

Bringing Suppression Motions for Unlawful Roving Border Patrol Stops

Or

How to get kicked off ICE Chief Counsel's Christmas Card List

**David Antón Armendáriz
De Mott, McChesney, Curtright & Armendáriz, LLP
800 Dolorosa, Suite 100
San Antonio, Texas 78207-4559
(210) 354-1844
(210) 212-2116 Fax
davida@demottusa.com
<http://www.demottusa.com>**

**AILA Spring 2010 Texas/Oklahoma/New Mexico Chapter Conference
April 15-17, 2010
Austin, Texas**

INTRODUCTION

The purpose of these materials is to assist practitioners who want a means to defend clients in removal proceedings who have no meaningful prospect of ordinary relief from removal but whose initial arrest by the government was an illegal roving patrol stop.¹ My goal is to give a succinct, general overview of applicable law (as I see it) and some practical advice, based upon my own experience, regarding the way in which an allegation of alienage can be challenged and suppression of evidence sought in these circumstances.

Seeking suppression of evidence will not endear you to some trial attorneys and immigration judges for many reasons: it can be a highly litigious process; it involves unfamiliar criminal and constitutional law; and, perhaps most importantly, it disrupts the ordinary deportation of people who are otherwise presumably deportable.² But often times it is simply the right thing to do and the only practical way of defending the client in removal proceedings against illegal government conduct.

THE PROBLEM: UNLAWFUL ROVING BORDER PATROL STOPS

Javier Zaldaña³ was driving on IH-35 North in Schertz, Texas, which is just north of San Antonio, to work in nearby San Marcos. He was in a red double cab truck with two other Latino co-workers. He was driving in accordance with the

¹ There are, of course, lots of other examples of illegal government conduct both pre- and post-seizure, e.g., illegal home or business raids, illegal warrantless arrests, abusive interviews, involuntary statements, failure to comply with regulations, etc., that would warrant suppression motions. The focus here, however, is on roving patrol stops in order to limit the issues and because such stops are as ubiquitous in central Texas as fire ants and common in many other parts of the country as well. In any case, many of the issues discussed herein will apply in other situations.

² The Supreme Court recognized exactly these factors in INS v. Lopez-Mendoza, 468 U.S. 1032, 1048 – 1049 (1984).

³ Name used with permission.

law and there was nothing visually unusual or suggestive of illegal activity about Javier, his passengers or his truck. Nevertheless, Border Patrol (“BP”) agents in two separate BP vehicles, acting in concert, pulled him over, questioned him and his companions about their immigration status, and arrested them. The official reasons for Javier’s stop remain unknown.⁴

Jose O.⁵ was driving alone on Loop 410 West in San Antonio in the late afternoon in an Isuzu Rodeo SUV vehicle when he too was stopped by BP agents. Jose was stopped, according to the government’s Form I-213,⁶ for “always looking straight ahead”, looking “nervous” and “switching lanes quickly.” The BP agents questioned him about his immigration status and arrested him. Under oath, the arresting Border Patrol agent claimed that he thought Jose was nervous because of the way in which he was “clenching” the steering wheel.⁷

Israel H.⁸ and his friend Cesar ate breakfast at a restaurant in San Antonio. Then they got into their double cab Dodge truck and drove onto IH-10 East in the direction of Seguin. They did not get very far before being stopped by six BP agents. They were questioned about their immigration status and arrested. On the I-213, the arresting agent claimed that they were stopped because of their “uncomfortable looking forward stare” and because they “appeared very nervous.”

⁴ Mr. Zaladaña has filed a claim, brought pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), against the Border Patrol agents involved in his illegal arrest. See Jaime Zaladaña v. Defendants John Doe 1, 2, 3, and 4, Patrol Agents, United States Customs and Border Protection, No. SA10CA0151 (W.D. Tx, filed Feb. 22, 2010).

⁵ Name redacted.

⁶ Form I-213 is the “Record of Deportable Alien.” It is the form that an immigration agent fills out after an alien is arrested with identifying and biographical information about the person arrested as well as other facts, often including manner entry into the United States and any applicable criminal history. The government often attempts to introduce this form as evidence in a removal hearing in order to support an allegation of alienage.

⁷ Name redacted.

⁸ Name redacted.

Damian C. was in a double-cab truck with four other Latino men. They were stopped without apparent cause under similar circumstances on Highway 87 outside San Angelo. When Damian asked the BP agent why he was stopped, the agent told him that it was because of the stuff he had in his truck and because he looked "Mexican." The related I-213 gives no stated reason for his stop.

Melchor R. was with three other Latino men in a double-cab Ford F-250 truck on IH-10 just outside San Antonio when he was stopped and arrested by BP agents. According to the I-213,⁹ Melchor and the other occupants were "stoic and appeared to be extremely nervous" and the agents thought the truck might be "disguised as a construction vehicle" so as to transport aliens further into the U.S., without further explanation.

Juan S. was with his brother and brother-in-law in a 1999 Ford F-350 four-door truck when they were stopped and arrested on Highway 151 in San Antonio outside Loop 410 by BP agents. They were pulling a concrete mixer and had other construction equipment with them. According to the I-213, Juan and the other occupants were stopped because they looked "stoic and nervous in their mannerisms."

Other than being clients of the undersigned, what do these arrested persons and factual scenarios have in common?

- the arrestees were all Latino men, generally dark skinned;
- all but one were arrested while driving in a double cab or four door truck;
- they were driving in accordance with the traffic law and there was nothing visually indicative of illegal activity;
- all but one were stopped by agents of the San Antonio Border Patrol Station in and around San Antonio;

⁹ See redacted copy attached.

- most were stopped for purportedly looking nervous, or stoic and nervous (whatever that means); and
- all of these arrests were illegal and violated clearly established law.

Why does this happen so frequently and with such impudence? The Supreme Court answered this question in INS v. Lopez-Mendoza:

Every INS agent knows ... that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding. When an occasional challenge is brought, the consequences from the point of view of the officer's overall arrest and deportation record will be trivial.

468 U.S. 1032, 1044 (1984).

THE LAW AS RELATES TO BORDER PATROL INVESTIGATORY STOPS IN A NUTSHELL

Whether they are observed or not, there exist constitutional, statutory and regulatory limits on the ability of Border Patrol agents to legally detain and/or arrest persons. On U.S. soil, the Fourth Amendment's prohibition against unreasonable searches and seizures and its warrant requirement upon probable cause apply equally to noncitizens as to citizens, without regard to immigration status. See Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006), cert. denied, 127 S. Ct. 837 (2006). The statutory and regulatory provisions outlining the limited authority of immigration agents to stop, detain, question and arrest certain persons are located at INA section 242(a) (providing for the arrest with warrant of any alien subject to deportation), INA section 287(a)(2) (providing for arrests without warrant under certain circumstances) and 8 C.F.R. section 287.8.¹⁰

¹⁰ Note that BP does not have authority to stop people for perceived violations of the state traffic code.

Immigration agents must have “reasonable suspicion” that persons are aliens to stop and inquire of them about their citizenship or residential status, or to detain them for questioning. Brignoni-Ponce, 422 U.S. 873, 884 (1975). “For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids [the government from] stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens” who may be illegally in the country. Id.

“To temporarily detain a vehicle for investigatory purposes, a Border Patrol agent on roving patrol must be aware of ‘specific articulable facts’ together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants.” U.S. v. Chavez-Chavez, 205 F.3d 145, 147 (5th Cir. 2000); see also U.S. v. Lopez-Moreno, 420 F.3d 420, 430 (5th Cir. 2005) (“For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity ... occurred, or is about to occur, before stopping the vehicle.”).¹¹ In making a reasonable suspicion inquiry, a court “must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

The Brignoni-Ponce “reasonable suspicion” factors include: (1) known characteristics of a particular area, (2) previous experience of the arresting agents with criminal activity, (3) proximity of the area to the border, (4) usual traffic

¹¹ This is the same analysis as applies to so-called “Terry” stops. See Terry v. Ohio, 392 U.S. 1 (1968) (To briefly detain a person for questioning, an officer needs a reasonable suspicion based on specific articulable facts).

patterns of that road, (5) information about recent illegal trafficking in aliens or narcotics in the area, (6) behavior of the vehicle's driver, (7) appearance of the vehicle, and (8) number, appearance, and behavior of the passengers. See 422 U.S. at 884-85. According to the 2008 U.S. Census Bureau figures, in Bexar County where most of the above mentioned arrests took place, almost 1.7 million persons reside, well over half of which are persons of Hispanic or Latino origin. Race and ethnic appearance, standing alone, do not constitute reasonable suspicion. Brignoni-Ponce, 422 U.S. at 885-86.

Proximity to the border is a decisive factor in the Brignoni-Ponce analysis. “[I]f there is no reason to believe that the vehicle has come from the border, the remaining factors must be examined charily.” Rodriguez-Rivas, 151 F.3d 379, 380 (5th Cir. 1998); see also U.S. v. Jacquinot, 258 F.3d 423, 428 (5th Cir. 2001) (“One of the vital elements in the reasonable suspicion test is whether the agents had reason to believe that the vehicle in question recently crossed the border.”). (emphasis added). “When the stop occurs a substantial distance from the border, th[e] element [of proximity to the border] is missing.” Id. (citing United States v. Melendez-Gonzalez, 727 F.2d 407, 411 (5th Cir. 1984)). Vehicles traveling more than 50 miles from the border will generally be considered a “substantial distance” from the border.” Id. (citing United States v. Inocencio, 40 F.3d 716, 722, n. 7 (5th Cir. 1994)).

Decades of case law make clear that the kind of roving patrol stops described at the beginning of these materials doesn't pass constitutional muster. In Rodriguez-Rivas, 151 F.3d 379 (5th Cir. 1998), the Fifth Circuit found a Fourth Amendment violation where the agent stopped the vehicle over 50 miles from the border just because a five foot seven inch tall defendant was slouching in his

seat. In U.S. v. Ortega-Serrano, 788 F.2d 299 (5th Cir. 1986), a vehicle stop 300 to 400 miles north of the border was deemed improper where it was based on an uneven paint job and the fact that the vehicle occupants were Hispanic and appeared “dirty” and “nervous.” In U.S. v. Lamas, 608 F.2d 547 (5th Cir. 1979), the Court held that an agent was not constitutionally justified in stopping a vehicle 190 miles from the border even though the car was heavily loaded, had out-of-state plates yet did not appear to be a “typical tourist’s car,” and the passengers appeared to avoid eye contact with the agents. In U.S. v. Lopez-Valdez, 178 F.3d 282, 288 (5th Cir. 1999), “a midsize sedan traveling on a road near the U.S.-Mexican border with as many as eight visible passengers does not give rise to reasonable suspicion of unlawful activity.” And in the very recent decision, U.S. v. Rangel-Portillo, the Fifth Circuit reviewed a stop by BP agents a mere 500 yards from the border and overturned a wrongful denial of a suppression motion:

[T]he district court noted that all of the passengers in the vehicle wore seatbelts, sat rigidly, refrained from talking to one another, and had no shopping bags [although exiting a Wal-Mart]. This Court, however, cannot infer reasonable suspicion from these factors since there is no rational reason to conclude that law-abiding citizens are less likely to wear their seatbelts or exit a Wal-Mart parking lot sans shopping bags. See Chavez-Chavez, 205 F.3d at 148 (“A factual condition that is consistent with alien smuggling does not provide reasonable suspicion if that condition also occurs even more frequently in the law-abiding public.”). Thus, it is logical to conclude that none of these factors carry any weight since law-abiding individuals are just as likely, if not more likely, to wear their seatbelts, sit rigidly, and refrain from conversing with one another as they exit a Wal-Mart parking lot.

586 F.3d 376, 381 (5th Cir. 2009).

Applicable regulations incorporate the “reasonable suspicion” requirement. See 8 C.F.R. § 287.8(b)(2).¹² Suppression may also be appropriate, therefore, under the administrative exclusionary rule of the BIA, where DHS violates regulations promulgated for a noncitizen’s benefit and the noncitizen suffers prejudice. See Matter of Garcia-Flores, 17 I.&N. Dec. 325, 329 (B.I.A. 1980).

Of course, a roving investigatory patrol stop can quickly blow into a simple arrest, which would require probable cause and possibly an arrest warrant – whether because the stop is extended in duration or because the person is handcuffed or a thousand other reasons relating to the government’s greater exercise of control over the person being held.¹³ In my experience, challenges in removal proceedings arising from roving patrols stand or fall on whether the arresting BP agents had reasonable suspicion to make the initial stop rather than on whether the agents later had probable cause to arrest so no in-depth discussion of what constitutes probable cause will be included here (although it is certainly worthwhile to add lack of probable cause to a suppression motion). In other words, it would be an odd situation if the BP agents had initial reasonable suspicion but later lacked probable cause and the individual was nevertheless in removal proceedings.

PROCEDURE

¹² Subsections (1) and (2) to 8 C.F.R. section 287.8 (b), entitled, “Interrogation and detention not amounting to arrest,” read:

- (1) Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.
- (2) If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.

¹³ For statutory and regulatory arrest authority, see INA sections 287(a)(2), (4) and 8 C.F.R. section 287.8(c).

So you think that your client was illegally stopped. Now what? For the moment, let's assume that your client entered without inspection and has no prior arrests by immigration agents or other immigration history. Let's further assume that he or she was issued an initial bond and his family bonded him out. I'll discuss issues that arise when your client is in an immigration jail or has any other immigration history later.

The government has the initial burden of demonstrating alienage in removal proceedings by clear, convincing and unequivocal evidence. Woodby v. INS, 385 U.S. 276, 281, 284-85 (1966). You deny the factual allegations in the Notice to Appear that accuse your client of not being a U.S. citizen and of being an alien without admission or parole and you deny the charge of removability – it is your right to place the burden on the government to demonstrate alienage. At this point, assuming the trial attorney has no other evidence of alienage (another issue that will be taken up later), he or she will usually submit the Form I-213 as evidence of alienage, which, if not contradicted, is generally considered inherently trustworthy and admissible as evidence to prove alienage. Matter of Ponce-Hernandez, 22 I.&N. Dec. 784, 785 (B.I.A. 1999).¹⁴ Does the IJ admit it? The IJ should not admit it at that time if you object to its admission and you can make a prima facie case that the evidence contained in the I-213, namely your client's statements implicating him or herself as a non-citizen to the BP agent – were

¹⁴ Some trial attorneys – especially trial attorneys who are accustomed to defending suppression motions – will not immediately submit the I-213; instead they will ask the immigration judge to be allowed to question the client on the spot about his or her alienage. I object and tell the IJ that my client does not intend to answer any questions from the government until the government submits evidence of alienage; I cite to Matter of Tang, 13 I.&N. Dec. 691 (B.I.A. 1971) (“[U]pon presenting evidence that the respondent is an alien, the Service may call upon him to testify and may use his testimony to find that deportability is established.”). In Matter of Guevara, 20 I.&N. Dec. 238 (B.I.A. 1991), the B.I.A. held that a negative inference from silence, without more, does not constitute clear and convincing evidence of alienage.

obtained by the government on account of an egregious violation of the Fourth Amendment.

Despite the fact that I have gone to some lengths to describe how BP roving stops often violate the Fourth Amendment, neither the Fourth Amendment (and its applicable judicial exclusionary rule) nor strict evidentiary rules ordinarily applies in removal proceedings. Nevertheless, all persons in the U.S. are entitled to due process of law under the Fifth Amendment. See Reno v. Flores, 507 U.S. 292 (1993). For evidence to be admissible in removal proceedings, it must be probative and its use fundamentally fair or its use will run afoul of the Fifth Amendment. See Matter of Toro, 17 I.&N. Dec. 340, 343 (B.I.A. 1980). Although “[e]very [F]ourth [A]mendment violation will not of necessity result in a finding that the admission of resulting evidence is fundamentally unfair[, t]he circumstances surrounding an arrest and interrogation, however, may in some cases render evidence inadmissible under the due process clause of the [F]ifth [A]mendment. [Thus,] cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the [F]ifth [A]mendment’s due process requirement of fundamental fairness.” Id. (citations omitted); see also Lopez-Mendoza, 468 U.S. at 1050 – 51 and n. 5; Matter of Garcia-Flores, 17 I.&N. Dec. 325 (B.I.A. 1980); Matter of Garcia, 17 I.&N. Dec. 319 (B.I.A. 1979); Matter of Cervantes – Torres, 21 I. & N. Dec. 351 (B.I.A. 1996).

Searches and arrests by immigration agents that violate clearly established Fourth Amendment principles will constitute egregious misconduct under the due process standard. See Toro, 17 I.&N. Dec. at 340. Courts have held that if immigration 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. See 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) (“Where there evidence that the stop was based on race, the violation would be egregious, and the exclusionary rule would apply.”).

A person in removal proceedings who raises a claim questioning the legality of evidence must come forward with proof establishing a prima facie case before the government has to justify the manner in which the evidence was obtained. See Matter of Barcnas, 19 I.&N. Dec. 609, 611 – 12 (B.I.A. 1988); Matter of Wong, 13 I.&N. Dec. 820 (B.I.A. 1971); Matter of Tang, 13 I.&N. Dec. 691 (B.I.A. 1971); Matter of Ramirez-Sanchez, 17 I.&N. Dec. 503 (B.I.A. 1980); Matter of Burgos, 15 I.&N. Dec. 278 (B.I.A. 1975). So to challenge the admissibility of the I-213, you must present a prima facie case that the evidence contained in the I-213, namely your client’s statements implicating him or herself as a non-citizen to the BP agent – were obtained by the government on account of an egregious violation of the Fourth Amendment.

The initial prima facie case is usually satisfied either with your client’s testimony or an affidavit outlining the illegal arrest. As pleadings are always taken at a master hearing and as most IJs don’t like to devote master hearing time to the taking of extensive testimony, most IJs will reset the master hearing to give you an opportunity to submit the affidavit outlining the illegal arrest as an attachment to your motion to suppress evidence.¹⁵ If you already have the

¹⁵ The motion should identify with particularity the evidence that you want suppressed or risk a finding of inadequacy, see Matter of Wong, 13 I.&N. Dec. 820 (B.I.A. 1970), e.g., “Respondent seeks suppression and exclusion of all evidence derived from his illegal stop and seizure by immigration enforcement agents on or about [insert date], including, but not limited to, any statements then made by Respondent, any fingerprints taken and

motion and affidavit ready, he or she should set the case for an individual hearing on the issue of alienage for the taking of all testimony, including your client's.¹⁶ Your client's affidavit standing alone is insufficient; his or her testimony is absolutely necessary to defend your motion to suppress. See Matter of Barcenas, 19 I.&N. Dec. 609 (B.I.A. 1988). Examples of several such affidavits that I have used to make the initial prima facie case are included in these materials.

At the individual hearing, you will take your client's testimony to demonstrate essentially the same facts that are in the affidavit that has already been submitted to the Court.¹⁷ The government will cross-examine your client in order to do two things: attempt to get your client to admit alienage and undermine your client's story. Needless to say, at all stages in this process, your client must be well prepared. He or she must understand which questions can be answered and which questions he or she must refuse to answer based upon the Fifth Amendment right against self-incrimination.¹⁸

An illegal entry is a criminal act, see 8 U.S.C. §§ 1302, 1306, 1325, and any person that entered illegally has the right to refuse to answer any questions that would implicate him or herself in that act. The privilege against self-incrimination "not only extends to answers that would in themselves support a conviction

resulting record checks, any documentation arising from such statements or fingerprints including any resulting Forms I-213, I-214 and I-215, and any evidence seized from Respondent."

¹⁶ In my experience it is best to be prepared with the necessary affidavit at the hearing in which you expect to have to plead to the allegations. Generally speaking, the less time you give the government to think about how they intend to defend the case and to obtain other evidence of alienage, the better.

¹⁷ It is, of course essential, that your client's testimony reflects what is in the affidavit. Any divergence will be a possible basis for the IJ to find your client not credible. This means that affidavits should be succinct and direct without any more information than is necessary to make your prima facie case.

¹⁸ The only questions I advise my clients to answer relate to the illegal arrest – everything else is either irrelevant or seeks an answer that implicates the client in an illegal act. Most IJs will require your client to personally invoke his or her right to avoid self-incrimination as opposed to allowing you, the defense attorney, to do it. I generally invoke the 5th on my client's behalf until the IJ shuts me down. This can be difficult for some clients who are not used to refusing the demands of governmental agents or judges. Again, your client must be well prepared in advance.

under a ... criminal statute, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a ... crime." Hoffman v. United States, 341 U.S. 479, 486 (1951). Trial attorneys will argue that removal proceedings are administrative, that the client is not being criminally charged, and that there is no Fifth Amendment right against self-incrimination in administrative proceedings. That is simply false. See Kastigar v. U.S., 406 U.S. 441, 444 (1972) ([T]he Fifth Amendment privilege against compulsory self-incrimination ... can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory").

If your client says something on the stand that implicates alienage, generally speaking, all is lost, see Matter of Carrillo, 17 I.&N. Dec. 30 (B.I.A. 1979) (finding that the voluntary statement given at the hearing rendered unnecessary the inadmissible testimony obtained in violation of Fifth Amendment right to remain silent), because whatever your client says can be used against him or her as the client, under current case law, has no right to a suppression hearing that is separate and apart from removal proceedings. See Matter of Benitez, 19 I.&N. Dec. 173, 175 (B.I.A. 1984) (stating that there is no statutory or regulatory right to a separate suppression hearing in deportation proceedings); Matter of Bulos, 15 I.&N. Dec. 645, 646-47 (B.I.A. 1976) (raising but not ruling on whether evidence in connection with a suppression motion may be considered in determining the issue of the respondent's removability).¹⁹ The one exception to this is where your client's admission of alienage on the stand is compelled by the IJ despite your client's invocation of the privilege against self-incrimination. See Matter of

¹⁹ I believe this is incorrect. Constitutional protections are meaningless if a client cannot present evidence of their violation except at his or her own peril. See Simmons v. United States, 390 U.S. 377, 393-94 (1968) (testimony given by a defendant in criminal proceedings in support of a motion to suppress evidence on Fourth Amendment grounds could not thereafter be admitted against him at trial on the issue of guilt unless he made no objection).

Sandoval, 17 I. & N. Dec. 70, 72 (1979) (“[W]e agree that the respondent’s admission at the hearing concerning her alienage was elicited from her after she was improperly denied her Fifth Amendment privilege against self-incrimination. We will accordingly disregard the respondent’s admission in this regard.”). It takes a smart and thick-skinned client and a lawyer willing to be aggressive with government counsel and with the IJ, if necessary, to defend a suppression case to a successful conclusion.

The government may, but will probably not, bring in the arresting agent(s) to rebut your client’s testimony as relates to the arrest and to attempt to substantiate the legality of the arrest. After what happened in my Jose O. case, decision attached, the government has not brought another agent to testify in any of the cases in which I have been involved. Instead, they have tried mightily to find other evidence of alienage, discussed below. I have been told that it is now their policy or procedure to not bring in the agents and to just either find other evidence of alienage or rest on their arguments against the entire validity of bringing a suppression motion based on a violation of constitutional rights in removal proceedings.

TRICKY ISSUES AND OTHER CONSIDERATIONS

Detained clients.

How IJs handle bond hearings for clients whose only way of avoiding removal is a motion to suppress varies wildly. One important point that any reader of these materials must understand is that government counsel can and will use any information or documentation submitted in a bond proceedings as evidence of alienage or as a means of locating evidence of alienage.

Although bond proceedings are separate from removal proceedings, see 8 C.F.R. § 1003.09(d), nothing really prevents the government from making copies of whatever documents you provide as part of your bond package and trying to submit that in the removal case or using information that you provide in your bond package to go out and get other evidence of alienage. If you provide a date of birth, for example, government counsel can and may use it to obtain from the home country the client's birth certificate.²⁰ If you identify, an apartment complex at which your client lives or has lived, do not be surprised if the government contacts the apartment manager in an attempt to get whatever information or documentation your client gave when he or she first applied for the apartment. If you identify an employer, do not be surprised if the government contacts the employer seeking similar documentation.

The bottom line is that it is difficult to seek a bond order without prejudicing your client's ability to defend the removal case. We can argue until we are blue in the face that bond proceedings are separate and that all that information should be kept out or that it is the fruit of the poisonous tree but there always exists the risk that IJs will let it in or that they will simply not make the government lay a foundation to explain where they got the documents in the first place. If your client was issued a bond upon being arrested and there is any way your client can pay it, he or she should do so and avoid the issues that arise with seeking a bond redetermination hearing from the IJ.

²⁰ Of course, the government will already have your client's date of birth because it will be part of the information they took upon his arrest; nevertheless, if you submit that information in your bond packet, then you are giving the government an independent source of that information to which they can point if you later challenge whatever independent evidence they obtain by means of that date of birth. See discussion of independent evidence of alienage, infra.

There is also the issue of identity that arises in bond hearings. If you are fortunate enough to have a client who had proof of identity on his or her person at the time of the initial arrest, then the government should have that documentation and you will not have the problem of being unable to prove your client's identity during a bond hearing without prejudicing your client's defense to the removal case. Some IJs are insistent that you prove your client's identity with government issued documentation (either domestic or foreign) before they will order any change in custody status. There is no good way around this problem if the government does not already have that proof in their possession. Some clients simply have to choose between seeking a bond order and possible release (which is a tenuous proposition at best given that the client will often have no "real" relief from removal available) and defending their removal case.

Other evidence of alienage and the issue of the "suppression of identity."

The government is loath to bring into court and put under oath an arresting agent. The last thing the trial attorney wants to do is have an agent subject to cross-examination and having to explain what "stoic and nervous" means and why they are arresting people for merely looking nervous when decades of case law says that doing so is illegal.²¹ In order to avoid this scenario,²² they work diligently to obtain alternative evidence of alienage untainted by the illegal arrest. See Matter of Cervantes-Torres, 21 I & N Dec. 351 (independently obtained evidence of alienage will suffice to prove alienage regardless of an alien's illegal

²¹ I imagine some agents may even refuse to come to court for fear of giving testimony that could be used against them in a civil claim brought against them pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). They have good reason to fear. See e.g., Jaime Zaladaña v. Defendants John Doe 1, 2, 3, and 4, Patrol Agents, United States Customs and Border Protection, No. SA10CA0151 (W.D. Tx, filed Feb. 22, 2010).

²² For an example of how once such scenario played out, see my Jose O. case, decision attached.

arrest). For Mexicans, for example, with a name and date of birth, a trial attorney has little trouble getting a certified record of birth from the Mexican government.

When the government seeks to submit other evidence of alienage, you have to examine it from every angle to see whether there are any objections that you can make to keep it out. Did the government get those documents as a result of its having taken the client's name, place and date of birth at the illegal arrest, and if so, are the documents the fruit of the poisonous tree? Government counsel typically argues that even if it were true that they obtained the documents of identification by means of biographical data taken as a result of the arrest, biographical data is part of that person's "identity" and "identity" cannot be suppressed. Government counsel repeats ad nauseam the mantra that the "identity" of an alien is never itself suppressible as if this suffices to satisfy any and all concerns about the origin of the documents and whether they relate to the respondent. Unfortunately, this argument tends to mesmerize IJs (who are not used to serious and difficult questions of evidentiary admissibility and jurisdiction) but I believe that it fundamentally misrepresents the case law and confuses the relevant issues.

In Lopez-Mendoza, the Supreme Court, considered two consolidated cases involving two unrelated but similarly situated aliens - Respondents Lopez-Mendoza and Sandoval-Sanchez. The Court, affirming prior law, held that the "body" or "identity" of a defendant in a criminal or civil proceeding is never itself suppressible as the fruit of an unlawful arrest, whether or not an unlawful arrest occurred. 468 U.S. at 1040. The problem was that "[a]t his deportation hearing, [Respondent] Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no

objection to the evidence offered against him.” Id. Just as a criminal defendant cannot escape a criminal court’s jurisdiction on account of an illegal arrest (although such a person could avail himself of the exclusionary rule), an alien’s illegal arrest has no bearing on whether a subsequent deportation hearing can be brought against that person. See id. In other words, the illegal arrest does not affect the immigration court’s in personam jurisdiction over the respondent. See e.g., Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972)(“Even if the arrest were illegal, the mere fact that the authorities got the ‘body’ of Huerta-Cabrera illegally does not make the proceeding prosecuting him or deporting him the fruit of the poisoned tree...”). By contrast, Respondent Sandoval-Sanchez had “a more substantial claim [because h]e objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding.” Lopez-Mendoza, 468 U.S. at 1040.

When government counsel argues that a respondent cannot refuse to identify his date or place of birth or that a respondent cannot object to the government using biographical data taken at the time of the illegal arrest to obtain other evidence of alienage because “identity cannot be suppressed,” they are conflating and confusing a challenge to the court’s in personam jurisdiction, which the Supreme Court in Lopez-Mendoza stated is not permissible, with a challenge to illegally obtained evidence, which the Lopez-Mendoza Court did not foreclose, even in removal proceedings. A respondent in proceedings bringing a motion to suppress and exclude illegally obtained evidence is not objecting to his being compelled to come forth and defend himself against the government’s charge of alienage; he is simply objecting to the government’s use of illegally

obtained evidence. They are two separate objections entirely. One is proper; one is not.

As for other evidence of alienage, if the government has immigration records (e.g. previously filed I-130s, orders of voluntary departure) relating to your client that they can successfully tie to your client by means of a proper foundation, it is likely that you will not be able to keep them out and you will lose your suppression case. The Fifth Circuit has held that a person's alien ("A") file cannot be suppressed. See U.S. v. Herrera-Ochoa, 245 F.3d 495, 498 (5th Cir. 2001) (Immigration file need not be suppressed even if there was an illegal arrest because the person does not have a legitimate expectation of privacy in the file and therefore has no standing to challenge its introduction into evidence). Also, if you file a FOIA request for your client's "A" file, do not be surprised if the signed form that identifies a date and place of birth that you sent to the government comes back to bite you.

CONCLUSION

There are a thousand ways to lose a suppression case but they are one of the rare instances in which you, as the defense counsel, get to go on the offensive and attack the illegality of the government's actions and seek to prevent the removal of someone for whom there is otherwise no relief. They can be interesting and exciting but you are forewarned: they can get you kicked off ICE Chief Counsel's Christmas card list.

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
[REDACTED] JOSE

FILE A [REDACTED]

DATE: Feb 14, 2008

UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:
BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
800 DOLOROSA STREET-SUITE 300
SAN ANTONIO, TX 78207

OTHER: _____

MEO

COURT CLERK
IMMIGRATION COURT

CC: CHRISTINA PLAYTON
P O BOX 1939
SAN ANTONIO, TX, 782970000

FF

**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]

RESPONDENT

IN REMOVAL PROCEEDINGS

)
)
)
)
)
)
)

Case Number: [REDACTED]

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

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)
TO: [] ALIEN [] ALIEN c/o Custodial Officer
ALIEN'S ATT/REP [] INS
DATE: 3-14-08 BY: COURT STAFF MEO
Attachments: [] EOIR-33 [] EOIR-28
[] Legal Services List [X] Other Phoned Attorneys

Alien's Name XXXXXXXXXXXX , Jose	File Number XXXXXXXXXX Event No: XXXXXXXXXX	Date 03/19/2007
<p>IAFIS Neg NCIC Neg TECS Neg</p> <p>Record of Deportable/Excludable Alien: Subject was apprehended on 410 West and Perrin-Seitel Road in San Antonio, Texas en route to job-site. Subject was not in possession of any type of immigration documents to work or reside in the United States. Subject was in possession of a Texas Drivers License when stopped for an immigration inspection of subject.</p> <p>Border Patrol Agent R. Salinas was performing traffic duties on 410 West bound when he drove along side an Isuzu Rodeo gray in color with only a driver. Subject became very nervous at the presents of a marked Border Patrol vehicle and always looking straight ahead. Agent Salinas followed the vehicle noticing subject started to switch lanes quickly. Agent Salinas stopped the vehicle to perform an immigration inspection of the subject. The driver was not in possession of any type of immigration documents.</p> <p>Subject was arrested and transported to the San Antonio Border Patrol Station for processing and final disposition.</p> <p>Subject is a native and citizen of Guatemala who last entered the United States by wading the Rio Grande River near Laredo, Texas without being inspected or admitted by an Immigration Officer.</p> <p>Subjects' CIS, IAFIS, and criminal history were negative.</p> <p>Subject was later transported to GEO Detention Center as per Deportation Officer Benson.</p> <hr/>		
Signature  RICARDO SALINAS	Title SENIOR PATROL AGENT	

AFFIDAVIT

STATE OF TEXAS

§
§
§

COUNTY OF BEXAR

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared Jose [REDACTED] and after being by me duly sworn did upon oath depose and say:

1. I work for a landscaping company and drive a blue 1996 four door Isuzu Rodeo. I was driving home from work on Monday, March 19, 2007, at about 5:30 PM, when I was stopped and arrested by the Border Patrol. At the time of my arrest, I had violated no traffic law, all of the inspection stickers on the vehicle that I was driving were current, and there were no warrants for my arrest that would have justified the stop and arrest.
2. As part of my daily route from work back home, I drive down East Loop 1604 and exit on to IH-35 south to get on 410 West. On that day, March 19, 2007, as I was driving down IH-35 South, driving the legal speed limit and in accordance with all traffic laws, I noticed through my rearview mirror that a vehicle driving behind me. At first I thought it was a park police vehicle because of its green and white color. Then I saw that it was a Border Patrol vehicle.
3. I continued driving the legal speed limit. As we came close to the 410 west ramp the Border Patrol vehicle drove next to my vehicle. I continued to drive and in accordance with the law. I could see that the Border Patrol Agent was staring at me.
4. The Border Patrol vehicle then began to slowly brake to get in back of my vehicle. As soon as the Border Patrol vehicle was behind me he flashed his lights and siren.
5. I began to pull over thinking he had received a call to go after someone else but he followed behind me. The Border Patrol agent and myself pulled our vehicles over near Perrin Beitel and 410 West. A second law enforcement vehicle also arrived. That vehicle, however, was a city police and not Border Patrol.

6. As soon as I arrived to a complete stop the Border Patrol agent jumped out his vehicle ran towards my passenger door and opened it. The city police officer stayed near his vehicle. The Border Patrol Agent immediately asked for my driver's license in English. I responded that I don't speak English. He then asked the same question in Spanish and I replied that I do not have one.
7. The Border Patrol Agent then asked if I had any weapons and answered no. The Border Patrol Agent asked if I had a work authorization card. I answered no. He also asked me my nationality and I answered his question. At no point the Border Patrol Agent asked if I had a green card.
8. Then, rather than just asking me to get out of the vehicle, he physically pulled me out through the passenger side and put handcuffs on me. The Border Patrol then began to search me. I was taken to the Border Patrol vehicle passenger side where I stood. The Border Patrol Agent walked over to the city police officer. I was watching the Border Patrol Agent speaking to the officer and he was moving his upper body side to side. The city officer then made his way to his vehicle and left. The Border Patrol Agent made his way over to me and I asked him why he had pulled me over. He said that I looked nervous but that was not true. While driving, I was not behaving in any way nervously or strangely. I was just driving normally. He then put me in his vehicle with others that had been picked up previously.
9. The Border Patrol Agent then walked to my vehicle to move it closer to the shoulder. As he was moving my vehicle, I reached into my pocket to call my cousin to notify her that I was being arrested by immigration, but she never answered. I made a second phone call to a friend but as soon as I told him that immigration caught me, the Border Patrol Agent snapped away my cell phone. He said if that had been a weapon he would have died.
10. He then drove us to a Border Patrol office. When we arrived, they put me in a holding cell. As I was sitting in the holding cell, some of the detainees were commenting that the Border Patrol Agents had said it was easy to spot illegals due to their "clothing."
11. I was called by the Border Patrol Agent but not by my name. He called me in Spanish a "Guatemalan Terrorist." I asked why he was calling me a Guatemalan Terrorist and he replied, "Because you are Guatemalan and I don't know you."
12. I was then being processed with photos and fingerprints. The Border Patrol Agent then received a phone call from someone and he got mad. He called me over but with a vulgarity, "Pendejo!"

13. He accused me of calling a relative to pick up my vehicle. The Border Patrol Agent again used the vulgarity and threatened to arrest everyone who lived at the address on the insurance card. He then called another detainee to continue processing. Once he was through with him, he then again called me "Pendejo!" The Border Patrol Agent began to question me.
14. After the interview I was returned to the holding cell. Approximately 45 minutes later the Border Patrol Officer again called me "Guatemalan Terrorist," to put on the handcuffs and head to GEO Detention Center.

[Signature]
Jose [Redacted], Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this the 22nd day of May 2007 in witness whereof I put my signature and seal of office.

[Signature]
Notary Public

My commission expires:



I, Rosalio Castorena, hereby certify that I am competent in Spanish and English and that I accurately and orally translated the above document from English to Spanish to Jose [Redacted], who confirmed the veracity of the factual statements above prior to his signing this document.

Date: May 22, 2007

[Signature]

I, Jaime Javier Zaldana, declare under penalty of perjury, pursuant to 28 USC section 1746 that the following information is true and correct to the best of my knowledge.

1. I am currently detained at the South Texas Detention Complex, Pearsall, Texas.
2. On the morning of January 5, 2010 at about 9:00 am, I was traveling on IH-35 North in Schertz, Texas driving to work in San Marcos, Texas in a red pick truck with two other co-workers, Roberto Mendoza and Jonathan Morales. Roberto was sitting in the front seat of the truck and Jonathan was sitting in the back seat. I was traveling according to the law at a rate of 65-70 mph and we had our seatbelts on. On the Access road to my right, I see a border patrol Tahoe driving south and a border patrol charger driving right behind it in the same direction. I kept driving and next thing I know, I see flashing lights in my rearview window signaling for me to pull over, and they were coming from the BP charger. I pulled over on the should of the highway. The charger parked on the right side of the truck on the medium between the highway and access road. 2 border patrol officers got off the Charger and came to the window where Roberto was sitting. One of the officers said, "You have documents? (in Spanish)" looking at Roberto. Roberto responded, "No." then again the officer said, "You have documents? (in Spanish)" looking at me. I responded, "No". and then lastly told Jonathan, "You have documents? (in Spanish)" and Jonathan responded, "No."
3. The BP officer opens the door of the truck, reaches in and handcuffs Roberto from his left wrist and reaches over to me and handcuffs me to Roberto with my right wrist. BP officer said, "Get off" (In Spanish). Roberto and I get off together because we are handcuffed together, then Jonathan gets off and the officer handcuffs him too. As they make us stand by the charger, the Tahoe pulls up

Jonathan
not
mind

behind the truck and parks there. 2 more BP Officers get off and they are chuckling and joking with the officers that are searching us. The officers search us and take our wallets and cell phones. While being searched one of the officers asks me where am I going, where am I coming from, and how long have I been in the U.S. I told him that I was driving from home, that I was heading to San Marcos. The officer then tells us to follow him and signaled us to get inside the Tahoe. Jonathan is placed in the backseat of the Tahoe, while Roberto and I are told to get in the back of the SUV where there are no seats or seatbelts and we are still handcuffed to each other.

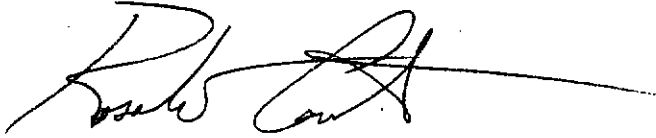
4. The Tahoe officers gets back into the SUV and drive across the medium and start to head south on the access road. They drove a little ways to pick up more people where they had been pulled over. They put one other man into the backseat with Jonathan and then got back onto the access road, but this time heading north. We arrived where a BP Van was parked and had other men in it too.
5. They told us to get out and walked us to the van. They opened the doors and right away we noticed that the air coming out of the van was very hot. Once they sat us down, the driver started to drive. We began to feel really hot because we could see that the driver had set the settings to full blast hot, while the settings to the driver were set on low heat. Some of us in the van asked the driver to please lower the heat, because it was too hot and he just laughed at us. He was also driving really fast and would not break on bumps or turns and we didn't have any seatbelts on, so we were all bouncing in our seat and I remember bumping my forehead on the window of the van a couple of times because we couldn't keep our balance in our seats.

6. When he stopped in one occasion to pick up more people to put in the van, I heard him chuckling telling another officer that we want to cool off and the other officer just laughed and didn't say a word.
7. He drove us around for approximately 3 hours and then finally got back on IH 35 south and then 410 west in San Antonio. He took us to their office near 410 & Bandera. Once there, they made us get off and get into 2 lines. They made us give them whatever we had in our pockets and shoelaces. They put us in cells.
8. One by one they took our fingerprints and photos. When they were processing me, I told the officer if I could make a phone call. He said yes, and told me that he would dial the number. I told him that I didn't know it by memory and if I could look in my phone since it was right next to us on the table. He said that he could not do it. The officer asked me my background information and then told me that I have 2 options. Option 1 was to go back to my country and option 2 was to see a judge to fight my case. I signed a document that indicated that I wanted to an immigration judge.
9. At about 4pm, they handcuffed us in twos and put us back in the van with the same driver. He sped down 410 and took us to the immigration ICE office located on 410 & Randolph. There no officer talked to us, they just held us in a cell and then sometime after 5pm, they put us in a bus and brought us to the STDC, Pearsall, Texas.

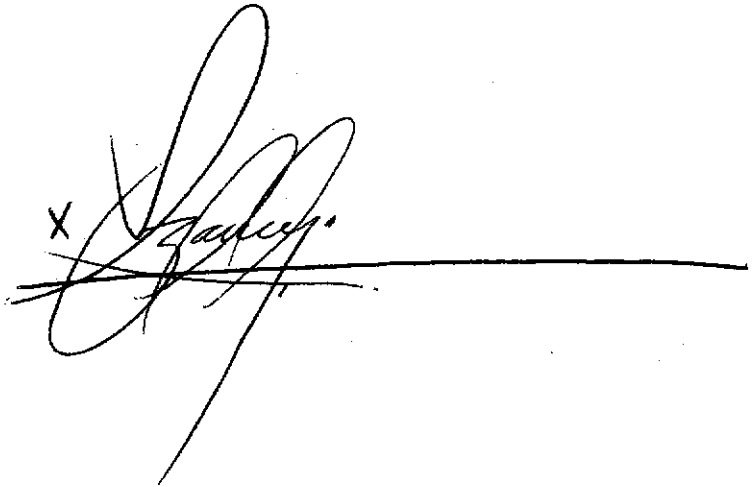
01/13/2010

CERTIFICATION OF TRANSLATION

I, ROSALIO CASTORENA, CERTIFY THAT I AM COMPETENT IN THE ENGLISH AND SPANISH LANGUAGE AND THAT THE DOCUMENT HAS BEEN ACCURATELY TRANSLATED FROM SPANISH TO ENGLISH.



ROSALIO CASTORENA
Legal Assistant
De Mott, McChesney, Curtright & Associates, LLP
Immigration Attorneys
800 Dolorosa, Suite 100
San Antonio, Texas 78207
(210) 354-1844 (210) 212-2116 (fax)






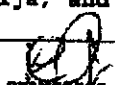
EXH 3 for ID


U.S. Department of Homeland Security

Subject ID: [REDACTED]

Record of Deportable/Inadmissible Alien

Family Name (CAPS) [REDACTED] MELCHOR		First Middle		Sex M	Hair BLK	Eyes BRN	Complexion MED
Country of Citizenship MEXICO	Passport Number and Country of Issue	Finger Number CASE NO. [REDACTED]		Height 68	Weight 178	Occupation LABORER	
US Address See Narrative				Scars and Marks See Narrative			
Date, Place, Time, and Manner of Last Entry 12/31/2003, 1100, 14.74 mile(s) E of LAR, WALKING				Passenger Booked at			
Number, Street, City, Province (State) and Country of Permanent Residence SANTA CATALINA, GUANAJUATO, MEXICO				FBI Number 391595CDS			
Date of Birth 01/06/1976				Age: 32		Date of Action 11/25/2008	
City, Province (State) and Country of Birth SANTA CATALINA, GUANAJUATO, MEXICO				Location Code LRT/STX		Method of Location/Apprehension TRC	
Date Visa Issued				Social Security Account Name		Admission SAN ANTONIO, TX	
Immigration Record NEGATIVE				Criminal Record		Date/Place 11/24/2008 1030	
Name, Address, and Nationality of Spouse (Maiden Name, if Appropriate)				Number and Nationality of Minor Children 3 U.S. CITIZENS			
Father's Name, Nationality, and Address, if Known See Narrative				Mother's Present and Maiden Name, Nationality, and Address, if Known See Narrative			
Monitor Due Property in U.S. Not in Immediate Possession None Claimed				Fingerprinted: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Systems Checks See Narrative	
Name and Address of (Last/Current) U.S. Employer				Type of Employment		Charge Code (Word(s)) 16A	
Narrative (Outline particulars under which alien was located/apprehended. Include details not shown above regarding time, place and manner of last entry, attempted entry, or any other entry, and statements which establish administrative and/or criminal violation. Indicate reason and mode of travel to interior.) FINS #: 14343498				Employed from/to		By HERBERT T. LEIZA	
							
US ADDRESS: KARNES COUNTY CORRECTIONAL FACILITY 810 COMMERCE ST. KARNES CITY, 78118				Status at Entry PWA Other			
SCARS, MARKS, AND TATTOOS: TATTOO BREAST, LEFT				Sum When Feared TRAVEL/STAYING Length of Time Illegally in U.S. OVER 1 YEAR			
Alien has been advised of communication privileges _____ (Date/Initials) FRANCISCO DELGADO IFA (Signature and Title of Immigration Officer)				Received: (Subject and Documents) (Report of Interview) Office: FRANCISCO DELGADO on: November 25, 2008 at 0848 (time) Disposition: Notice to Appear Detained (I-862) Examining Officer: RENE GUERRA			

Alien's Name [REDACTED], MELCHOR	File Number [REDACTED] Event No: [REDACTED]	Date 11/25/2008
<p>TATTOO ARM, LEFT UPPER</p> <p>FATHER NAME AND ADDRESS: ----- Nationality: MEXICO [REDACTED] AMADOR SANTA CATARINA, GUANAJUATO, MEXICO</p> <p>MOTHER NAME AND ADDRESS: ----- Nationality: MEXICO [REDACTED] SALOME SANTA CATARINA, GUANAJUATO, MEXICO</p> <p>FUNDS IN POSSESSION: ----- United States Dollar 41.29</p> <p>RECORDS CHECKED: ----- CIS Neg EARM Neg IBIS Neg NAILS Neg NCIC Neg O Neg</p> <p>NAME AND ADDRESS OF US EMPLOYER: ----- A&M ROOFING</p> <p>TYPE OF EMPLOYMENT: ----- Operators, Fabricators, and Laborers</p> <p>NARRATIVE: ----- Subject was one of four undocumented aliens apprehended on today's date by Agents of the San Antonio Border Patrol. Agents observed a black truck east bound on I-10. The truck was loaded with four (4) adult Latin males and with construction material in the bed of the truck. Agents believed the truck may be disguised as a construction vehicle so as to transport illegal aliens further into the United States. The agents also noted that the passengers were stoic and appeared to be extremely nervous when encountered by the agents. Agents Salinas, Leija, and Delgado began to follow and overtake the vehicle when they</p>		
Signature  FRANCISCO DELGADO	Title BPA	

Alien's Name ██████████, MELCHOR	File Number A089 768 564 Event No:STX0911000021	Date 11/25/2008
<p>noticed that the truck sped up and exit on Santa Clara Road. Agents signaled with their emergency lights in order to perform an immigration inspection of the occupants.</p>		
<p>A total of four (4) undocumented aliens were apprehended in the truck. All were employed as construction workers in Bryan, Texas but were lost and headed towards Houston, TX. All occupants were arrested and transported to the San Antonio Border Patrol Station for processing and final disposition.</p>		
<p>Subject is a native and citizen of Mexico who last entered the United States by wading the Rio Grande River near Laredo, Texas without being inspected or admitted by an Immigration Officer.</p>		
<p>Subject was in possession of two fraudulent Social Security Administration cards. Subject claimed to SPA Salinas upon arrest that he was a United States citizen. After further questioning by SPA Salinas, subject admitted being a native and citizen of Mexico and that he was not in possession of any immigration documents that would allow him to live or work in the United States legally.</p>		
<p>After initial checks on IDENT, it was determined that subject had previously falsely claimed to be a United States Citizen. Subject's records checks resulted negative criminal history and no outstanding warrants.</p>		
<p>Further questioning by STX SBPA revealed that subject had attempted to use the fraudulent Social Security Administration cards to gain employment, but that the employers recognized them to be fraudulent. The cards in question contain SSA numbers ██████████95 and ██████████65. Due to the above facts subject is being considered a flight risk because of his previous attempts to use somebody else's identity to try to obtain employment.</p>		
<p>Subject requested and was granted a voluntary returned to Mexico / I-826 on 11/24/08. However subject is now being represented by David Armandariz of De Mott, McChesney, Cutright, and Associates, L.L.P. Subject's attorney faxed to San Antonio Station Form G-28 to rescind subject's V/R. Subject's attorney has withdrawn subject's previous disposition and is now being processed as a NTA / I-862.</p>		
Signature  FRANCISCO DELGADO	Title BPA	