-13(113); Exh. 14 (114).⁶ She stated that she did not question Respondent Ortiz alone; for at least part of the interview, she was assisted by another agent who spoke Spanish. She testified that the first photograph depicted her guiding Respondent Ortiz from the kitchen area toward the dining room. Exh. 14 (114) at 1. Officer Szeto denied that she would generally "grab" or push a person to move them, but stated that she would instead "gently guide" the person toward the central area. She stated that she was doing this in the photograph. *Id.* She also noted that a plastic bag, presumably containing Respondent Ortiz's belongings, appears in Exhibit 14 (114) at 3 and 4, although it does not appear to be present in Exhibit 14 (114) at 2. From this series of photographs, Officer Szeto testified that she encountered Respondent Ortiz in the kitchen and escorted her upstairs to a table, where she commenced questioning Respondent Ortiz to complete the scratch I-213. Then, after establishing alienage, she retrieved Respondent Ortiz's backpack from the kitchen, searched it, and inventoried its contents on the scratch I-213.

Officer Szeto was shown a copy of a handwritten "scratch I-213," which she confirmed she wrote while interviewing Respondent Ortiz. Exh. 7 (for identification) (113). She noted that her initials appeared on the left side of the form. *Id.* She explained that she asked for all of the information on the scratch I-213, including several questions about Respondent Ortiz's employment history at El Balazo, which she stated she asked because of its relevance to the criminal investigation. She also explained that the monetary calculations that appear on the left side of the scratch I-213 are a record of the money that Respondent Ortiz had in her backpack when it was searched. She stated that she typically collects this information to ensure that no personal belongings are lost when items are held during an arrest. She testified that she did not

⁶ Time-stamped versions of the photographs were later submitted and marked as Exhibit 14 (114). The photographs were taken in the following order: Exhibit 9 (113) (10:37:48 a.m.); Exhibit 11 (113) (10:47:12 a.m.); Exhibit 10 (113) (11:31:38 a.m.); Exhibit 13 (113) (11:32:10 a.m.); Exhibit 12 (113) (11:32:34 a.m.). The photographs depict the following:

Exh. 14 (114) at 1: View from the kitchen toward the back of the restaurant. A female agent and female employee are walking side by side with their backs to the camera, and the agent's hand is on the employee's back. Another agent appears in the right side of the photograph.

Exh. 14 (114) at 2: View from the kitchen into the dining area. A female employee and female agent are seated at a table next to a window, but glare from the sun blocks vision of any objects that may appear on the table. The employee is wearing an apron.

Exh. 14 (114) at 3: Same view as Exh. 14 at 2. Only the female employee is seated at the table, and a plastic bag is sitting on the table in front of her.

Exh. 14 (114) at 4: View of the dining area from the side. The female employee is seated at presumably the same table with the bag on the table. A man wearing a hat and a white shirt is seated at a different table with his back to the camera. A third table appears to have at least one apron on it.

Exh. 14 (114) at 5: View of an exit door in the back of the dining area. The female employee appears in the bottom left of the photograph with her arms crossed.

sign the scratch I-213 because it is not an official document, and she does not normally sign scratch I-213s when she completes them.

Officer Szeto stated that she would not have asked Respondent Ortiz to retrieve her personal belongings to be searched until after she had determined alienage and placed Respondent Ortiz under arrest. She testified that she did that in this case: after asking Respondent Ortiz the I-213 questions and establishing alienage, Officer Szeto asked her where her backpack was. Together, they walked to the cashier area, retrieved the bag, and returned to the table where they had been seated previously. She testified that, when a subject has a backpack or other bag, she usually asks him or her whether there are weapons in the bag, and she instructs him or her not to open the bag. She then typically asks for permission to look in the bag, and usually the subject gives her permission to do so. She stated that she typically communicates with non-English-speaking subjects through a combination of her limited Spanish and hand gestures.

Officer Szeto stated that she does not normally check a subject's identification before questioning, and she did not recall if she did so in this case. She stated that she would remember if Respondent Ortiz had resisted in any way, including refusing to let her look in her purse, because she would have noted such a unique event in the scratch I-213. She also testified that she would not rely on information found on an identification card to establish alienage or complete a form I-213. On cross-examination, Officer Szeto was asked about several abbreviations in her scratch I-213 that also appear on Respondent Ortiz's Mexican identification cards. See Exh. 5 (113). She was not able to recall the abbreviation for Chihuahua, Mexico, but she was able to state two alternate abbreviations for Hidalgo, Mexico. Exh. 7 (for identification) (113); Exh. 2 (for identification) (113).

Officer Szeto testified that she did not accompany Respondent Ortiz to Sansome Street. She stated that, after she finished questioning Respondent Ortiz, she conducted a pat-down search of Respondent Ortiz. Then one of the agents told her that they did not need her assistance anymore, so she left. She stated that she believed this happened around lunchtime, because she remembered going to get lunch after she left the restaurant.

Officer Szeto was shown a copy of the formal I-213 regarding Respondent Ortiz. See Exh. 2 (for identification) (113). She stated that she did not create this form, and noted a discrepancy between that form and the scratch I-213 that she filled out: while the scratch I-213 states that Respondent Ortiz is married, the formal I-213 states that she is not.

On cross-examination, Officer Szeto was asked about the authority conferred upon her by the warrant. She acknowledged that the warrant only authorized the agents to search the premises, and not any specific person. However, she stated that her authority to detain the occupants of the restaurant inhered from the interests in protecting officer safety and preserving evidence. She also stated her understanding that she had reasonable suspicion to question Respondent Ortiz about her status in the United States because of two facts: first, the warrant

stated that the restaurant was suspected of hiring and harboring undocumented workers; and second, Respondent Ortiz appeared to be an employee of the restaurant due to her uniform.

3. Rebuttal Testimony of Respondent Ortiz

Respondent Ortiz testified briefly in rebuttal on June 17, 2011. She testified that she recognized Officer Szeto as the agent who questioned her on May 2, 2008.

Respondent Ortiz stated that the photograph at Exhibit 14 (114) at 1, in which she and Officer Szeto appear in the kitchen, was taken early in the operation before Officer Szeto questioned Respondent Ortiz. She stated that, when the employees were told to place their belongings on a table, Respondent Ortiz told Officer Szeto that her bag was in the kitchen, and together they retrieved it. She stated that Officer Szeto did not allow her to carry the bag back to the kitchen.

Respondent Ortiz also described the photograph at Exhibit 14 (114) at 3. She stated that this photograph was taken after she and Officer Szeto retrieved her backpack from the kitchen; Officer Szeto began to search the backpack without permission, and during this search she found an identification card. Respondent Ortiz testified that, seeing the identification card out on the table, she did not feel free to refuse to answer Officer Szeto's questions. She stated that, had Officer Szeto not searched her bag, she "may have" felt free to remain silent during questioning. She stated that Officer Szeto then placed her belongings in the plastic bag that appears in several of the photographs. *Id.* at 3, 4. She also stated that the bag is also on the table in Exhibit 14 (114) at 2, but it is not visible because of the sunlight. She testified that she removed her apron at some point, and that an agent placed the apron in the same place as her belongings.

C. Testimony and Declaration of Respondent Solis and Officer Barge

1. Testimony of Respondent Solis

Respondent Solis testified in support of his declaration on October 12, 2010. His declaration appears at Exhibit 5 (114).

Respondent Solis testified that he remembered the events of May 2, 2008, clearly. He arrived at the Haight Street El Balazo around 7:00 a.m., as it was his duty to prepare the restaurant for the day's business. He recalled that four employees, including himself, arrived at 7:00 a.m., and several others arrived around 9:00 a.m. He testified that he was storing merchandise downstairs when ICE agents entered the restaurant at around 10:30 a.m. Respondent Solis testified that he realized the agents had entered when they shouted at the workers to stop working; one agent approached him from behind, shouted at him to stop working, and "grabbed" him on the back. He testified that the agents did not identify themselves as ICE agents, but he guessed that they were because of their uniforms. He did not know exactly what "ICE" meant, but he knew that it had something to do with immigration.

The agents told Respondent Solis and the other workers to go upstairs. Respondent Solis noticed that, while some agents were guiding the workers, others had stationed themselves at the restaurant's exits. He stated that the agents spoke in loud voices and ordered the workers to sit down in the dining room, remove their personal belongings from their pockets, and place them on a central table.⁷ He recalled that one of the agents asked him for the keys to the restaurant. Each of the workers was instructed to sit at a separate table. Respondent Solis placed his wallet and cell phone on the central table. He testified that he did not feel that he could deny the agents permission to search his wallet because they did not ask for permission but merely shouted instructions at him and the other workers. On cross-examination, Respondent Solis testified that he was standing up when he produced his wallet, and he remained standing for a little while, and then he eventually sat down. He maintained that no one spoke to him directly until he sat down at a table.

Respondent Solis testified that, around 11:00 a.m., a male agent sat down with him and began asking him questions about his identity, family, and background. He stated that the agent identified him by calling his name, and for this reason he believed that the agent had already searched his wallet when he began questioning. Respondent Solis stated that he had not told any of the agents his name up until that time. However, he admitted that he did not actually see any agent specifically search his wallet because he was looking around the restaurant and not directly at the table. The first agent did not speak Spanish, but later another agent who did speak Spanish joined him. The first agent asked him questions in English, only some of which he understood. Neither of the agents told him that he had a right to refuse to answer their questions or to speak to an attorney. Respondent Solis testified that he never asked the agents if he could leave or to speak to an attorney. He denied that any agent ever asked him for permission to look in his wallet, and he denied that the agent looked in his wallet after he had told him his country of origin.

Respondent Solis testified that he believed an agent removed an identification card from his wallet during the search. He stated that he did not remember if this card contained his place of birth. He also acknowledged that he generally maintains a friendly and jovial demeanor. He stated that he felt afraid and serious on the morning of the ICE operation, but he admitted that he may have smiled at some point during the morning.

Respondent Solis testified that, around noon, two or three agents took him to the lower level of the restaurant along with two other workers. Although he had not been able to see outside from the table where he had been seated, when he was led to the lower level he was able to see two or three cars parked outside the restaurant. The agents handcuffed the workers, placing their hands behind their backs, and put them in vehicles which took them to Sansome

⁷ On direct examination, Respondent stated that the agents first ordered the employees to sit and then told them to place their belongings on the central table. However, in cross-examination and in his declaration, he stated that the agents first ordered the employees to place their belongings on the table, and only after that instructed the employees to sit down. Exh. 5 (114) at 2. On cross-examination, he stated that he remained standing until an agent called his name, at which point he sat down.

Street. He asked the agents several questions during the ride to Sansome Street, but no one answered him. Respondent Solis remained at Sansome Street until about 8:00 p.m., when he was taken to the ISAP⁸ building. He testified that he left that building around 9:00 or 9:30.

Originally, Respondent Solis testified that he has not returned to Sansome Street since the day of his arrest. However, on cross-examination he stated that he returned to Sansome Street on May 21, 2008, accompanied by his attorney, Francisco Ugarte, and held a meeting with ICE agents. Respondent Solis did not disclose anything that he discussed during this meeting.

On cross-examination, Respondent Solis was asked if he knows a man named Bruce Smith who works at a hardware store near the Haight Street El Balazo. He stated that he did not remember ever meeting someone by that name.

2. Testimony of Agent Michael Barge

Agent Michael Barge testified on June 17, 2011. At the time of his testimony, Agent Barge was a Special Agent for ICE-HSI in Sacramento, California. He had worked in that capacity for seven years. Agent Barge attended the Federal Law Enforcement Training Program academy when he became an ICE agent, and he has had periodic trainings since then. He estimated that he had executed approximately 100 criminal search warrants during his career, and estimated that around 50 of these took place prior to the El Balazo operation. He stated that he knows what a facially valid search warrant looks like.

Agent Barge testified that he understood there was a warrant authorizing the search on May 2, 2008. He stated that, later, he learned from an article distributed to him at work that the El Balazo owners were arraigned in San Francisco for tax evasion and hiring illegal aliens. See Exh. 7(114). Agent Barge testified that, typically, before a warrant's execution, the agents executing it would pass it around to view individually, but he stated that he had no independent memory of whether that actually happened prior to the El Balazo operation. On cross-examination, Agent Barge was questioned extensively about the extent of his memory of the El Balazo operation. Agent Barge's answers to these questions revealed that he has vague and imperfect memories of the day's events. For example, he did not confirm or deny if any agent made any announcements to the employees at any time during the search; he did not remember if the employees were asked to place their personal belongings on a table; and he could not state whether agents guarded the doors of the restaurant during the operation.

Agent Barge testified that, in his understanding, the warrant authorized the agents to detain occupants of the restaurant while searching it, both for officer safety and to preserve evidence. He explained that it would be improper to release occupants from the search site after securing it, because he would want to know the occupants' relationship to the business to determine if they may have useful information related to the investigation. Agent Barge admitted

⁸ The Court notes that "ISAP" stands for Intensive Supervision Appearance Program.

that, when an occupant of a search site is detained, he or she is not free to leave, but that person is also not "under arrest." He stated that he understood the warrant authorized the search of the premises for documents specifically, and he stated that he did not believe any of these business records would normally be found on the persons of restaurant employees. He differentiated his authority to search for these documents, which derived from the warrant itself, from his authority to search employees' persons, which derived from the policy concerns discussed above.

Agent Barge testified that, on the day of the operation, he first went to Sansome Street where he was assigned a car. He rode as a passenger in a Sport Utility Vehicle from Sansome Street to the restaurant, but he did not recall where the driver parked. He recalled exiting the car and entering the restaurant through the front door in a group of about 10 agents. He characterized the agents' entry into the restaurant as "low key," and not fast. Agent Barge testified that his assignment was to walk toward the back of the restaurant and lead occupants from there toward the front of the restaurant. He testified that he recalled hearing agents saying things like "police" and "search warrant" in what he described as "authoritative" voices, but he did not testify that the agents were shouting. Agent Barge testified that he did not draw his weapon at any time during the operation. He also testified that he recalled walking up a set of stairs with Agent Vaughan, discovering several occupants, and instructing them to go inside the restaurant.

Agent Barge recognized Respondent Solis as the individual whom he questioned at the Haight Street El Balazo on May 2, 2008. He stated that he first encountered Respondent Solis when he discovered that Respondent Solis spoke a bit of English; because Agent Barge does not speak Spanish, he wanted to interview someone who spoke English. He stated that he began speaking with Respondent Solis while they were standing up in the dining area, and that during this conversation, Respondent Solis admitted that he was present in the United States without authorization "and smiled." Agent Barge stated that he had reasonable suspicion to question Respondent Solis about his immigration status because he knew that Respondent Solis was an employee of a business being investigated for the illegal hiring and harboring of undocumented workers. Agent Barge testified that, after hearing that Respondent Solis did not have authorization to be in the United States, he had probable cause to arrest Respondent Solis. He then led Respondent Solis to a nearby table, where he questioned him more thoroughly. Agent Barge estimated that this initial conversation lasted for only a few minutes. Agent Barge did not recall if any agents made any announcements to the group after the employees had been gathered in the dining room. He testified that he would not have continued speaking to Respondent Solis had he been aware that announcements were being made.

Agent Barge was presented with a scratch I-213, which he confirmed is the scratch I-213 that he partially completed regarding Respondent Solis. Exh. 6 (for identification) (114). He was also shown another document, which he explained was a photocopy of the scratch I-213 in which the portions that he completed were highlighted in pink ink. Exh. 8 (for identification) (114). Agent Barge explained that he was called by a supervisor and had to leave the site before completing the interview, so a different agent took over completing the scratch I-213. Agent

Barge stated that he assumed this other agent was Agent Vaughan, because his name appears on the formal I-213. See Exh. 2 (for identification) (114). Agent Barge did not know how any of the employees were transferred from the restaurant to Sansome Street because of his early departure.

Agent Barge was also shown a "Detention Form/Field Interview Form" ("FIF") that he confirmed he completed at the Haight Street location.⁹ Exh. 9 (for identification) (114). He first testified that he completed the FIF immediately after sitting down with Respondent Solis at the table in the dining area. Later, he admitted that he has no specific memory of completing the form, but stated that normally he would complete an FIF first and then would more thoroughly complete the scratch I-213 using information from the subject and from any identification documents he had been provided. He was unable to explain why the word "Yucatan," written in the area designated for "Place of Birth," appears in parentheses. See *id.* He testified that he circled the word "arrested" on the FIF. *Id.*

Agent Barge stated that he asked Respondent Solis for identification immediately after determining that he could communicate with him in English. He stated that it is his practice to always ask for identification first to avoid confusion if the subject of an interview gives him a false name. He stated that he somehow obtained Respondent Solis's wallet and asked permission to look inside it, but he did not recall how he came to possess the wallet. He stated that he knew he asked permission to look inside the wallet because he noted as much on the FIF; he also stated that he "wouldn't look in someone's wallet without getting consent," even if a warrant technically authorized him to do so. He stated that he had no doubt that Respondent Solis gave him consent to search the wallet, and stated that he believed the wallet search would have been illegal had he not obtained consent. Agent Barge also testified that he believed he was only at the restaurant for approximately 30 minutes before being called to his new assignment.

3. Rebuttal Testimony of Respondent Solis

Respondent Solis was asked to explain his recollection of how his wallet was searched on the day of the El Balazo operation. He reiterated that he recalled being moved from the back of the restaurant to the dining area, and he stated that an agent, probably not Agent Barge, told him to put his belongings on a table with other personal items of the employees. He testified that Agent Barge was the agent who then searched his wallet, but he admitted that he did not see Agent Barge actually looking through the wallet; his belief that Agent Barge searched the wallet arose when Agent Barge called his name and began questioning him. He also testified that Agent Barge had his identification card in his hand when he called Respondent Solis's name. Respondent Solis testified unequivocally that Agent Barge did not ask him for permission to look inside his wallet.

⁹ Agent Barge testified that, while his independent memory of the events of May 2, 2008, was vague, he used the FIF to refresh his memory. He stated that, prior to his testimony, he discussed the FIF briefly with counsel for the DHS, and he also recalled receiving the FIF in an email from DHS counsel several months earlier.

Respondent Solis testified that he did not remember whether he was sitting or standing when Agent Barge began questioning him. He stated that he was seated at a table for at least part of the time he was being questioned.

III. ANALYSIS

A. Admissibility of Warrant

In reaching a decision in this case, the Court may consider evidence that is "probative and its use fundamentally fair, so as not to deprive an alien of due process of law." *Matter of Grijalva*, 19 I&N Dec. 713, 719 (BIA 1988); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999); *see also Lopez-Chavez v. INS*, 259 F.3d 1176, 1181 (9th Cir. 2001). Where evidence is submitted after a filing deadline, the Court still may consider it if the party explains the reasons for the late filing and shows "good cause for acceptance of the filing." Imm. Court Prac. Manual §§ 3.1(b), (d)(ii) - (iii).

Here, the DHS submitted a copy of a criminal search warrant for the Haight Street El Balazo restaurant on September 2, 2010. Exh. 8 (113); Exh. 3 (114). The warrant, dated April 28, 2008, authorizes the search of the Haight Street El Balazo restaurant on or before May 7, 2008. *Id.* It authorizes the search and seizure of employee and applicant personnel records, payroll records, immigration forms related to the work eligibility of employees, correspondence related to employee wages, and tax records, among other things. Respondents objected to the admission of the warrant based on lack of authentication and untimeliness. Resp'ts' Opp. to DHS's Submission of Evid. (Sep. 20, 2010).

The Court finds that the warrant is probative, as it relates directly to whether ICE's search of the El Balazo restaurant and associated detention of Respondents was lawful. Furthermore, the Court finds that introduction of the warrant is fundamentally fair: the warrant was submitted while the DHS still carried its burden of justifying the manner in which it obtained the evidence in the I-213s as required under *Barcenas*. 19 I&N Dec. at 611. The DHS consistently represented that, prior to its submission in this Court, the warrant was under seal with the District Court during the first two years of Respondent's proceedings, and the Court is satisfied that the DHS acted diligently to obtain the warrant. Thus, the Court does not find the DHS's delay in providing the warrant to be unreasonable. The Court finds that admission of the warrant is probative and fundamentally fair, and the DHS has established good cause for acceptance of the late filing. Therefore, the Court admits the warrant into evidence in the instant proceeding. Exh. 8 (113); Exh. 3 (114).

B. Applicable Law

In immigration proceedings, evidence is generally admissible if it is probative and its use is fundamentally fair. *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999). The inadmissibility of evidence that undermines fundamental fairness stems from the Fifth

Amendment due process guarantee that operates in removal proceedings. See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945); *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954). While the exclusionary rule is not *per se* applicable to allegations of Fifth Amendment violations in removal proceedings, evidence is nevertheless inadmissible if it was obtained in violation of the alien's privilege against self-incrimination, or if the statement was involuntary or coerced. See *Matter of Sandoval*, 17 I&N Dec. 70, 83 n.23 (BIA 1979); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980). The Board of Immigration Appeals ("Board") has held that evidence obtained by coercion or other activity which violates the due process clause of the Fifth Amendment may be excluded. See *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980) (citations omitted); *Garcia*, 17 I&N Dec. at 321. A statement may also be excluded under the Fifth Amendment if the circumstances surrounding the interrogation were fundamentally unfair. See *Toro*, 17 I&N Dec. at 343.

A respondent cannot generally suppress evidence asserted to be procured in violation of the Fourth Amendment because of the civil nature of removal proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (finding the Fourth Amendment exclusionary rule inapplicable to deportation proceedings). However, the Supreme Court left open the possibility that the exclusionary rule might still apply in cases 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." *Id.* at 1050-51. In applying this exception, the Ninth Circuit has developed a two-part test to determine when evidence should be suppressed in an immigration proceeding. *Orhoraghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994). The Court first must determine whether the government violated the Fourth Amendment. *Id.* If it did, then the Court must determine whether the agents committed the violations deliberately or by conduct a reasonable officer should have known would violate the Constitution. *Id.*

Where a search is based on a facially valid search warrant, "a defendant challenging a search will lose if either: (1) the warrant issued was supported by probable cause; or (2) it was not, but the officers executing it reasonably believed that it was." *Pearson v. Callahan*, 129 S.Ct. 808, 821 (2009) (citing *United States v. Leon*, 468 U.S. 897 (1984)). In *Michigan v. Summers*, the Supreme Court noted that the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search premises. 452 U.S. 692, 703 (1981); see also *Muehler v. Mena*, 544 U.S. 93, 98 (2005). In *Summers*, the Court ruled that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Summers*, 452 U.S. at 705. The *Summers* Court reasoned that detention was warranted due to factors such as "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found," as well as officer safety and facilitation of "the orderly completion of the search." *Id.* at 702.

The Supreme Court elaborated on the *Summers* holding in *Muehler*. 544 U.S. 93. In that case, police officers obtained a warrant to search Mena's residence for weapons and evidence of gang membership. *Id.* at 95-96. Mena was asleep in bed, and officers handcuffed her at gunpoint. *Id.* at 96. Immigration and Naturalization Service officers, who were working with

federal agents in the investigation, questioned Mena about her alienage and immigration status while she was detained in the garage. *Id.* The Court found that Mena's detention was "plainly permissible" under *Summers* because there was a warrant to search the premises, and Mena was on the premises. *Id.* at 98. The Court explained that "[i]nherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." *Id.* at 98-99. While the officers had detained Mena for several hours in handcuffs, the Court found the force reasonable based on the danger to the officers and level of contraband suspected at the location. *Id.* at 99. In addition, the *Muehler* Court found that it was permissible for the officers to question Mena regarding her immigration status during the search of her home. *Id.* at 100-01. The Court rejected as "faulty" the Circuit Court's finding that the "officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event." *Id.* It noted, "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Id.* at 101 (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)).

In *Dawson v. City of Seattle*, the Ninth Circuit applied the Supreme Court's reasoning to find that the detention of residents of a boarding house was reasonable during a public health inspection executed pursuant to a warrant. 435 F.3d 1054 (9th Cir. 2006). During the inspection, the plaintiffs were kept for approximately two hours in a secure room. *Id.* at 1059. The Ninth Circuit noted that the detention of occupants of a building while officers execute a search warrant is permissible, so long as the length of detention is reasonable. *Id.* at 1065. In finding that the detention was reasonable, the court looked to the three rationales articulated by the Supreme Court in *Summers*: (1) prevention of suspects from fleeing; (2) minimizing the risk of harm to the officers or occupants; and (3) expediting the search. *Id.* at 1066. The court rejected the plaintiffs' argument that *Muehler* and *Summers* apply only to searches for contraband, rather than searches for evidence. *Id.* In addition, the court found that officer safety associated with the health conditions of the building, the risk of the tenants fleeing and thus rendering themselves unavailable for questioning as witnesses, and the tenants' potential impairment of the search all justified the officers' detention of the tenants. *Id.* at 1066-67.

Regarding the Fifth Amendment, the Ninth Circuit has concluded that the analysis of whether a statement was made voluntarily is "markedly different" in civil proceedings than in criminal trials. *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1278 (9th Cir. 1979). In *Cuevas-Ortega*, it elaborated:

[S]ince it is the alien's burden to show lawful entry, since he must answer non-incriminating questions, since his silence may be used against him, and since his statements are admissible despite lack of counsel, it is more likely than not that the alien will freely answer the government agent's questions. Thus, where there is nothing in the record indicating that the alien's statement was induced by coercion, duress or improper action on the part of the immigration officer, and

where the petitioner introduces no such evidence, the bare assertion that a statement is involuntary is insufficient.

Id. at 1277-78 (internal citation omitted). Coercion and duress may be demonstrated by a showing that the statement was obtained through physical abuse, hours of interrogation, denial of food or drink, threats or promises, or interference with the respondent's attempt to exercise his rights. See *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, the Board has found that a respondent's admissions were involuntary when he was led to believe that his return to Mexico was inevitable, he was detained without any explanation of why he was in custody, he could not communicate with his attorney, and all of his attempts to contact his attorney were actively interfered with by the immigration officer interrogating him. See *Garcia*, 17 I&N Dec. at 320-21.

In addition to serving as a direct remedy for constitutional violations, suppression may also be appropriate where agency regulations are violated. The violation of an agency regulation can compromise the Fifth Amendment's guarantee of fundamental fairness and undermine the respondent's due process rights. However, there is "no rigid rule . . . under which every violation of an agency regulatory requirement results in . . . the exclusion of evidence from administrative proceedings." *Matter of Garcia-Flores*, 17 I&N Dec. 325, 327 (BIA 1980). To exclude evidence based on officers' noncompliance with DHS regulations, an alien must meet a heavy burden of proving that: (1) the regulation was not adhered to; (2) the regulation was intended to benefit the alien; and (3) the violation prejudiced the alien's interest in that it affected the outcome of the proceedings.¹⁰ *Garcia-Flores*, 17 I&N Dec. at 328-29; see also *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979). Once the alien establishes a *prima facie* regulatory violation, the burden shifts to the DHS to justify the manner in which the evidence was obtained. *Barcenas*, 19 I&N Dec. at 611.

B. Credibility of Witnesses

To assess credibility, the Court applies the provisions of the REAL ID Act of 2005. See INA § 240(c)(4)(C). Considering the totality of the circumstances and all relevant factors, a credibility finding may be based on the demeanor, candor, and responsiveness of the applicant or witness; the inherent plausibility of the account; the consistency between written and oral statements (whenever made, whether or not made under oath, and in consideration of the circumstances under which the statements were made); the internal consistency of each such statement; the consistency of such statements with other evidence of record; any inaccuracies or falsehoods in such statements; or any other relevant factor. *Id.* The REAL ID amendments further provide that this Court may make a credibility determination without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. *Id.* However, the Court must take into consideration "the normal limits of human understanding and memory,"

¹⁰ A respondent will not have been prejudiced, for example, if evidence supporting a finding of removability arose prior to the regulatory violation. *Garcia-Flores*, 17 I&N Dec. at 329.

and acknowledge that “some inconsistencies or lack of recall may be present” in any case. *Shrestha v. Holder*, 590 F.3d 1034, 1044 (9th Cir. 2010).

The Court carefully observed the testimony of all witnesses under the factors described above. Each witness’ testimony, standing alone, was generally clear, detailed, plausible, and mostly consistent throughout direct and cross-examination. Both Respondents’ testimony was largely consistent with their written declarations and with each other, although the Court did observe some inconsistencies. See Exh. 3 (113); Exh. 5 (114). Similarly, Officer Szeto and Agent Barge testified consistently and plausibly; however, their testimony lacked the detail and specificity that characterized Respondents’ testimony. Both agents admitted that they had limited independent recollection of the events of May 2, 2008, and their testimony often referenced typical or usual procedures, rather than events that they actually remembered took place on May 2, 2008.

Officer Szeto’s and Agent Barge’s testimony regarding the operation differs from Respondents’ account in several ways. First, Respondents testified that the officers instructed them to “dump” their personal belongings on a table, and that the officers then searched their belongings for evidence of alienage before proceeding to question them. Officer Szeto and Agent Barge testified that they did not recall such a search taking place. Officer Szeto stated that she did not search Respondent Ortiz’s bag until after placing her under arrest, and Agent Barge maintained that he searched Respondent Solis’s wallet only after receiving consent. Second, Respondents testified that the officers conducted the operation in what they believe was an unreasonably forceful manner: they stated that they observed officers with drawn weapons, that the officers yelled and spoke in “demanding” voices, that the officers “grabbed” the employees when guiding them around the restaurant, and that the officers used handcuffs. In contrast, both ICE officers testified that the operation was “not chaotic” but was calm and routine, that they did not recall seeing any handcuffs used or weapons drawn, and that their interactions with employees were cordial.

The Court notes that both Respondents’ accounts of the alleged pre-interview search were not entirely consistent, either internally or with their written statements. See Exhs. 3 (113), 5 (114). Respondent Ortiz’s declaration states, “One ICE [agent] and I went to get my purse, which was lying next to the cash register. When he returned, he started to rummage through it.” Exh. 3 (113) at 2. This passage suggests that the agent who retrieved and searched her backpack was a male. *Id.* However, on direct examination, Respondent Ortiz testified that a female agent retrieved and searched her backpack, and then the same agent then questioned her. Finally, on cross-examination, she stated that two agents, a male and a female, searched her bag together. Similarly, Respondent Solis testified on direct examination, “The agents ordered us to sit and then ordered us to remove our belongings and place them on the table.” However, according to his declaration and his testimony on cross-examination, the agents did not tell the employees to sit until after they had placed their belongings on the table. Exh. 5 (114) at 2. On cross-examination, Respondent Solis stated that he did not sit down until an agent called his name after presumably searching his wallet. Given the centrality of this event to Respondents’ claim to a

Fourth Amendment violation, the Court is concerned by their changing testimony. However, in light of the length of time that passed between the ICE operation and these proceedings, and the likely stress and chaos of the operation itself, the Court is not satisfied that these inconsistencies, standing alone, render Respondents' testimony to be not credible.

The documentary evidence does little to clarify how the operation proceeded. The photographs depict Officer Szeto and Respondent Ortiz at several moments throughout the operation: both are shown leaving the kitchen with their backs facing the camera, and both are shown sitting at a table, presumably while Officer Szeto conducted Respondent Ortiz's I-213 interview. Exh. 14 (114) at 1-3. Two additional photographs show Respondent Ortiz sitting alone with a plastic bag containing her backpack on the table. *Id.* at 3, 4. Because it is impossible to tell from the first photograph whether Officer Szeto and Respondent Ortiz are carrying the bag, there is no photographic evidence to prove either that they returned to the kitchen after questioning to retrieve the bag, as Officer Szeto testified, or that the bag was retrieved and searched prior to questioning, as Respondent Ortiz stated. *Id.* at 1. Similarly, while the photographs depict an apparently calm scene, they do not disprove Respondent Ortiz's account of the ICE agents' demeanor throughout the operation. Finally, the Scratch I-213 completed by Officer Szeto does not answer the question of when Respondent Ortiz's bag was searched. Exh. 7 (for identification) (113). Officer Szeto testified that she would have noted any irregularities in her interview, such as resistance or an altercation, on the scratch I-213. However, without any other evidence to corroborate Officer Szeto's version of events, the Court is not satisfied that the mere absence of a mention of a search proves definitively that no such search occurred.

Similarly, the FIF and scratch I-213 prepared by Agent Barge do not persuade the Court to credit Agent Barge's version of events over Respondent Solis's. See Exhs. 6, 8, 9 (for identification) (114). The narrative section of the FIF states "Subject said he is from Mexico. Allowed me to look thru [sic] wallet where I found a Mexico ID card. I asked if he has papers to be in the U.S. and he said no. I asked are you illegal: he said yes and smiled." Exh. 9 (for identification) (114). Agent Barge confirmed that he prepared this FIF, but conceded that he was not certain of exactly when he did so. Agent Barge also conceded that he did not recall how he first obtained Respondent Solis's wallet. He maintained that he asked for permission to search the wallet, but his testimony leaves open the possibility that someone else searched it before it came into his hands. Similarly, the scratch I-213 contains no mention of a pre-interview search, but this omission, without more, does not disprove that such a search took place. Exhs. 6, 8 (for identification) (114). The scratch I-213 merely shows that Respondent Solis was interviewed by Agents Barge and Vaughan; however, since Respondent Solis does not dispute that he answered the agents' questions, the form does not corroborate Agent Barge's account over Respondent Solis's. Finally, that the FIF states that Respondent "smiled" when asked if he was present in the United States illegally does not prove how the operation as a whole proceeded. Exh. 9 (for identification) (114).

The Court finds that all witnesses testified credibly under the standards set forth in the

REAL ID Act. See INA § 240(c)(4)(C). The Court did not observe significant inconsistencies or implausibilities in the witnesses' testimony, independent of the issues discussed above, that would allow the Court to reach an adverse credibility finding. Although Respondents' testimony regarding the pre-interview search was inconsistent at times, there is no documentary evidence to prove that no such search took place, and neither agent was able to definitively state whether the search took place due to imperfect memory. The Court acknowledges the irreconcilable discrepancies discussed above, but it cannot credit one version of events over another because the documentary evidence does not reliably corroborate either version.

C. Constitutionality and Regulatory Compliance of the Detention, Interrogation, and Arrest

Having found that each witness testified credibly, the Court will evaluate the constitutionality and regulatory compliance of the ICE agents' actions under both versions of events. The Court first analyzes the agents' account of the El Balazo operation, and, for the reasons discussed below, finds that no constitutional or regulatory violation took place. Additionally, even under Respondents' version of events, no constitutional or regulatory violation tainted the evidence of alienage that the agents eventually obtained. Accordingly, the motion to suppress and terminate will be denied.

According to Officer Szeto and Agent Barge, the officers entered the Haight Street El Balazo restaurant calmly at around 10:30 a.m. on May 2, 2008, pursuant to a facially valid warrant. They did an initial sweep of the restaurant and collected the five or six employees on site, guiding them toward the dining area. Officer Szeto sat down with Respondent Ortiz and began asking her questions to complete the scratch I-213. *See* Exh. 7 (for identification) (113). During this questioning, she established that Respondent Ortiz was present in the United States in violation of the law, and at that point she placed Respondent Ortiz under arrest. She subjected Respondent Ortiz to a brief pat-down search and then asked her where her personal belongings were, and together they returned to the kitchen to retrieve Respondent Ortiz's backpack. After obtaining permission, Officer Szeto searched Respondent Ortiz's backpack and counted the money in her wallet, recording the amounts in the scratch I-213. *Id.* The interview and search took place in an orderly fashion. After completing the interview, arrest, and search, Officer Szeto turned over Respondent Ortiz to be taken to Sansome, and she left the site.

Meanwhile, after the employees had been gathered in the dining area, Agent Barge identified Respondent Solis as being able to speak English, and he began talking to him. He first asked Respondent Solis for permission to search his wallet for identification and, having received consent, he opened the wallet and found Respondent Solis's identification card. He then began asking Respondent Solis questions and, through questioning, discovered that Respondent was present in the United States illegally when Respondent Solis admitted as much and "smiled." He then guided Respondent Solis to a nearby table, where he continued questioning and began to fill out the scratch I-213. Exh. 6 (for identification) (114). At some point, Agent Vaughan came to assist him with questioning. Agent Barge was called to another assignment before completing

the interview, so Agent Vaughan took over and completed the scratch I-213 himself.

Respondents first argue that the agents were not authorized to seize, search, and interrogate them, either by the warrant or by independent reasonable suspicion. The Court disagrees. The DHS submitted the search warrant, which was signed by a magistrate judge and authorized the agents to search the premises for business records in furtherance of the criminal investigation. Exh. 8 (for identification) (113); Exh. 3 (for identification) (114). Both agents testified that they were aware of the warrant's existence prior to entering the site, and that they believed it to be a facially valid warrant. See *Pearson*, 129 S.Ct. at 821. Regarding the initial detention, it is well-settled that agents executing a search warrant are authorized to detain persons found present at the site of the search in order to protect officer safety, prevent destruction of evidence, and ensure the orderly execution of the warrant. *Summers*, 452 U.S. at 705. In *Summers*, the Court noted that the record need not establish the actual existence of potential threats to persons or evidence to justify such a detention; it is enough that the situation is one where such threats reasonably might exist. *Id.* at 702. In this case, the agents' decision to gather the employees in a central area and then isolate them for individual questioning was not unreasonable. As both agents testified, there were dangerous items in the restaurant that could have caused safety concerns, and it is reasonable for agents to restrict the movement of persons present at the site of an investigation to determine their relationship to the site and to obtain any useful information they may have. See *Muehler*, 544 U.S. at 100. Furthermore, Officer Szeto testified that individuals present when a search warrant is executed are detained to ensure that they do not have evidence in their possession that is relevant to the investigation. See *Summers*, 452 U.S. at 702. While Agent Barge disputed that he would expect to find business documents on the persons of the employees, this rationale is ultimately reasonable and supported by case law. The Court finds that this initial detention was justified by the need to ensure officer safety and to protect the integrity of the investigation during the orderly execution of a search warrant. See *Muehler*, 544 U.S. at 101.

Second, the agents' questioning of Respondents about their immigration status was within the authority granted to them by the warrant. In addition to briefly detaining persons present during the execution of a search warrant, agents are authorized to question detainees, including regarding their immigration status. *Muehler*, 544 U.S. at 101. The questioning did not continue for an unreasonable amount of time, as Respondents were apparently arrested within approximately one hour of the start of the search, while the search was still taking place. See *id.*; *Summers*, 452 U.S. at 704. Respondents argue that the agents did not have reasonable suspicion that they, as individuals, were present in the United States illegally, so their continued detention and interrogation was unjustified. Resp'ts' Closing Brief at 7 (Aug. 1, 2011). In *Summers*, the Court recognized that the particularized suspicion regarding the individual is a relevant factor in determining the reasonableness of a detention during the execution of a search warrant. 452 U.S. at 703. However, the Court also acknowledged that such reasonable suspicion may arise from the existence of a facially valid search warrant based on probable cause that criminal activity is afoot on the premises. *Id.* Here, the ICE agents had reasonable suspicion of Respondents' lack of immigration status based on the fact that they were visibly employed at El Balazo, a site

currently under investigation for illegal employment of undocumented immigrants. In any event, the Court need not make this determination because the detention and questioning were justified under *Muehler*. 544 U.S. at 102.

The Act permits authorized immigration officers to arrest without a warrant where they have "reason to believe that the alien so arrested is in the United States in violation of any [immigration] law." INA § 287(a)(2); 8 C.F.R. § 287.8(c)(2)(i). Both agents testified that, while the information contained in the warrant provided some suspicion that Respondents, employees at El Balazo, might be present in the United States without documentation, they did not place Respondents under arrest until they had completed the scratch I-213s and concluded that they were present in the United States in violation of law.¹¹ Exh. 4. Respondents did not deny that they answered the officers' questions about their background and status in the United States at the restaurant. Thus, under the agents' account, Respondents were not placed under arrest until there were sufficient facts, gleaned from their own voluntary admissions, supporting the agents' reasonable belief that they were in the United States without permission. See INA § 287(a)(2); 8 C.F.R. § 287.8(c)(2)(i).

Even under Respondents' version of events, the Court does not find that exclusion is an appropriate remedy to any potential violation that may have taken place. Respondents argue that the agents impermissibly searched their belongings *prior to* commencing questioning. According to Respondents, the officers ordered the employees to place their personal belongings on a table in the dining area, and then they began searching the employees' wallets and purses for evidence of alienage. After conducting these searches, the agents began questioning Respondents and completing the scratch I-213s. When asked how this pre-interview search affected their decision to answer the agents' questions, Respondents stated that they "may have" felt free to remain silent if their belongings had not already been searched. They did not establish that they *would not* have answered the questions but for the search, nor did they show that the officers would not have questioned them but for the search.

The Court need not determine if the alleged pre-interview searches violated Respondents' constitutional or regulatory rights because the officers had independent authorization to question and eventually arrest Respondents. In *Matter of Cervantes-Torres*, the Board, following long-standing Supreme Court precedent, held that the exclusionary rule does not apply "where the government learned of the evidence from an independent source." 21 I&N Dec. 351, 353 (BIA 1996). When the challenged evidence was obtained from a source independent of the alleged constitutional violation, exclusion of that evidence would "put the police in a worse position than they would have been in absent any error or violation." *Nix v. Williams*, 467 U.S. 431, 443 (1984). The Supreme Court has held that evidence discovered during an illegal search, which is then later obtained through a validly issued warrant, is not subject to the exclusionary rule.

¹¹ The regulations also require that a warrant for arrest be obtained except where the agent "has reason to believe that the person is likely to escape before a warrant can be obtained." 8 C.P.R. § 287.8(c)(2)(ii). Under the circumstances, it was reasonable for Officer Szeto and Agent Barge to believe that placing Respondents under arrest was necessary to prevent them from fleeing before a warrant could be obtained.

Murray v. United States, 487 U.S. 533, 538-39 (1987). In *Murray*, law enforcement officials illegally entered the defendant's warehouse and found evidence of criminal activity; they left the evidence undisturbed and obtained a search warrant, failing to mention their prior illegal entry. *Id.* at 535-36. The Court held that the evidence ultimately obtained from that warrant was admissible because there was no causal link between the illegal entry and the lawful discovery of the evidence pursuant to the warrant. *Id.* at 543.

Here, as discussed above, the warrant authorized the agents to search the Haight Street El Balazo and, by extension, authorized them to detain and question persons present on the premises pursuant to *Summers* and *Muehler*. *Muehler*, 544 U.S. at 101; *Summers*, 452 U.S. at 705. In addition, the officers had reasonable suspicion to believe that Respondents were present in the United States without authorization due to the information they possessed about the criminal investigation and their status as employees at the restaurant. See 8 C.F.R. § 287.8(c)(2)(i). Thus, even if the officers did conduct an illegal search of Respondents' belongings prior to questioning them, the warrant conferred upon them independent authorization to obtain evidence of alienage through questioning, which they did. See *Nix*, 467 U.S. at 443. Respondents do not dispute that they actually did respond to questions about their identity and alienage. Thus, the Court finds that, even under Respondents' account of the operation, no constitutional or regulatory violation gave rise to the discovery of alienage, and the exclusionary rule does not apply. Because the officers had authority and reason to question Respondents independent of the alleged pre-interview search, Respondents have not established that their statements are the "fruit of the poisonous tree" of the search. See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Additionally, any potential violation of Respondents' rights under the regulations did not prejudice Respondents. See *Garcia-Flores*, 17 I&N Dec. at 328.

Finally, even under Respondents' account of the operation, the agents' actions were not unreasonably forceful or coercive so as to violate Respondents' rights under the Fifth Amendment or render their statements unreliable. The facts of the present case are distinct from cases in which the Board has found impermissible coercion. Compare *Garcia*, 17 I&N Dec. at 320-21 (suppression appropriate where officer prevented respondent from contacting his attorney, respondent was held in detention for a substantial time period, and officers represented to him that he had no rights and his return to Mexico was "inevitable") with *Ramirez-Sanchez*, 17 I&N Dec. at 506 (suppression inappropriate absent "physical abuse, hours of interrogation, denial of food or drink, threats or promises, or interference with any attempt by the respondent to exercise his rights"). Here, Respondents allege that the officers entered the restaurant with guns drawn, "grabbed" the employees to bring them into the dining room, and spoke in loud and "demanding" voices. They also testified that the fact that their wallets had already been searched prior to questioning influenced them to voluntarily answer the officers' questions, whereas they may have chosen not to do so had no search taken place. Even under Respondents' account, the Court cannot find that the officers used unreasonable or coercive methods to obtain Respondents' admissions. Officer Szeto and Agent Barge both testified that there were legitimate concerns of officer safety due to the dangerous items present in the restaurant, so the Court cannot conclude that a decision to enter the restaurant with weapons drawn would have been per se unreasonable. Moreover, neither Respondent claims to have been detained for an unreasonable amount of time,

physically abused, threatened, or made any promises. *See Ramirez-Sanchez*, 17 I&N Dec. at 506. Finally, Respondents' testimony regarding the influence of the pre-questioning search on their decision to answer questions does not satisfy the Court that such a search would have created impermissibly coercive conditions.

The Forms I-213, the FIF, and the information contained therein cannot be suppressed from the record under Board, Ninth Circuit, or United States Supreme Court precedent. *Garcia-Flores*, 17 I&N Dec. at 328-29; *Orhorhaghe*, 38 F.3d at 493; *Lopez-Mendoza*, 468 U.S. at 1050. Thus, the Court admits the following documents into the record: Respondent Ortiz's formal Form I-213 is admitted as Exhibit 2 (113); Respondent Ortiz's scratch I-213 is admitted as Exhibit 7 (113); Respondent Solis's formal Form I-213 is admitted as Exhibit 2 (114); the copies of Respondent Solis's scratch I-213 are admitted as Exhibits 6 (114) and 8 (114); and the FIF regarding Respondent Solis is admitted as Exhibit 9 (114).

D. Removability

A Form I-213 is considered inherently trustworthy and admissible as evidence to prove alienage or deportability, absent evidence that the form contains information that is incorrect or was obtained by coercion or duress. *See Ponce-Hernandez*, 22 I&N Dec. at 785; *Barcenas*, 19 I&N Dec. at 609. As discussed above, the Court has found that the Forms I-213 were not obtained by coercion or duress. Further, there is no evidence in the record that the forms contain material information that is incorrect.¹² The Form I-213 regarding Respondent Ortiz states that she was born in Metepec, Hidalgo, Mexico, on June 10, 1984, and is a citizen of Mexico. Exh. 2 (113) at 1. It further states that Respondent Ortiz last entered the United States on or around an unknown date in April 2005, at or near Nogales, Arizona, without inspection. *Id.* at 2. Based on these facts, the Court finds that Respondent Ortiz is removable as charged as an alien present in the United States without having been admitted or paroled. INA § 212(a)(6)(A)(i).

The Form I-213 regarding Respondent Solis states that he was born in Yucatan, Mexico, on March 19, 1965, and is a citizen of Mexico. Exh. 2 (114) at 1. It further states that Respondent Solis last entered the United States on July 8, 2005, at an unknown place by crossing through the desert. *Id.* at 2. Based on these facts, the Court finds that Respondent Solis is also removable as charged as an alien present in the United States without having been admitted or paroled. INA § 212(a)(6)(A)(i).

Because Respondents have not had an opportunity to designate a country of removal or indicate their intent to file any applications for relief from removal, they will be provided such an opportunity now. Should they wish to apply for relief from removal, their cases will be reset to allow them an opportunity to seek that relief.

¹² The Court notes that Respondent Ortiz's Form I-213 indicates that she is not married, which is incorrect according to the scratch I-213 and Officer Szeto's testimony. Exh. 2 (113) at 2; Exh. 7 (113). However, because this fact has no bearing on Respondent Ortiz's immigration status, the Court finds that it does not undermine the reliability of the Form I-213.

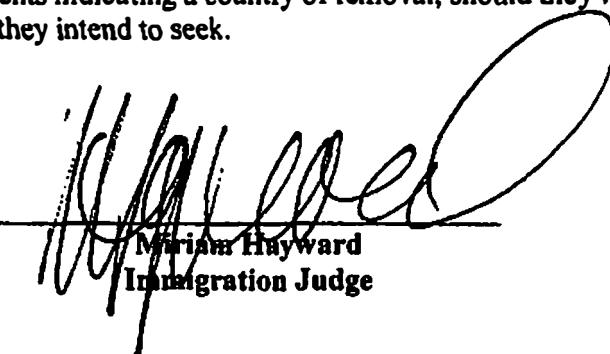
Based on the foregoing, the following order shall enter:

ORDER

IT IS HEREBY ORDERED that Respondents' motion to suppress be and hereby is **DENIED**.

IT IS FURTHER ORDERED that Respondents' motion to terminate be and hereby is **DENIED**.

IT IS FURTHER ORDERED that Respondents, within 15 days of the issuance of this order, submit written statements indicating a country of removal, should they wish to do so, and what forms of relief, if any, they intend to seek.



Miriam Hayward
Immigration Judge