

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

IN THE MATTER OF)
)
Damian C. [REDACTED]) Case Number: A [REDACTED]
)
RESPONDENT) IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) of the Act: Entry Without Inspection

APPLICATION: Motion to Suppress Evidence and Terminate Proceedings

ON BEHALF OF THE RESPONDENT

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ON BEHALF OF THE GOVERNMENT

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WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

Removal proceedings were initiated against the respondent by the filing of the Notice to Appear (NTA), dated January 15, 2009, charging him with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act). Exhibit #1.

At a master hearing on June 24, 2009, the respondent acknowledged receipt of his NTA and denied the allegations and charge of removability contained therein. At the hearing, the Department of Homeland Security (DHS) offered into the record a Form I-213, Record of Deportable / Inadmissible Alien, which was admitted into the record as Exhibit #2 for identification purposes only. The respondent then filed a motion to suppress the Form I-213 and terminate proceedings.

At the conclusion of the June 24, 2009 hearing, the Court reset this matter for a hearing on April 1, 2010. The Court ordered that the parties file all supporting documents by February 1, 2010. The Notice of Hearing explicitly noted this filing deadline.

At the April 1, 2010 hearing, the DHS offered into the record a group of documents which have been identified as Group Exhibit #3. Lacking a good reason to excuse the Court's prior deadline, the Court denied the DHS's request to admit the documents into the record. *See* 8

C.F.R. § 1003.31 (stating that Immigration Judges possess the authority to set time limits for the filing of documents); Immigration Court Practice Manual, Chapter 3.1 (d)(ii) (stating that the Immigration Judge retains the authority to determine how to treat an untimely filing); *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984) (statements by counsel are not evidence).

At the April 1, 2010, the respondent testified in support of his motion to suppress the Form I-213 and terminate these proceedings.

At the conclusion of the respondent's hearing, the DHS requested a continuance to obtain additional evidence. Having failed to establish a good cause to continue this matter, the request was denied as a matter of discretion. *See Witter v. INS*, 113 F.3d 549, 555 (5th Cir. 1997); *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1997); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983) (motions to continue to prepare must be accompanied, *inter alia*, by a showing that any additional evidence that the party seeks to present is probative, noncumulative, and significantly favorable to the party).; 8 C.F.R. § 1003.29.

At the present time, the respondent's pending Motion to Suppress and Exclude Evidence is ripe for adjudication.

II. Testimony of the Respondent

The respondent testified that he was arrested by Border Patrol in January 2009 near San Angelo, Texas while he was traveling on a two lane road in a white GMC double-cab truck with four other individuals, Damian [REDACTED], Gregorio [REDACTED], Jose [REDACTED], and Ricardo [REDACTED]. The truck had three or four suitcases in the bed.

Around three or four in the afternoon, the respondent's vehicle was traveling on the road and passed by a Border Patrol vehicle. The Border Patrol agent then pulled over the respondent's vehicle and asked the occupants of the vehicle for their "papers." After responding to the agent's questions, the respondent was arrested and taken to a Border Patrol office.

At the office, the respondent asked why he was arrested. He was told that he was arrested because "[they] look Mexican and the truck, it looked, and also that it had to do with construction." The Border Patrol officers did not mistreat the respondent in any way.

III. Legal Standards

An alien who seeks to suppress evidence has the burden of proving a *prima facie* case for suppression. *Matter of Wong*, 13 I&N Dec. 820, 22 (BIA 1971); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975). The alien's motion to suppress must be made in writing and state with particularity the grounds therefore. *See* 8 C.F.R. § 1003.23(a). It also must be supported by specific and detailed affidavits based on personal knowledge, identifying a basis for suppression, and enumerating the articles to be suppressed.

Matter of Wong, 13 I&N Dec. 820, 821-22 (BIA 1971). If the affidavit is such that the facts alleged, if true, could support a basis for excluding the submitted material, then the alien must support his claims through testimony. See *Barcenas*, 19 I&N Dec. at 611-12. Once the respondent has established a *prima facie* case, the burden shifts to the DHS to justify the manner in which the evidence was obtained. *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971).

While the exclusion rule ordinarily does not apply in removal proceedings, an alien may merit suppression of evidence if he can show that there is a policy or widespread abuse or that the evidence was obtained through an egregious violation of the Fourth Amendment or other liberties that transgresses "notions of fundamental fairness and undermines the probative value of the evidence obtained." *Lopez, supra*, at 1050-51. A mere violation of an alien's constitutional rights is insufficient for suppression of evidence, however. See *id.*

"The Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

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." *United States v. Chavez-Chavez*, 205 F.3d 145, 147 (5th Cir.2000); see also *U.S. v. Arvizu*, 122 S.Ct. 744, 750-53 (2002).

In considering whether the agent had reasonable suspicion to stop a vehicle, "[n]o single factor is determinative; the totality of the particular circumstances known to the agents is examined when evaluating the reasonableness of a roving border patrol stop." *United States v. Hernandez*, 477 F.3d 210, 213 (5th Cir.2007). "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." *Id.* "No single factor is dispositive, and each case must be examined based on the totality of the circumstances known to the agents at the time of the stop and their experience in evaluating such circumstances." *United States v. Rodriguez*, 564 F.3d 735, 741 (5th Cir.2009).

Where there is reasonable suspicion to stop someone (e.g. for speeding), an officer's inquiry into an individual's immigration status is not a violation of the Fourth Amendment. *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005). However, race or alienage alone is insufficient to establish reasonable suspicion. *Brignoni-Ponce, supra*, at 885-87; see, e.g., *King and Yang, supra*.

The Court of Appeals for the Fifth Circuit has recognized that Border Patrol agents face a difficult task in securing our nation's southern border. See *U.S. v. Rangel-Portillo*, 586 F.3d 376,

380 (5th Cir. 2009). While respecting the challenges that our agents face in attempting to secure our nation's borders, this Court must ensure that the basic precepts of the Fourth Amendment have been met when in evaluating the reasonable suspicion behind an agent's detention of a specific individual's vehicle. *Id.*

IV. Findings of Fact and Conclusions of Law

In the present case, the respondent seeks to suppress the admission of the Form I-213 and any other statements or records resulting from his arrest, including his previous immigration records. The respondent first argues that the stop of his vehicle constituted an egregious violation of his Fourth and Fifth Amendment rights because he was stopped solely because of his Hispanic appearance. The Court agrees.

The respondent presented credible testimony and a written affidavit testifying that he was arrested while traveling in a white GMC pickup truck, with nothing in the cab or the truck bed which would elicit reasonable suspicion, near San Angelo, Texas.

The DHS has provided no evidence to refute the respondent's *prima facie* case for suppression. *See Matter of Tang*, 13 I&N Dec. 691. It does not provide a statement from the Border Patrol officer or present any explanation other than the respondent's Hispanic appearance as the reason for the stop.

Given the respondent's testimony and the lack of any evidence of suspicious activity or indications of alienage, the Court cannot conclude that the officers had a "reasonable suspicion" beyond the respondent's Hispanic appearance to stop his vehicle. *See, e.g., U.S. v. Lopez-Veldez*, 178 F.3d 282 (5th Cir. 1999)(reversed district court denial of suppression motion notwithstanding vehicle's proximity to the border, numerous passengers in the vehicle, and the road the vehicle was traveling on could be used to circumvent an immigration checkpoint); *U.S. v. Rodriguez-Rivas*, 151 F.3d 377 (5th Cir. 1998)(reversed district court denial of suppression motion where vehicle was stopped by Border Patrol because it had no front license plate); *U.S. v. Jones*, 149 F.3d 364 (5th Cir. 1998)(reversed district court finding of reasonable cause based on car's 80-mile proximity to the Texas-Mexico border, fresh mud on the vehicle's tires, and a tarp covering something in the back).

The respondent was not traveling within one hundred miles of the Texas-Mexico border. *See* Section 287(a)(3) of the Act (defining the term "reasonable distance" from the border to mean within one hundred air miles).¹ The Court cannot infer reasonable suspicion from the fact that respondent was traveling with four other individuals in a truck that had suitcases, since there is no rational reason to conclude that law-abiding citizens are less likely to travel with other individuals in a truck with suitcases. *See United States v. Chavez-Chavez*, 205 F.3d 145, 148 (5th Cir.2000) ("A factual condition that is consistent with alien smuggling does not provide reasonable suspicion if that

¹ The Court takes notice that, from San Angelo, Texas, the closest banks of the Rio Grande lie somewhere between Langtry, Texas and Shumla, Texas, approximately 130 miles away.

condition also occurs even more frequently in the law-abiding public.”). The Court is left with only the respondent’s Hispanic appearance as the cause for the stop.

To allow roving-patrol stops of all vehicles in San Angelo, Texas carrying Hispanic-looking persons without further evidence of suspicious activity would subject residents to “unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.” See *Brignoni-Ponce*, 422 U.S. at 882. Thus, given the totality of the circumstances, the Court finds that the respondent’s constitutional rights were egregiously violated when he was stopped merely for his Hispanic appearance. See *Brignoni-Ponce*, 422 U.S. at 885-87.

Accordingly, the Court grants the respondent’s motion to suppress. As the DHS has produced no further evidence of the respondent’s alienage, the Court terminates these proceedings.

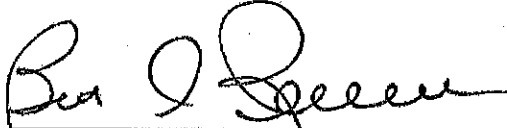
For the above reasons, the following orders shall be entered:


ORDER

IT IS HEREBY ORDERED that the respondent’s Motion to Suppress Evidence and Terminate be **GRANTED**.

IT IS FURTHER ORDERED that the respondent’s proceedings be **TERMINATED**.

Date: April 27, 2010


BERTHA A. ZUNIGA
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)
TO: ALIEN ALIEN c/o Custodial Officer
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DATE: 5/3/10 BY: COURT STAFF 
Attachments: EOIR-33 EOIR-28
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