File: Phoenix Date: NOV 29 2006

In re: LUIS MIGUEL NAVA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Judy C. Flanagan, Esquire

ON BEHALF OF DHS: Linda I. Spencer-Walters
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Termination

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge terminating proceedings. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). In this regard, we note that we must review the Immigration Judge's findings of fact under the "clearly erroneous" standard. *See* 8 C.F.R. 1003.1(d)(3)(i). Further, the case law of the United States Court of Appeals for the Ninth Circuit is controlling. *See Matter of Anselmo*, 21 I&N Dec. 25 (BIA 1989).

We are not persuaded that the Immigration Judge erred in finding that the evidence of alienage is inadmissible in that it was obtained in violation of the respondent's due process rights under the Fifth Amendment to the United States Constitution. The respondent and his Phoenix fellow high school students were detained when they visited Niagara Falls while on a school trip to compete in a solar boat contest. They assert, and the Immigration Judge found, that they were detained solely on account of their Hispanic appearance. Had it been a "routine border stop", then there should have been evidence submitted to show that the Department of Homeland Security (DHS) was following routine procedures when it stopped the respondent and his fellow students. There is no evidence in the record that proof of nationality was routinely requested of students visiting Niagara Falls on a school trip, accompanied by their teachers. Moreover, there is no evidence to support the assertion that the 9 hour interrogation was consensual. On

the contrary, the evidence indicates that the respondent was not free to leave and was threatened with deportation that night to Mexico. With respect to the claim that the stop was authorized because there were "many articulable facts" leading the DHS to believe that the respondent was illegally in the United States, there is no evidence of what those facts were. The only evidence is the statement of the DHS agent that the respondent and his fellow students–all Hispanic–did not "fit in" in Buffalo, that they "stood out", that they were the only Hispanics in the Visitor Center, and remarks by the agents referring to "Mexican take-out". Given this evidence, we cannot conclude that the Immigration Judge's finding that the respondent was detained solely because of his Hispanic appearance was clearly erroneous. Under the decision of the United States Court of Appeals for the Ninth Circuit in *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994), the stop was illegal and suppression of the evidence obtained as a result of the illegal stop is required.

Additionally, the suppression of the evidence is required because it was obtained by coercion. *See Bong Youn Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980). This respondent, along with three other students on his school trip, was interrogated by agents of the DHS over 9 hours. The hearing of all four students was conducted jointly. At that hearing there was testimony from the respondent and the other students that they were repeatedly asked the same questions by angry officers, that they felt intimidated, and believed that they were under arrest. Students and teachers were crying. The principal testified that the DHS agent threatened to deport the respondent and his fellow students to Mexico that night, and that the teacher accompanying the students told her that the Border Patrol was trying to frighten the students. One of the students testified that she was not allowed to call her mother, and the respondent testified that he asked four different times to call a lawyer and was refused permission. The Immigration Judge has not been shown to have erred in concluding that the respondent adequately demonstrated that the evidence obtained as a result of that interrogation was coerced and consequently obtained in violation of the respondent's Fifth Amendment right to due process. Accordingly, the motion to suppress was properly granted. The appeal of the decision terminating proceedings is dismissed and the motion to remand is denied.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
PHOENIX, ARIZONA

IN THE MATTERS OF:	**IN REMOVAL PROCEEDINGS**
HUICOCHEA, Yuliana DAMIAN, Jaime H. NAVA, Luis Miguel CORONA, Oscar J. **Respondents**	**FILE NOS.:**

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, as aliens present in the United States without being admitted or paroled, or who have arrived in the United States at any time or place other than as designated by the Attorney General.

On Behalf of the Respondent:
Judy Flanagan, Esq.
Marianne Gonko, Esq.
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On Behalf of the Government:
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

It is alleged that the respondents are natives and citizens of Mexico who arrived in the United States at an unknown place in an unknown manner without being admitted or paroled after inspection by an Immigration Officer. On June 20, 2002, the former Immigration and Naturalization Service (INS), now Department of Homeland Security (DHS), issued Notices to Appear (NTA) charging the respondents as removable from the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or the Act), as amended, as aliens present in the United States without being admitted or paroled, or who have arrived in the United States at any time or place other than as designated by the Attorney General. (Exs. 1-4, NTAs.)

At an initial removal proceeding in Phoenix, Arizona on September 24, 2002, the respondents, through counsel, conceded service of the NTAs. In continued proceedings in Phoenix, Arizona on November 28, 2003, the respondents, through counsel, admitted identity, denied all allegations in the respective NTAs, and denied the charges of removability. The DHS asked for a continuance to obtain evidence of alienage and removability. The respondents' had also requested a continuance. Both parties having requested a continuance, a continuance was granted.

On September 29, 2004, the DHS submitted proposed exhibits in three of the four matters, consisting of Forms I-213 and certain foreign language documents, which the Court marked for *identification only.*[1] (Exs. 5-7.) On July 11, 2005, each respondent filed Motions to Suppress and Terminate, (Exs. 8-11, 13-14, 16-17), and on July 15, 2005, a Motion to Continue. (Exs. 12, 15, 18, 18A.) On July 19, 2005, the DHS filed oppositions to the respondents' motions to continue, (Exs. 19A-D), and on July 21, 2005, oppositions to the motions to terminate. (Exs. 20A-D.)

At an individual removal hearing in Phoenix, Arizona on July 21, 2005, the Court denied the respondents' motions to continue. (See Exs. 12, 15, 18, 18A.) The respondents, through counsel, objected to admission of the DHS's proposed Exhibits five through seven based upon lack of authentication, lack of translation, and previously filed Motions to Suppress alleging an "egregious violation" of the United States Constitution. The Court held ruling on the admissibility of the proposed documentary evidence in abeyance pending proceedings on the motions to suppress. Each respondent then offered testimonial evidence in support of his or her motion and the DHS presented rebuttal testimony.

II. Statement of the Law

An Immigration Judge shall decide whether an alien is removable from the United States. INA § 240(c)(1)(A) (2005). The determination shall be based only on the evidence produced at the hearing. Id. Where a respondent is charged as being in the United States without being admitted or paroled, the initial burden is on the DHS to first establish that the respondent is an alien. 8 C.F.R. § 1240.8(c) (2005). Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. Id.; INA § 291; see also Iran v. INS, 656 F.2d 469, 471-72 (9th Cir. 1981).

III. Removability

The DHS has failed to meet its burden to establish the alienage of each respondent. The motions to suppress and terminate will be granted for several independent reasons. First, the

[1] The DHS submitted no proposed documentary evidence in the matter of Oscar Corona, A95 422 301.

DHS's proposed documentary evidence of alienage in three of the four matters will not be admitted into evidence on the respondents' objections. In the fourth matter, the DHS simply offered no documentary evidence of any kind. Nor was the alienage of any respondent established by clear and convincing evidence through testimony. Second, the DHS failed to meet its burden to rebut the respondents' prima facie showing that the evidence of alienage was obtained through an "egregious violation" of the United States Constitution.

A. The Government's Evidence of Alienage

The DHS seeks to establish that three of the four respondents are not citizens or nationals of the United States by offering proposed exhibits five, six, and seven into evidence. Each contains a Form I-213 (Record of Deportable/Inadmissible Alien) and a photocopy of a document written in the Spanish language purported to be a Mexican birth certificate. The DHS also elicited limited testimony on the issue of alienage during an evidentiary hearing on the respondents' motions to suppress.

1. The Forms I-213

In removal proceedings, the immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial. 8 C.F.R. § 1240.7(a). Absent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability. Matter of Barcenas, 19 I&N Dec. 609, 611 (BIA 1998); see also Felzcerek v. INS, 75 F.3d 112, 116 (2d Cir. 1996) (stating that the I-213 may also fall within the public records hearsay exception at FED. R. EVID. 803(8)). Here, however, the respondents alleged through testimony and motions to suppress and terminate that the information contained in the Forms I-213 is inaccurate and was obtained by coercion, duress, and violation of numerous procedural and substantive rights. (See Exs. 8-11, 13-17.) The respondents also objected at the hearing that the Forms I-213 were not properly authenticated.

Authentication of official records is a basic requirement in removal proceedings. See Iran, 656 F.2d at 472 (rejecting the INS' contention that authentication is not required in a deportation hearing). By regulation, any official record or entry therein "shall be evidenced by an official publication thereof, or a copy attested by the official having legal custody of the record or by an authorized deputy." 8 C.F.R. § 1287.6(a); see also FED. R. CIV. P. 44. The Ninth Circuit Court of Appeals has repeatedly stated that an official record purporting to establish alienage and entry must be authenticated through some recognized procedure. Lopez-Chavez v. INS, 259 F.3d 1176, 1181 (9th Cir. 2001) (stating that Form WR-424, which is similar to an I-213, "must be shown . . . [to have] been certified by the INS District Director as a true an accurate reflection of INS records"); Espinoza v. INS, 45 F.3d 308, 310 (9th Cir. 1995) (Form I-213 admissible where INS introduced copy certified by District Director); see also Matter of Barcenas, 19 I&N Dec. at 611 (Form I-213 properly authenticated where Border Patrol Officer identified the Form I-213 and

testified that he prepared it from answers provided to him by the respondent). Here, the Forms I-213 submitted in proposed Exhibits five through seven were neither certified by the DHS as true and correct copies nor identified or otherwise authenticated by the preparing officer. Therefore, as the respondents have challenged the reliability of the information contained in the Forms I-213 and those official records have not been properly authenticated as required, they will not be admitted into evidence.

2. The Purported Foreign Birth Certificates

It is essential that foreign language documents offered by a party in a removal proceeding be translated. By regulation, foreign language documents "shall be accompanied by an English language translation and a certification signed by the translator . . . ." 8 C.F.R. § 1003.33. Such certification must include a statement that the translator is competent to translate the document, and that the translation is true and accurate to the best of the translator's abilities. Id. Here, however, the DHS failed to submit any English language translation of the three Spanish language documents included in Exhibits five through seven. Therefore, the purported foreign birth certificates cannot be admitted into evidence.

Additionally, the foreign language documents are not properly authenticated. The requirements for authentication of foreign official records are set forth at 8 C.F.R. § 1287.6(b)-(c), and mirror the provisions at Rule 44(a)(2), FED. R. CIV. P. The regulation at 8 C.F.R. § 1287.6(c) provides for authentication of foreign official records held by countries which are party to the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents.[2] See FED. R. CIV. P. 44(a)(2), Advisory Comm. Notes on 1991 Amendment. Where the United States and the foreign country where the record is located are parties to the Convention, "the treaty or convention is to be followed." Id.; see also 8 C.F.R. § 1287.6(b)-(c). Mexico is a party.[3] The Convention provides that the requirement of a final certification by diplomatic officers of the United States is abolished and replaced with a model *apostille*, which is to be issued by officials of the country where the records are located. See 8 C.F.R. § 1287.6(c)(2); FED. R. CIV. P. 44(a)(2), Advisory Comm. Notes on 1991 Amendment. By regulation, the document to be authenticated "must be accompanied by a specific certificate in the form dictated by the Convention." 8 C.F.R. § 1287.6(c)(1); see also 33 U.S.T. 883, 20 I.L.M. at 1411-1412. Here,

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[2] Convention Abolishing the Requirement of Legalization for Foreign Public Documents, with Annex, Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189, 20 I.L.M. 1405 (1981) (entered into force for the United States October 15, 1981).

[3] U.S. Dep't of State, Bureau of Admin., Office of Authentications, "Countries Participating in Hague Convention," *at* http://www.state.gov/m/a/auth/c1268.htm (last visited Aug. 17, 2005); Hague Conference on Private International Law, "Convention Abolishing the Requirement of Legalisation for Foreign Public Documents - Status Table," *at* http://www.hcch.net/index_en.php?act=conventions.status&cid=41 (last visited Aug. 17, 2005); FED. R. CIV. P. 44(a)(2), Treaties to the Conventions, Parties to the Convention (West 2005).

however, the required *apostille* has not been provided.[4] The Court is bound to follow the federal regulations. Therefore, as the Forms I-213 and foreign official records are not properly authenticated and the foreign official records are not accompanied by an English language translation as required, Exhibits five through seven will not be admitted into evidence. The DHS submitted no other documentary evidence of alienage.

3. The Testimonial Evidence

Each respondent offered testimony at the evidentiary hearing on the suppression motions. However, none of the respondents admitted alienage at any other time. Testimony that a respondent crossed the border at an early age or that a respondent's parents brought him to the United States from another country does not unequivocally establish that he is not a citizen or national of the United States. Nor did the respondents' witness, Jane Juliano, Ph.D., testify as to the alienage of any respondent.

The government's witness at the suppression hearing, Supervisory Customs and Border Protection Officer Martin Mahady, claimed that Mr. Nava admitted on June 20, 2002 that he was not a citizen of the United States. However, Officer Mahady testified only during an evidentiary hearing on the respondents' motions to suppress for the limited purpose of rebutting the respondents' prima facie case of an egregious violation of the Constitution. The Board of Immigration Appeals has not determined whether testimony given by a respondent in support of a motion to suppress evidence on Fourth Amendment grounds is admissible on the issues of alienage and removability. See Matter of Benitez, 19 I&N Dec. 173, 175 (BIA 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 (BIA 1976) (raising but not ruling on the question of whether evidence in connection with a suppression motion may be considered in determining the issue of the respondent's deportability). However, constitutional protections are meaningless if a respondent presents evidence of their violation at his or her peril. See Simmons v. United States, 390 U.S. 377, 393-94 (1968) (holding that testimony given by a defendant in criminal proceedings in support of a motion to suppress evidence on Fourth Amendment grounds could not thereafter be

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[4] Alternatively, federal regulations also provide for authentication of official foreign records held by countries which are not signatories to the Convention, 8 C.F.R. § 1287.6(b), but those requirements have not even been met. Under these provisions, "an official record or entry therein shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized." 8 C.F.R. § 1287.6(b)(1). Such attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation regardless of whether he is charged with responsibility for maintaining the record or keeping it in his custody. Matter of Nand, 13 I&N Dec. 336, 338 (BIA 1969). Second, a U.S. Foreign Service officer "must certify the genuineness of the signature and official position" of the attesting officer. 8 C.F.R. § 1287.6(b)(2). Here, the DHS provided untranslated copies of the purported foreign official records and certain certifications by the U.S. Consul. (See Exs. 5-7.) While it appears that the purported foreign official records were attested by a person authorized by Mexican law to make the attestation, the attestation is in the Spanish language and has not been translated. In any case, the certification by the U.S. Consul does not purport to certify the genuineness of the signature and official position of the attesting person as required by 8 C.F.R. § 1287.6(b)(2) and Rule 44(a)(2), FED. R. CIV. P.

admitted against him at a trial on the issue of guilt unless he made no objection). Therefore, Officer Mahady's testimony is not admissible on the ultimate issues of alienage and removability.

In the alternative, Officer Mahady's testimony on July 21, 2005 about Mr. Nava's alleged statements in 2002, while credible and admissible, 8 C.F.R. § 1240.7(a), will be accorded little evidentiary weight. Officer Mahady testified that he "believe[d]" that Mr. Nava was the respondent whom he interviewed on June 20, 2002. He testified that he recalled that Mr. Nava admitted that he was "illegal" and was not a citizen of the United States. However, he immediately qualified that testimony by claiming that he did not have his notes in front of him. The tone of the qualification strongly suggested uncertainty. Mr. Nava had previously testified that he answered the officers' questions about alienage and entry by stating that he did not know. Officer Mahady further stated that his testimony was based solely on events occurring more than three years earlier and that since that time he has inspected hundreds of people each day at the Rainbow Bridge Port of Entry. Additionally, while he claimed to recall specific statements made by Mr. Nava three years ago, he could not recall whether Mr. Nava was generally polite or cooperative. Nor could he recall whether he repeated the same questions to Mr. Nava, but "only that a statement was made." Furthermore, he testified that the entire procedure took a mere two to three hours, but all four respondents testified credibly that they were detained for approximately eight or nine hours. Moreover, after Officer Mahady testified, Mr. Nava took the stand again and emphatically stated that he did not recognize the officer's voice. Under the circumstances, without more, the officer's testimony falls well short of establishing by clear and convincing evidence that Mr. Nava is not a citizen or national of the United States.

The DHS elicited no other testimony. Therefore, as neither the testimony nor documentary evidence establishes by clear, convincing, and unequivocal evidence that the respondent are not citizens or nationals of the United States, the DHS has failed to meet its burden to establish the threshold jurisdictional issue of alienage. See 8 C.F.R. § 1240.8(c). Accordingly, the respondents' motions to terminate must be granted.

B. The Motions to Suppress

A respondent bears the burden of proving that the government's evidence was unlawfully obtained. Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980); Matter of Wong, 13 I&N Dec. 820, 821-22 (BIA 1971). A motion to suppress must be supported by testimony. Matter of Barcenas, 19 I&N Dec. at 611. However, once a respondent makes a prima facie showing, the burden shifts to the government to go forward and prove that it obtained its evidence lawfully. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1444-45 (9th Cir. 1994); Matter of Ramirez-Sanchez, 17 I&N Dec. at 505; Matter of Rojas, 15 I&N Dec. 722, 723 (BIA 1976); Matter of Garcia, 17 I&N Dec. 319, 320-21 (BIA 1980); Matter of Wong, 13 I&N Dec. at 821-22.

The strict rules of evidence do not apply in civil removal proceedings. See Matter of Wadud, 19 I&N Dec. 182, 188 (BIA 1984); Tashnizi v. INS, 585 F.2d 781, 782-83 (9th Cir. 1978). The sole test for admissibility is whether the evidence is probative and its use is not

fundamentally unfair so as to deprive the respondent of due process of law as mandated by the Fifth Amendment. Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823 (9th Cir. 2003); Matter of Barcenas, 19 I&N Dec. at 612; Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980); Tashnizi, 585 F.2d at 782-83. Suppression has been determined to be a proper remedy for a violation of the Fifth Amendment. Matter of Garcia 17 I&N Dec. 319, 321 (BIA 1980). Although the exclusionary rule is generally inapplicable in removal proceedings, evidence may also be suppressed it if was obtained through an "egregious violation" of the Constitution or would be fundamentally unfair. Matter of Cervantes, 21 I&N Dec. 351, 353 (BIA 1996); Gonzalez-Rivera v. INS, 22 F.3d at 1444-45; Orhorhaghe v. INS, 38 F.3d 488 (9th Cir. 1984); INS v Lopez-Mendoza, 468 U.S. 1032, 1050-1051 (1984). Evidence that is the fruit of the unlawful action is also suppressible. See United States v. Crews, 445 U.S. 463, 470 (1980); Wong Sun v. United States, 371 U.S. 471, 484 (1963).

1. Testimonial Claims

Each respondent testified credibly in the English language in support of his or her respective motion to suppress information obtained by Immigration Officers on June 20, 2002. The respondents are each graduates of Wilson Charter High School, now Vicki A. Romero High School, in Phoenix, Arizona. Two of the students are currently enrolled in Phoenix-area community colleges, a third completed a four-year degree in only three years from Arizona State University, and the fourth is the spouse of a United States citizen and recent father of a United States citizen child. Each speaks English fluently. In March of 2002, as members of Wilson High's extracurricular Solar Technology Club, the respondents placed second in a state-wide solar boating competition with a 15-foot solar powered boat they had designed and constructed themselves. The team won an all expenses paid trip to Buffalo, New York to compete in an international solar boating competition. The team traveled to Buffalo together that June and qualified for the competition in the opening days. On June 20, 2002, on a scheduled day off, the students decided to spend a day sightseeing and touring Niagara Falls. The entire Solar Technology Club, accompanied by two teachers and two parent chaperones, arrived at the falls at 10:00 or 10:30 a.m. There they split into two groups: one teacher led three respondents and another student on a ferry tour, while a second teacher, the two parents, the fourth respondent, and three other students remained at the visitor center. No student ever crossed the border into Canada.

Respondent Mr. Jaime Damian testified that the teacher leading the group which remained at the visitor center was interested in viewing the falls from the Canadian side. While the students waited outside on a pedestrian walkway, the teacher approached the Port of Entry to ask U.S. Officers if the students could cross into Canada and reenter with only their school-issued identification cards. All of the students appeared to be Latino and had Hispanic names. Ten minutes later, the teacher emerged from the immigration building and instructed the students that they needed to enter the office to show their identification. Inside the immigration office, an officer asked the students for proof of legal status. Three students showed some form of identification before it was Mr. Damian's turn. Mr. Damian, who had celebrated his seventeenth

birthday only two days earlier, carried only his high school ID card. When the officer asked Mr. Damian about his legal status, Mr. Damian responded that he did not know and that his school ID was all he had. The officer repeated the questions at least 20 times.

Twenty minutes later, the officer placed Mr. Damian and the teacher in a small office. The officer told Mr. Damian that he could not leave because he was illegal. Mr. Damian overheard the officer ask the teacher just outside the office if there were other students like Mr. Damian, and the teacher responded that there were but she did not know their immigration status. The officer returned to the room, stated he was trying to help Mr. Damian, and asked Mr. Damian to call home to ask his mother about his legal status. Mr. Damian testified that he felt that he had no choice. When Mr. Damian reached his mother by telephone in Phoenix, the officer placed the telephone on speaker and listened to the conversation. The officer eventually escorted Mr. Damian to a different room on an upstairs floor.

Meanwhile, the three other respondents, Ms. Yuliana Huicochea, Mr. Oscar Corona, and Mr. Luis Nava, were returning from the ferry ride. Upon disembarking at or near the visitor center, they observed the two parent chaperones in tears and learned that immigration authorities had detained Mr. Damian. The students remained at the visitor center while their teacher and the two parent chaperones walked to the immigration building. Approximately fifteen minutes later, the teacher returned with an Immigration Officer, who asked the students for identification and about their legal status, place of birth, and manner of entry into the United States. Mr. Corona testified that the officer asked aggressively and with a strong voice. The respondents were the only Hispanic young people in the busy visitor center and were the only people questioned. The officer then instructed the three respondents to follow him to the immigration building some 150 yards opposite the visitor center across a large parking lot. While crossing the parking lot, Mr. Nava asked the officer if he could speak to a lawyer before questioning. The officer responded that Mr. Nava did not need a lawyer because he was not under arrest. The group entered the immigration building and after several minutes the students were taken upstairs. Mr. Nava testified that he asked for a lawyer to be present a total of three times before arriving upstairs, but the officer repeated that there was no need for lawyer. On the upper floor the officers repeated the same questions for ten minutes and placed the three respondents in a larger room with Mr. Damian, who was crying.

The respondents testified that several officers made offensive comments during the ensuing interrogation. A female supervisor asked the students what they were doing in Buffalo. When the students replied that a large Arizona power and water utility had sponsored their school club to compete in an international competition, the supervisor replied that perhaps they would not be noticed in Arizona because everyone in Arizona is Hispanic, but that in Buffalo they were going to be questioned. Three of the respondents testified to hearing this statement. Also, Mr. Corona and Mr. Nava each testified that when two male officers were talking between themselves about ordering food for colleagues, one officer raised his voice slightly and suggested "Mexican takeout." According to the testimony, the second officer smiled and glanced at the respondents. Mr. Nava testified that the officer's tone was mocking and that he believed the officers were not

talking about food. Mr. Corona testified that he believed the comment was directed at the respondents because he never saw any Mexican food restaurants in Buffalo.

Mr. Damian and Mr. Nava testified that they were told that they could not leave unless they produced copies of their birth certificates. One officer told Ms. Huicochea that he would call her mother to obtain the birth certificate. Ms. Huicochea, a juvenile, asked to speak with her mother first, but the officer informed her that she could not. The Principal of Wilson Charter High School, Mrs. Jane Juliano, Ph.D., testified that in the course of several conversations with one of the teachers that afternoon, she learned that the officers wanted the students' birth certificates to verify identity. At approximately 2:30 p.m. Arizona time, she spoke by telephone with a female officer who told her that unless the school produced the birth certificates, the students would be deported to Mexico right then and there. When Dr. Juliano explained that the students were on a school field trip, that the school was prohibited from asking about their immigration status by federal law, and that she believed the students were protected under federal law during school activities, the officer abruptly replied, "Don't send your illegals to New York." Dr. Juliano testified that she ultimately produced the birth certificates because she felt coerced and believed the officer that the immigration authorities had the authority to deport the students that day. She also testified that one of the two teachers present, a former law enforcement officer, told her that the officers were trying to intimidate the students.

The respondents testified that they were detained for approximately eight or nine hours. Each testified that the officers never offered food or water during that period, and that a teacher eventually delivered food. Throughout the day they were repeatedly asked the same questions by different officers. Each respondent testified that officers were rude and at times unprofessional. Mr. Damian testified that one officer took notes on a piece of napkin. He also testified that he was questioned by a total of six different officers during the course of several shift changes. Mr. Corona and Mr. Nava were explicitly told that they were not under arrest. However, the officers fingerprinted and issued NTAs to each respondent. Near the end of the eight or nine hour detention, the officers required the students to sign several documents before they could leave. Mr. Damian testified that he did not know what he was signing, despite being told by a teacher what the papers were. He did not recall ever receiving notice of his juvenile rights. Two other respondents testified that they received a document advising them of their juvenile rights while signing documents at the end of the day. The teachers were present while the respondents signed. Before he signed, Mr. Nava asked for an attorney for the fourth time. He was told that he could have an attorney, but that it would take a long time to arrange. As the detention had been very lengthy already, Mr. Nava agreed to sign. Hearing this, Ms. Huicochea signed as well. Mr. Nava estimated that the respondents were released at approximately 10:00 or 10:30 p.m.

The DHS produced one witness at the suppression hearing, Mr. Martin Mahady, Jr., a Supervisory Customs and Border Protection Officer at Rainbow Bridge, Port of Buffalo, New York. Officer Mahady testified telephonically that in June of 2002 he was a Special Operations Inspector with 28 years of experience and that he recalls the events of three years ago. He testified that a different officer encountered the respondents on the pedestrian walkway near the Port's exit

lane information window asking what they would need to go into Canada. He stated that the window is not on the side of the building where people return from Canada, and that the respondents had obviously not come from Canada. He was inside the building at the time, did not make the initial encounter, first came into contact with the respondents after they were "brought" into the office from the outside walkway, and has no idea what happened at the window. He claims that he interviewed Mr. Nava only, although Mr. Nava subsequently testified that he did not recognize Officer Mahady's voice, was in the second group of students encountered at the visitor center, and never inquired at the exit window on the pedestrian walkway. Officer Mahady testified that it was natural to ask Mr. Nava about his nationality because he was on a school trip near the border and had no documents. He stated that he does not typically question children who are crossing into Canada. When asked if there are there many Hispanics in Buffalo, Officer Mahady stated, "Yeah, we have a . . . section downtown Buffalo . . . there's quite a few of them."

Officer Mahady further testified that the processing took two to three hours, and that he remembered staying on after his shift ended. He did not recall if officers asked the respondents the same questions more than once. He stated that the respondents were definitely detained and not free to leave. He testified that Mr. Nava "wasn't free to go – he was detained but he was not under arrest – it was an administrative process that we were doing." He stated that the respondents were never placed in holding cells but were questioned inside the office in the "processing area." He claimed that the respondents were offered food[5] and that he never overheard any racist or derogatory remarks. He did not recall asking the respondents if they wanted to speak to an attorney or parent, but testified that this was not necessary because they were never placed under arrest. He testified that he is not aware of the procedure for advising juveniles of their rights. Officer Mahady was surprised to learn that three of the respondents were detained at the visitor center and stated, "We wouldn't inspect someone at the visitor center."

2. Analysis

In the Ninth Circuit, any bad faith violation of the Fourth Amendment is sufficiently egregious to require application of the exclusionary rule in civil proceedings. Adamson v. C.I.R., 745 F.2d 541, 545-46 (9th Cir. 1984). A bad faith violation occurs when officers obtain evidence by deliberate violations of the Fourth Amendment or by conduct that a reasonable officer should know is unconstitutional. Gonzalez-Rivera, 22 F.3d at 1449-51 (quoting Adamson, 745 F.2d at 545-46); Orhorhage v. INS, 38 F.3d at 501. The Ninth Circuit Court of Appeals has ruled that a stop based on Hispanic appearance alone is a bad faith violation if it occurred after the Supreme Court ruled such conduct unconstitutional in United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975), because a reasonable office should know such behavior violates the Constitution. Gonzalez-Rivera, 22 F.3d at 1450-51. In this case, the respondents presented a prima facie case that the initial encounter with Mr. Damian was a detentive, investigative "stop" that was not

[5]Noting that a teacher brought food for them.

supported by reasonable suspicion of illegal presence but rather was apparently based on Hispanic appearance alone.

The authority conferred upon Immigration Officers by section 287(a) of the Act to question persons believed to be aliens is limited by the Fourth Amendment's prohibition against unreasonable searches and seizures. Matter of King & Yang, 16 I&N Dec. 502, 504 (BIA 1978); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975). There is a critical distinction between consensual encounters for "mere questioning" and a detentive, investigative "stop." The Fourth Amendment's requirement that seizures not be "unreasonable" does not apply to consensual encounters for "mere questioning," such as interrogation relating to one's identity or a request for identification. INS v. Delgado, 466 U.S. 210, 216 (1984). So long as the subject does not feel compelled to answer, and a reasonable person would believe he was free to leave or refuse to respond, the officers may engage in mere questioning without reasonable suspicion or probable cause. Id. at 216-20 (holding that factory workers had not been "seized" even though a large number of armed INS officers entered the workplace, blocked off exits, and forcefully questioned many employees). Failing to provide valid documents in response to "mere questioning" can give an officer a reason to suspect that a person is an undocumented alien and therefore justify further detentive questioning. Cheung Tin Wong v. INS, 468 F.2d 1123, 1128 (D.C. Cir. 1972).

In contrast, an initially consensual encounter may escalate into an investigative "stop" within the reach of the Fourth Amendment, or an encounter may be an investigative stop from the beginning, "'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" Delgado, 466 U.S. at 215 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)); Orhorhage v. INS, 38 F.3d at 494. A detentive, investigative "stop" of a person or a vehicle requires a reasonable, articulable basis for making the brief seizure. Brignoni-Ponce, 422 U.S. at 886-87. In the context of the instant case, a "stop" would require reasonable suspicion that a person is an alien illegally in the United States. See id. The test for whether a detention has occurred is if the circumstances of the encounter are so intimidating – such as where an officer has restrained one's liberty by means of physical force or show of authority – as to demonstrate that a reasonable person would have believed he was not free to walk away. Delgado, 466 U.S. at 215-16. The setting of the encounter is one factor in the totality of the circumstances bearing on the extent to which the encounter was objectively intimidating. United States v. Savage, 889 F.2d 1113, 1116 (D.C. Cir. 1989).

In this case, the initial encounter between Mr. Damian and an Immigration Officer was not a simple consensual encounter for mere questioning but rather a detentive, investigative "stop" within the scope of the Fourth Amendment. A reasonable person two days beyond his sixteenth birthday would not feel free to walk away from interrogation inside an immigration enforcement building's "processing area" that he had been instructed to enter by an adult who had just been speaking with U.S. Officers. See Florida v. Royer, 460 U.S. 491, 504-05 (1983) (suspect seized when officers requested him to accompany them to police room, approximately 40 feet away, for questioning). Officer Mahady confirmed that the first respondent encountered was initially questioned in a "processing area" inside the immigration building. Unlike the adult factory

workers in Delgado, who were questioned inside their usual place of work in a manner which did not result in a reasonable fear that they were not free to continue working or to move about the factory, Id. at 217-21, Mr. Damian was a child who was affirmatively directed inside the confines of a U.S. Government law enforcement "processing area" for questioning. Additionally, three of his fellow students responded to the officer's questions before his turn arrived to cooperate as well. See Santa Fe Independent School District v. Doe, 530 U.S. 290, 311-12 (2000) (striking down policy allowing student-led prayer at high school football games because, *inter alia*, child's decision to attend is not purely voluntary as "adolescents are often susceptible to pressure from their peers towards conformity" and effect is to coerce religious worship by "social pressure"). Under the circumstances, a reasonable person would believe that a child in Mr. Damian's circumstances was not free to leave or refuse to respond. Therefore, the encounter was not a consensual one for "mere questioning" but a detentive, investigative stop which must be supported by reasonable suspicion.

Mr. Damian's initial detention was not justified by articulable, reasonable, particularized suspicion that he was an alien illegally in the United States. The Court considers the totality of the circumstances and gives due weight to the officer's factual inferences when determining whether he or she had reasonable suspicion that a person was engaged in illegal activity. United States v. Arvizu, 534 U.S. 266, 273-74 (2002). The testimony of Mr. Damian and Dr. Juliano indicated that a teacher merely asked U.S. Officers if students in a school group could cross the border with only their student ID cards. Office Mahady testified that to his knowledge the only factors comprising reasonable suspicion of alienage in this case were that the children: (1) were on a school trip near the border; and (2) carried only school-issued IDs. He testified that the respondents had clearly not returned from Canada.[6] However, mere knowledge that American high school students on a school-sponsored sightseeing trip wished to view Niagara Falls from the Canadian side of the border but possessed only school-issued ID cards is plainly insufficient to establish reasonable suspicion that any was an alien illegally in the United States. Instead, the shocking evidence in this case strongly indicates that the respondents were detained solely because of their Hispanic appearance. A female supervisory officer actually went so far as to tell the respondents that they were questioned because they stand out in Buffalo due to their Hispanic appearance. Furthermore, the outrageous mocking reference to "Mexican takeout" in the presence of the respondents evidences a culture of racial hostility and notions of racial superiority. See United States v. Montero-Camargo, 208 F.3d 1122, 1134 (9th Cir. 2000). As the United States Supreme Court emphasized many years ago, "[w]e have long regarded racial oppression as one of the most serious threats to our notion of fundamental fairness." Lopez-Mendoza, 468 U.S. at 1449. Based on the testimony, the Court has little trouble in finding that the respondents have established a prima facie case of a bad faith, egregious violation of the Constitution.

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[6] Significantly, the initial stop is not excepted from the requirements of the Fourth Amendment as a routine "border search," which includes exit searches, United States v. Des Jardins, 747 F.2d 499, 504 (9th Cir. 1984), *modified in part on other grounds*, 772 F.2d 578 (1985), because the respondents made no attempt to cross the border. Nor was inspection of Mr. Damian inevitable as the evidence indicates that the teacher would not have led the group across the border if the students could not reenter with only their school-issued ID cards.

Once a respondent makes a prima facie showing that the government's evidence was unlawfully obtained, the burden shifts to the government to go forward and prove that it obtained the evidence lawfully. Gonzalez-Rivera, 22 F.3d at 1445. Here, the DHS not only failed to meet this burden, but its testimonial evidence reinforced the respondents' prima facie case as discussed above. Therefore, as the DHS has failed to meet its burden to prove that it obtained its evidence lawfully, all evidence resulting from the initial stop, which includes the statements of all four respondents made to arresting officers and recorded on the Forms I-213, as well as the purported foreign birth certificates, will be suppressed. Absent other evidence of alienage, proceedings must be terminated.[7]

IV. Conclusion

On the basis of the foregoing analysis, the DHS has not met its burden in these cases and the charges of removability are not sustained. As the DHS has lodged no other charges, proceedings will be terminated.

Accordingly, the following orders shall be entered:

ORDER: ***IT IS ORDERED THAT*** the proceedings in the above captioned matters be **TERMINATED.**

Date: August 18, 2005

John W. Richardson
U.S. Immigration Judge

[7] The Court need not reach the respondents' claims that they were denied the rights to speak to a parent and have an attorney present for questioning. The Court notes, however, that federal regulations require only that Immigration Officers advise aliens of certain rights applicable in civil removal proceedings at the time of arrest. See 8 C.F.R. § 287.3(c). Nor does the Court reach the issues of whether the respondents' statements after the initial encounters and the production of birth certificates were compelled, coerced, or otherwise involuntary.