

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA STREET-SUITE 300
SAN ANTONIO, TX 78207

JOSEPH DE MOTT AND ASSOCIATES
ARMENDARIZ, ESQ., DAVID A.
800 DOLOROSA, SUITE 100
SAN ANTONIO, TX 78207

IN THE MATTER OF
~~XXXXXXXXXX~~, JOSE

FILE A ~~XXXXXXXXXX~~

DATE: Feb 14, 2008

UNABLE TO FORWARD - NO ADDRESS PROVIDED

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IMMIGRATION COURT
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA, SUITE 300
SAN ANTONIO, TX 78207

IN THE MATTER OF)

JOSE O. [REDACTED])

Case Number: [REDACTED]

RESPONDENT)

IN REMOVAL PROCEEDINGS)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended:
alien present in the United States without being admitted or paroled.

APPLICATION: Termination of Proceedings

ON BEHALF OF THE RESPONDENT

David Anton Armendariz, Esq.
800 Dolorosa, Suite 100
San Antonio, Texas 78207

ON BEHALF OF THE GOVERNMENT

Joel Gonzales, Esq.
P.O. Box 1939
San Antonio, TX 78297

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural history

The respondent (Respondent) is a male, native and citizen of Guatemala, who entered the United States without inspection at or near Laredo, Texas on or about August 15, 2000. On March 19, 2007 the Department of Homeland Security (DHS) personally served Respondent with a Notice to Appear (NTA) charging him as removable pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (Act), in that he is present in the United States without admission or parole. Record of Proceedings (ROP) Exhibit 1.

Respondent was apprehended by DHS after his vehicle was pulled over by a border patrol agent. On July 11, 2007, Respondent filed a motion to suppress and exclude any evidence supporting the factual allegations in the NTA derived from the stop made by the border patrol agent, including any statements then made by Respondent, any fingerprints taken of Respondent and resulting record checks, and any documentation arising from such statements or fingerprints, such as the Form I-213. The government has not filed a written opposition to the motion.

II. Motion to suppress

Respondent argues that the border patrol agent stopped his vehicle solely based on his racial appearance, and therefore the stop was an egregious violation of Respondent's Fourth and Fifth Amendment rights, which warrants the exclusion of the evidence. For the reasons below, the Court will grant the motion, suppress the Form I-213, and terminate proceedings.

- i. Testimony and credibility of the border patrol agent and Respondent*
 - A. Border patrol agent*

The border patrol agent and Respondent testified at a hearing before the Court on January 25, 2008. Agent Rolando Salinas testified that when he is on a roving patrol, as he was in this case, he looks for passengers in the back seat of cars, the expressions on the faces of the passengers, and how they react to the border patrol vehicle in assessing whether to stop a car. He said the people he stops are often construction workers or smugglers. He was non-responsive when asked how one Hispanic person might stand out from another as an illegal alien when the Hispanic population is so high in San Antonio. In this case, he said he was returning to the station and saw Respondent slow down. He stated that he pulled up behind Respondent and then drove alongside him on the driver's side. The

agent said that Respondent looked stiff and nervous, clenched the steering wheel, and did not look at him. He said that Respondent then switched lanes quickly, zigzagging across the lanes, causing the agent to believe that Respondent was evading him. According to the witness at this point in his testimony, this is when he first turned on his emergency lights. The agent maintained that Respondent sped up, zigzagged, and switched lanes before the agent turned his lights on. However, earlier on direct-examination, and later on cross-examination, he said that after he turned his lights on, Respondent did not "want to stop until [he] put on the siren." When questioned even further, he said that after he turned on his lights, Respondent did not drive like he was trying to evade him, but switched lanes merely to pull over. The agent said he then went up to Respondent's car and Respondent did not open the window or door for about five minutes after the agent arrived. At this point, the agent said he was afraid for his life, but did not call other agents for help. When asked why he feared for his life, he responded that it was because of Respondent's mannerisms and the time it took for him to open the car door.

On cross-examination, the agent testified that he received training on the legal issues pertaining to searches and seizures. The agent was nonresponsive when asked if the Form I-213 included the complete factual basis for the stop, but eventually answered that it did not. He was then questioned as to the basis for stopping Respondent. He said that the "subject became nervous," and that he was "always looking straight ahead." He was also nonresponsive when asked if he could tell if Respondent was nervous when he pulled up next to Respondent's car. When asked how he could tell that Respondent was clenching the steering wheel, he replied simply that he can tell when fists are clenched on a wheel and when they are not. He also maintained that drivers always look at law enforcement

vehicles when they pull up beside them, and Respondent did not look at him, which made Respondent appear nervous. He was again nonresponsive when asked why a failure to look at a law enforcement vehicle is a sign of nervousness. He also testified that if someone gives a quick glance to the side and then looks straight ahead, this too appears as nervous behavior, and that Respondent did exactly that. When asked whether Respondent always looked straight ahead, as the agent said earlier, or if Respondent gave a quick glance and then looked ahead, he said that Respondent gave a small glance.

The agent next testified that Respondent's legal obligation to stop began when the emergency lights were turned on. However, earlier, he said that Respondent was driving evasively by changing lanes and speeds only before the emergency lights were turned on. He also said earlier that Respondent did not want to stop after the lights were on. The agent was unresponsive when asked what behavior Respondent exhibited after the lights were turned on that indicated to the agent that Respondent did not want to stop. Eventually, the agent again said that Respondent kept driving after the lights were on. The agent then said that his testimony now was that Respondent switched lanes after the lights were on. A few minutes later, however, the agent again changed his testimony and said that the lane switching and zigzagging occurred before, and not after, he turned on the emergency lights, and that Respondent only switched lanes to get off the road after the lights were on. The agent also had a difficult time answering the question of what crime, if any, he believed Respondent had committed for which he had a reasonable suspicion or probable cause to stop him. Eventually, he said he believed that the crime Respondent committed was that he placed people in danger by trying to evade the stop. Later he said the crime was evading arrest. In any case, he could not articulate how Respondent was evading arrest if he pulled over immediately after the emergency lights were turned on.

The witness said there was nothing about Respondent's clothes or hair that made him look like an alien. Rather, the agent testified that Respondent looks like an "OTM," that is, someone "other than Mexican," because of his cheekbones, jaws, ears, and forehead, but not because of his skin color.

Since the agent said that most people that he stops are smugglers or construction workers, he was asked whether Respondent appeared to fit into either of those categories. He said that Respondent did not appear to be a smuggler, but did appear to be a construction worker. The agent said that when he was following Respondent, he could see construction tools in the back of Respondent's car. However, the agent said that Respondent's four-door Isuzu Rodeo did not have an open bed. Nevertheless, he said he could see a hammer and saw through the window in the back of the car, although he was not exactly sure what he saw. The Form I-213 does not include any information about any construction tools in the back of Respondent's car.

The agent first said that he considered Respondent to have been arrested when he handcuffed him, but then retracted that statement and said that he considered Respondent arrested when he pulled him out of the car. There was also confusion regarding the documents the agent asked for from Respondent and what documents Respondent gave him. The agent did not remember if he asked for a driver's license. He was also uncertain whether he asked for immigration documents. Later, the agent said he did in fact remember asking for immigration documents and that Respondent did have a license, but he was not sure whether it belonged to Respondent. He said that he did not include the driver's license number in the I-213 because there was no time to check the license number in the computer. The agent testified that he has never uttered a vulgarity against an alien, contrary to Respondent's testimony.

The Court finds that the agent's testimony is not credible. Overall, he had significant difficulties responding directly to questions asked by the attorneys and had problems with his memory. His testimony was generally vague and inconsistent. Overall, it was not clear that the witness actually recalled what occurred during the stop, which is somewhat understandable, given the high volume of arrests he has made and the passage of time. However, he could not plausibly explain why he stopped Respondent. Given the nonresponsive, inconsistent, and vague nature of his testimony, the Court cannot find him credible.

B. Respondent

Respondent testified that he did not realize that the agent's vehicle was a border patrol vehicle until the agent stopped him and ran to his car; before that, he thought it was the park police. He said he switched lanes after he saw the agent's lights turn on, and did not try to evade him. He claimed that his driver-side and passenger-side windows were rolled down, contrary to what the agent said. Respondent testified contrary to his affidavit by saying he did not make a phone call from inside the border patrol vehicle. He attempted to clarify this by saying that the agent took his phone as he tried to make a call. The agent told him that he was pulled over because he became nervous. Respondent said he was not speeding or doing anything quick or dangerous with the car. He also said that after the agent pulled up behind him, the agent moved to the right of Respondent's car, not the left. Respondent also testified that after the agent took him in for questioning, the agent called him a terrorist and said other vulgar things. Respondent claimed he does not currently have a driver's license and did not give one to the agent at the time of the stop. The Court finds that although Respondent contradicted his affidavit regarding the phone call, he otherwise testified credibly. His testimony is otherwise

consistent with his written affidavit.

ii. Applicable Law

Generally, the exclusionary rule does not apply to evidence seized in removal proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Thus, evidence obtained by DHS resulting from a search and seizure in violation of an alien's Fourth Amendment rights cannot be suppressed in removal proceedings for that reason alone. *See id; Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980).

Evidence can be excluded, however, if the "manner of seizing evidence is so egregious that to rely on it would offend the fifth amendment's due process requirement of fundamental fairness." *Matter of Toro*, 17 I&N Dec. at 343. In criminal proceedings, a vehicle stop satisfies the Fourth Amendment's requirements that protect people from unreasonable searches and seizures if the officer has "an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle." *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). In the immigration context, "[w]hen an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). In making this assessment, factors that may be considered include: (1) the characteristics of the area in which the vehicle is encountered; (2) the arresting agent's previous experience with criminal activity; (3) the area's proximity to the border; (4) the usual traffic patterns on the road; (5) information about recent illegal trafficking in aliens or narcotics in the area; (6) the appearance of the vehicle; (7) the driver's behavior; and, (8) the passengers' number, appearance and behavior. *See Id.* at 884-85. The apparent racial ancestry of a vehicle's occupants, standing alone, is

not reasonable grounds to suspect that the occupants are aliens. *Id.* at 886. Some courts have held that if border patrol officers stop a vehicle based solely on the racial appearance of the passengers, such a stop is an egregious violation of the Fourth Amendment, and thus grounds to apply the exclusionary rule in immigration proceedings. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1452 (9th Cir. 1994); *see also Almeida-Amaral v. Gonzales*, 461 F.3d 231, 237 (2d Cir. 2006) (“[W]ere there evidence that the stop was based on race, the violation would be egregious, and the exclusionary rule would apply.”). In this case, there is sufficient evidence to conclude that the border patrol agent stopped Respondent solely because of Respondent’s Hispanic appearance.

The agent testified that the only factors that indicated Respondent was an alien were his facial features, namely his cheekbones and ears, and his driving actions, namely clenching the steering wheel and looking straight ahead. The Court finds that the factors mentioned by the agent had such a low probative value that no reasonable officer would rely on them to determine whether there was reasonable suspicion to make a stop. First, assuming Respondent was looking ahead and did not look at the agent while driving, this cannot be grounds to assume that someone is nervous. The Fifth Circuit has held that the fact that a driver avoids making eye contact with border patrol agents cannot be a factor in assessing the reasonable suspicion standard. *See United States v. Lopez*, 564 F.2d 710, 711 (5th Cir. 1977). That is, “where a factor and its opposite can both be used to justify a stop, the court should not give weight to either factor.” *Gonzalez-Rivera v. INS*, 22 F.3d at 1446-47 (citing *United States v. Lopez*, 564 F.2d at 711). Here, the agent testified that he thought Respondent was nervous because he was looking straight ahead. He also said that if a driver gives a quick glance to the side and then looks straight ahead, that too appears as a nervous reaction. Since both looking straight ahead and

quickly glancing to the side can be considered as suspicious activity, Respondent's failure to look at the border patrol vehicle cannot be considered a factor in assessing whether to stop him.

Next, even if it is true that the agent saw Respondent clenching the steering wheel, this behavior likewise cannot be a reasonable factor to consider. Obviously, cars are driven by gripping the steering wheel. It is difficult to believe that the agent was able to detect from his vehicle the strength of the grip that Respondent had on the wheel. Even if Respondent was indeed strongly gripping the wheel, there is no evidence in the record to support the inference that such a grip indicates that the driver is nervous, rather than angry, excited, or reacting to traffic, for example.

Any of Respondent's driving maneuvers also cannot be a factor in this case in stopping his vehicle. Both the agent, at least at some point in his testimony, and Respondent said that Respondent did not change lanes or speeds, other than to pull over, after the agent turned on his lights or siren. The agent did not claim that Respondent broke any law other than evading arrest. Even if Respondent changed lanes or speeds before the agent turned on his lights or siren, there is no evidence that Respondent broke any law in doing so. In any event, the testimony of the agent in this regard is so inconsistent that the Court cannot conclude that the record establishes any such alleged evasive driving by Respondent.

Accordingly, the Court is left to conclude that the only basis for the agent's stop was that Respondent "looked like an alien." The other alleged reasons for the stop were of such minimal probative value in determining whether Respondent looked suspicious that no reasonable officer would have relied on them. *See Gonzalez-Rivera*, 22 F.3d at 1447 (holding that alien's ostensibly dry mouth, repeated blinking, and failure to look at border patrol vehicle could not be considered as factors in

assessing the reasons for the stop). Further, the fact that DHS officers receive training in Fourth Amendment law, as the agent did in this case, supports the inference that when a DHS officer makes a stop based solely on race, he has deliberately violated the law or has acted in conscious disregard of the Constitution. *See id.* at 1450.

Because the Court finds that Respondent was stopped solely because of his Hispanic appearance, the exclusionary rule applies, and the motion to suppress the Form I-213 will be granted. As there is no other evidence in the record establishing Respondent's alienage and removability, the proceedings will be terminated.

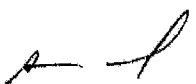
Accordingly, the following orders shall be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's motion to suppress is **GRANTED**.

IT IS FURTHER ORDERED that proceedings are **TERMINATED**.

Dated FEB. 14, 2008



Glenn P. McPhaul
United States Immigration Judge

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