

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
606 SOUTH OLIVE ST., 15TH FL.
LOS ANGELES, CA 90014

NOEMI RAMIREZ, ESQ.
523 W. 6th STREET, STE. 830
LOS ANGELES, CA 90014

IN THE MATTER OF
PEREZ, GREGORIO CRUZ

FILE A 095-748-837

DATE: Feb 12, 2009

___ UNABLE TO FORWARD - NO ADDRESS PROVIDED

___ 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
606 SOUTH OLIVE ST., 15TH FL.
LOS ANGELES, CA 90014

xx OTHER: Please see attached IJ order

___ CJ
COURT CLERK
IMMIGRATION COURT

FF

CC: LEFT, JAMES, ESQ.
606 S. OLIVE ST., 8TH FLOOR
LOS ANGELES, CA, 900140000

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA.**

File: A95 748 837)
)
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In the Matter of:)
)
PEREZ-Cruz, Gregorio) **IN REMOVAL PROCEEDINGS**
)
)
Respondent.)

CHARGE: Section 212(a)(6)(A)(I) of the Immigration and Nationality Act ("Act").
- *Present without being admitted or paroled.*

APPLICATION: Motion to Terminate/Suppress.

ON BEHALF OF RESPONDENT:
Noemi G. Ramirez, Esq. (Lead counsel)
Law Office of Noemi G. Ramirez

Ahilan R. Arulanantham (co-counsel)
ACLU of Southern California

ON BEHALF OF THE GOVERNMENT:
James M. Left
Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, 8th Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

On March 17, 2008, the Government personally served Respondent with a Notice to Appear ("NTA"). In the NTA, the Government alleged that Respondent, a native and citizen of Mexico, entered the United States at an unknown place on an unknown date in 1997, and was not then inspected by an immigration officer. Accordingly, the Government charged Respondent with removability pursuant to section 212(a)(2)(6)(A)(i) of the Act. The NTA was filed with the Court on March 28, 2008, thereby vesting it with jurisdiction over these proceedings pursuant to 8 C.F.R. §1003.14(a) (2008).

On August 5, 2008, Respondent appeared at his scheduled hearing with counsel. Respondent denied all factual allegations and contested the charge of removability contained in

the NTA. To support its charge, the Government submitted a Record of Deportable/Inadmissible Alien ("Form I-213"). The Form I-213 reports that Respondent was arrested on February 7, 2008, at his place of employment and that Respondent freely admitted he was born in Mexico and had no permission to enter or reside in the United States. During his initial hearing, Respondent indicated his intention to file a Motion to Suppress the Form I-213.

On October 6, 2008, Respondent, through counsel, filed a Motion to Terminate Proceedings and, Alternatively, to Suppress Evidence with supporting affidavits and documents. On November 6, 2008, the Government filed an Opposition to Motion to Terminate and Motion to Suppress. On November 21, 2008, Respondent filed a Reply to the Government's Opposition.

On November 19, 2008, Respondent, through counsel, filed a Motion to Continue. He asked the Court to continue his hearing originally scheduled for December 9, 2008, because Respondent's co-counsel was scheduled to appear before the Ninth Circuit on the same day as Respondent's hearing. The Court held a hearing on the motion on November 20, 2008, and granted Respondent's motion. Respondent's hearing was reset to January 13, 2009.

On December 19, 2008, the Government filed a copy and certified translation of Respondent's birth certificate from the state of Puebla, Mexico with a sworn declaration from ICE Special Agent Gustavo Valerio, the agent who obtained the birth certificate. On December 30, 2008, Respondent filed an objection to the Government's submission, arguing that if the Government used information from Respondent's interrogation to obtain the birth certificate, then the document is a "fruit" of the illegal arrest and interrogation that must be suppressed.

On January 13, 2009, Respondent was present with counsel at his scheduled hearing. The Court verified that the government is not seeking administrative closure of these proceedings pending any district court action by Respondent. In addition, the government confirmed that the government's opposition to Respondent's motions does not challenge the alleged facts by Respondent. The case was then taken under submission for issuance of a written decision.

On January 15, 2009, the Government filed a brief in support of the filing of documents. The Government states that to obtain Respondent's birth certificate, the Government relied on information concerning Respondent's name, date of birth, and place of birth. According to the Government, all of these facts are related to Respondent's identity which cannot be suppressed in removal proceedings according to INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). The Government therefore contends that the birth certificate is sufficient evidence to prove alienage.

II. Statement of Facts

As an initial matter, the Court notes that the Government has explicitly conceded that they do not dispute the facts as alleged by Respondent in his motions. Therefore, in the absence of any evidence to the contrary and in light of the government's representations, the Court will

make the following findings of fact and give them appropriate weight in the adjudication of Respondent's motion:¹

On February 7, 2008, agents from the U.S. Department of Homeland Security, Immigration and Customs Enforcement ("ICE") entered the premises of Micro Solutions Enterprise ("MSE") factory in Van Nuys, California pursuant to a search warrant issued on February 5, 2008, by U.S. Magistrate Judge Jeffrey W. Johnson in U.S. District Court, Central District of California. The search warrant authorized any special agent of ICE or any other authorized officer to search the premises of MSE for all documents and records relating to the employment of individuals at MSE from January 1, 2000, to the present. On the same day the search warrant was issued, three criminal complaints were filed in the U.S. District Court, Central District of California, alleging that three MSE employees made materially false representations or presented false documents to illegally obtain employment.²

Around 3:30 p.m. on the day of the raid, approximately 100 armed and uniformed ICE agents entered MSE from various entrances and ordered all workers to stop working and move into a large hallway. The ICE agents were visibly armed with guns and carried plastic handcuffs. ICE agents did not allow any person to talk on his or her cell phone and shouted at those who attempted to do so. All visible exits from the factory were manned and blocked by ICE agents. Eyewitnesses observed an agent handcuff one man who tried to leave the premises. The agents then separated the women from the men. The women were escorted into the cafeteria and the men were ordered to gather in a large hallway that led to the cafeteria.

After separating the men from the women, ICE agents ordered the men to form two distinct lines - one line for United States citizens or legal permanent residents and one line for those who had no permission to work in the United States. The agents took those who claimed to be citizens or permanent residents out of Respondent's sight. Respondent remained in the hallway.

ICE agents ordered the men in the hallway, including Respondent, to stand against the wall. The agents conducted a pat down of each man and during the search, they took Respondent's wallet. Respondent states that the officers were "very rude, shouting at us. When

¹ The Court's findings of fact are derived from Respondent's supporting documents submitted in support of his Motion, including Respondent's declaration (Tab B), the declaration of Maria Tavares (Tab C), the declaration of Denise Shippy (Tab D), the declaration of Claire Cox (Tab E), the declaration of Michael E. Whitehead (Tab F), the declaration of Joseph Viramontes (Tab G), the declaration of Irina Demidova (Tab H), the search warrant issued by the U.S. District Court (Tab K), criminal complaints filed against three MSE employees (Tab J), and the declaration of Pedro Vasquez (Tab Q).

² In his motion, Respondent states that ICE obtained authorization to arrest approximately 8 people at MSE on criminal charges; however, he only submits criminal complaints for three MSE employees in support of his motion.

anyone tried to talk, the guards would shout at us, and tell us to be quiet.” See Respondent’s Motion to Terminate, Tab B.

After conducting the pat downs, the agents systematically questioned each man in line while simultaneously placing them in handcuffs. Two ICE agents placed Respondent in plastic handcuffs and asked Respondent his name, where he was from, his date of birth, and how long he had worked at the factory.

Agents then moved Respondent and others to a different hallway, during which time Respondent remained handcuffed. Agents again questioned Respondent regarding his name and country of origin. By this time, Respondent states he had been detained for about an hour. Respondent also states that ICE agents refused to let people use the bathroom during this time.

ICE agents took groups of people to prearranged buses parked outside of the factory. Before boarding the bus, an officer took Respondent’s photograph and again asked him questions regarding his name and country of origin. Respondent then waited on the bus, handcuffed, for over an hour. The bus took Respondent to downtown Los Angeles where ICE agents then ordered him off the bus, searched him again, and took off his handcuffs.

Respondent was held in a large room with other workers. He states that by the time he arrived at the detention facility, he was hungry and thirsty. Workers were allowed to use the bathroom for the first time at this facility, which Respondent approximates was the first time anyone was allowed to use the bathroom in six hours. Respondent was not provided any water, so he drank from a faucet in the bathroom. He slept on the concrete floor of the holding cell, and in the middle of the night, he was called by ICE agents for another interview. At this time, agents took his photograph and fingerprints. They questioned him about his name, date of birth, immigration status, and criminal history. Respondent states that no agent or officer ever advised him of any rights, never told him that he had the right to an attorney, nor told him that whatever he said could later be used against him. Respondent states that he was never given any advisals at any time during his time at the factory or at the detention facility.

After the interrogation, Respondent returned to his cell. Later, the next day, Respondent was questioned by a Latina officer who asked him questions similar to those he had already been asked, and similarly she did not advise him of any of his rights. After approximately 18 hours from when Respondent first encountered agents at the factory, agents brought Respondent a small portion of food. A few hours later, he received a larger meal. After several more hours, officers told Respondent he could leave and gave him papers to sign for his release. According to Respondent, he was released around 1:00 a.m. on Saturday, February 9, 2008.

III. Arguments

A. Respondent’s Motion to Terminate

In his motion, Respondent asks the Court to terminate proceedings due to the regulatory violations committed by the Government during Respondent’s arrest and interrogation.

Alternatively, Respondent asks the Court to suppress all evidence obtained as a result of his arrest and interrogation, including the Form I-213, because all evidence was obtained in violation of the Fourth and Fifth Amendments. Finally, Respondent asks that if the Court finds that Respondent has established a *prima facie* case but finds that the motion cannot be resolved, that the Court schedule an individual evidentiary hearing on the motion or order the Government to produce evidence of other potential violations. Respondent requests these remedies on the following bases:

1. Termination for Regulatory Violations

Respondent first argues that his case should be terminated because the Government detained Respondent without reasonable suspicion or an arrest warrant in violation of 8 C.F.R. § 287.8(b) & (c). Under these regulations, an immigration officer may only detain a person in a manner that does not restrain the individual's freedom, if the officer has reasonable suspicion based on articulable facts that the individual is unlawfully present in the United States. Also, an immigration officer may not arrest an individual without an arrest warrant unless the individual is likely to escape before a warrant can be obtained. Here, Respondent argues that ICE agents detained every worker in the factory without individualized reasonable suspicion that each person in the factory, including Respondent, was unlawfully present in the United States. Respondent argues that at the time ICE agents entered the factory, his freedom was restrained and he did not feel free to leave. Thus, he argues that ICE officers detained him in violation of 8 C.F.R. § 287.8(b). Also, he argues that ICE officers arrested him without an arrest warrant, even though they could have obtained a warrant as evidenced by the fact that they obtained arrest warrants for approximately 8 workers at the factory prior to the raid. He also argues that there was no indication that he was likely to escape; therefore, he was arrested in violation of 8 C.F.R. § 287.8(c).

Second, Respondent argues that his case should be terminated because Respondent was unlawfully interrogated by ICE officers in violation of 8 C.F.R. § 287.3. He argues that, pursuant to this regulation, ICE officers were required to provide certain notices and advisals to him upon arrest, including 1) the reasons for his arrest, 2) the right to be represented by an attorney at no expense to the government, 3) a list of free legal service providers, and 4) that any statement may be used against him in subsequent proceedings. Respondent argues that he was arrested either at the point he was handcuffed at the factory or at the time he was transported by bus to the detention facility. Regardless of when he was arrested, Respondent maintains that he was never given any of the above required advisals at any time prior to any interrogation. He thus asserts that the Government violated 8 C.F.R. § 287.3 by failing to provide him the advisals required by regulation.

Due to these violations, Respondent argues that his case should be terminated according to the Board of Immigration Appeal's ("Board") decision in Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980). In its decision, the Board held that regulatory violations require termination when the regulation's purpose is to benefit the alien and a violation prejudices the interests of the alien protected by the regulation. *Id.* at 328. Also, the Board held that prejudice to the alien may be presumed when compliance with the regulation is mandated by the Constitution. *Id.* at 329. Here, Respondent argues 1) that the purpose of 8 C.F.R. § 287.8(b) &

(c) and 8 C.F.R. § 287.3 is to benefit Respondent because they serve to protect him from illegal arrest and interrogation, and 2) Respondent was prejudiced by violations of such regulations because he would not have answered the officers' questions or submitted to an interrogation if he knew he did not have to do so. Alternatively, Respondent suggests that prejudice in his case should be presumed because the regulations at issue closely mirror the framework and purpose of the Fourth and Fifth Amendments. Therefore, he asks the Court to terminate his case pursuant to the holding in Garcia-Flores.

2. *Suppression for Egregious Constitutional Violations*

Alternatively, Respondent asks the Court to suppress all evidence derived from the illegal arrest and interrogation due to the egregious Constitutional violations that occurred in his case.

First, Respondent argues that all evidence obtained as a result of his detention should be suppressed because ICE agents egregiously violated his Fourth Amendment rights. Respondent argues that ICE agents violated his Fourth Amendment rights by detaining him without reasonable suspicion. Overall, Respondent asserts that the Government egregiously violated his rights because the violations were deliberately pre-meditated and executed in a manner in which reasonable ICE agents would not have believed their actions were lawful under the Fourth Amendment.

Second, Respondent argues that all evidence obtained as a result of his interrogations at the detention facility should be suppressed because Respondent's statements were not voluntary and because ICE's conduct "shocks the conscience." Specifically, he argues that because he was held for 18 hours without food or water and forced to sleep on a cold floor, "his will would have been overborne by any agent attempting to elicit any statement from him," and thus any statements he gave were involuntary. He asks the Court to suppress all evidence obtained after "the government engaged in this heinous abuse."

In the event that the Court suppresses all evidence obtained as a result of Respondent's arrest and interrogation, including but not limited to the Form I-213, Respondent asks the Court to terminate his case on the ground that the Government would then fail to meet its burden to prove Respondent's removability by clear and convincing evidence.

3. *Request for Evidentiary Hearing or Order for Production of Documents*

Finally, Respondent requests that if the Court finds that Respondent has made a *prima facie* case but that material disputes of fact prevent resolution of this motion, that the Court schedule an individual evidentiary hearing on the motion. Also, if the Court is unable to resolve the motion on the grounds set forth therein, Respondent asks the Court to use its subpoena power to compel the Government to produce evidence concerning other potential violations that may have occurred that would justify suppression or termination in Respondent's case.

B. Government's Opposition

The Government opposes Respondent's motion to terminate on various grounds. First, the Government asserts that the Court should not fully consider the merits of Respondent's motion to suppress evidence, because the federal courts are in the best position to do so. The Government argues that any in-depth Constitutional issues involving application of the Fourth Amendment's exclusionary rule is best left to the federal courts. Also, the Government asserts that Respondent has already initiated legal action in the federal court, and that it is highly likely that the same issues will arise during litigation in federal district court; thus, the Government argues that Respondent should not be allowed to have "two bites at the apple."

Regarding the Form I-213 pertaining to Respondent, the Government argues that the I-213 comports with Fifth Amendment's basic standards of fairness and equity, establishes Respondent's alienage, and sustains the ground of removability against him. The Government argues that, under current case law, admission of the I-213 into evidence would be probative and fundamentally fair. Also, according to the Government, the I-213 is inherently trustworthy because it was prepared by government agents in the ordinary course of business. The Government maintains that Respondent has not argued that the information contained therein does not relate to him or is erroneous; therefore, the document is admissible. Also, the Government argues that Respondent has not sufficiently shown that the information contained in the I-213 was obtained by coercion or duress.

In addition, the Government argues that removability has been established through evidence sufficiently attenuated from any Fourth Amendment violation. It argues that a respondent's identity is not suppressible; therefore, the Government is not precluded from using Respondent's identity to investigate evidence independent of his arrest.

Further, the Government argues that Respondent's detention at the MSE factory was not illegal. According to the Government, ICE agents entered the MSE factory lawfully with a federal search warrant, and after 20 minutes, asked men and women to separate into separate lines. The Government argues that during those 20 minutes, Respondent does not claim that he was handcuffed or told that he was not free to leave. The Government's position is that Respondent identified himself as being an illegal worker by placing himself in the line for those who do not have legal authorization to work in the United States. At that point, the Government contends ICE agents had legal authority to detain Respondent pursuant to 8 C.F.R. § 287.8(b)(3). The Government therefore contends that ICE agents did not violate any federal regulations; however, even if the Court finds that the ICE agents violated 8 C.F.R. § 287.8(b)(3), the Government argues that Respondent has failed to show that he suffered prejudice as a result of the violation so as to merit termination of his case pursuant to Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980). Similarly, the Government contends that, based on the ICE agents' actions, Respondent was not detained in violation of the Fourth Amendment. However, the Government argues that if the Court finds that a Constitutional violation occurred, the exclusionary rule should not apply in immigration proceedings. In the alternative, if the Court finds that the exclusionary rule does apply in limited circumstances, the Government contends that Respondent has failed to establish that he suffered any egregious Constitutional violations that warrant employment of the exclusionary rule.

Finally, the Government argues that Respondent has failed to show that ICE illegally interrogated Respondent in violation of 8 C.F.R. 287.3(c) or the Fifth Amendment. According to the Government's interpretation of 8 C.F.R. 287.3(c), a respondent is not entitled to any advisals until he or she is arrested *and* placed in removal proceedings. Since Respondent was not formally placed into removal proceedings until after he was questioned at the detention facility, the Government contends that no advisals were required by the regulations. Also, the Government argues that Respondent has not established that his statements were given involuntarily in violation of the Fifth Amendment.

Based on the foregoing, the Government asks the Court to deny Respondent's Motion to Terminate and Motion to Suppress.

C. Respondent's Reply

In response to the Government's Opposition, Respondent first argues that it is proper for the Immigration Court to consider the merits of Respondent's claims, including the Constitutional claims. Respondent contends that even though he has initiated a legal action in federal district court, the nature of the action is to seek production of documents pursuant to a Freedom of Information Act ("FOIA") request. Respondent states that any federal litigation in his case will not lead to adjudication of Constitutional issues raised in this case, such as the legality of his detention or interrogation; therefore, it is appropriate for this Court to consider these issues as they pertain to Respondent's immigration case.

Also, Respondent maintains that ICE agents violated 8 C.F.R. 287.8(b) by detaining him absent any individualized reasonable suspicion that he was unlawfully present in the United States. Respondent argues that the Government cited to no legal authority to support its position that ICE can detain hundreds of workers based only on a warrant to search for documents and arrest 8 unrelated individuals. Respondent reiterates his position that he was detained at the moment ICE agents entered the MSE factory, blocked all exits, ordered all workers to stop working, and restricted all bathroom or cell phone use.

Further, Respondent contends that the Government's interpretation of the advisals requirement under 8 C.F.R. 287.3(c) is incorrect and in plain contradiction to the wording of the regulation. According to Respondent's interpretation, advisals are required upon arrest of an individual – not after he or she has been formally placed in removal proceedings as the Government contends. To do so would render a nullity the purpose of the regulations. Also, Respondent opposes the Government's contention that Respondent has not shown that the conditions he faced during detention rendered his statements involuntary. To the contrary, Respondent argues that being held for 18 hours with no food and water and being forced to sleep on a concrete floor during winter is coercive in nature and in violation of due process.

In conclusion, Respondent asks the Court to terminate proceedings or suppress all evidence due to the Government's regulatory and constitutional misconduct.

IV. Law and Analysis

The Court finds it proper to adjudicate Respondent's motion to terminate and suppress on the merits, despite the Government's contention that the federal courts are the appropriate forum for such arguments. See e.g., de Rodriguez-Echeverria v. Mukasey, 534 F.3d 1047 (9th Cir. 2008) (finding violations of the regulations by ICE agents, but remanding the case to the BIA and the immigration court to for adjudication of the motion to suppress in the first instance). Moreover, although Respondent has initiated action in federal court, the nature of his claim in federal court is substantially different than his arguments before this Court. The district court action seeks information under the Freedom of Information Act as the procedures that the government followed in planning and initiating the raid at the factory. Therefore, the Court finds that it is proper for it to consider Respondent's motions before the Court.

A. Motion to Terminate

The Board has held that removal proceedings may be "invalidated" or terminated when the Government violates its own regulations and infringes on the rights of a respondent. Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980). In Garcia-Flores, the respondent was arrested without a warrant at a food processing plant and interviewed by Immigration and Naturalization Service ("INS") agents. The agent who interviewed the respondent testified that he never advised the respondent that she had the right to an attorney at any point during the interview. The Board found that the respondent's interview was subject to 8 C.F.R. 287.3 (1977), which required agents to advise aliens arrested without a warrant of the reason for their arrest, their right to be represented by counsel, and that any statement they make may be held against them. Id. at 326. The Board observed that "an 'agency of the government must scrupulously observe rules, regulations, or procedures it had established' and that when 'it fails to do so, its action cannot stand and courts will strike it down.'" Id. at 327 (quoting U.S. v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969)). Also, it stated that when "the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. . . even where the internal procedures are possibly more rigorous than otherwise would be required." Id. at 328 (citing Morton v. Ruiz, 415 U.S. 199, 235 (1974)).

However, the Board also recognized that not every regulatory violation should result in termination of proceedings. Id. at 327 ("A rigid rule has not emerged, however, under which every violation of an agency regulatory requirement results in the invalidation of all subsequent agency action or the exclusion of evidence from administrative proceedings."). Therefore, the Board adopted a two-prong test to determine if a regulatory violation warrants termination of proceedings. First, the regulation in question must serve the purpose of benefitting the alien. Id. at 328. Second, the "regulatory violation will render the proceeding unlawful 'only if the violation prejudiced interests of the alien which were protected by the regulation.'" Id. (quoting U.S. v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979)). Regarding the second prong, the Board stated that an alien must specifically demonstrate that the violation harmed the alien's interests in such a way as to affect potentially the outcome of his deportation proceeding. Id. at 328-29.

Here, Respondent contends that the Government violated 8 C.F.R. § 287.8(b) & (c) and 8 C.F.R. § 287.3. The Court will thus consider the un rebutted evidence set forth by Respondent, in light of the controlling regulations and the two-prong test set forth in Matter of Garcia-Flores, to determine if termination of proceedings is appropriate.³

1. 8 C.F.R. § 287.8(b) & (c)

Respondent argues that proceedings should be terminated because the Government violated 8 C.F.R. § 287.8(b) & (c) by illegally detaining Respondent without reasonable or individualized suspicion that he was unlawfully in the United States. The regulation states in relevant part:

(b) *Interrogation and detention not amounting to arrest.* (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.

© *Conduct of arrests.* (2) *General Procedures.* (I) An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States.

(ii) A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.

³ The Court recognizes that the Board's decision in Matter of Garcia-Flores was published in 1980. The Board has not issued a decision regarding the scope and purpose of 8 C.F.R. § 287.3 since that time. The Ninth Circuit similarly recognized and addressed this fact in de Rodriguez-Echeverria v. Mukasey, 534 F.3d 1047 (9th Cir. 2008). In that case, the Ninth Circuit remanded to the Board for guidance on how to interpret 8 C.F.R. § 287.3 "given the considerable changes to the law since the BIA last interpreted this regulation and the apparent disagreement among government agencies as to what § 287.3 requires." de Rodriguez-Echeverria, 534 F.3d at 1052. Here, although the Court recognizes that statutory changes have been made to 8 C.F.R. § 287.3 since Matter of Garcia-Flores, the Board's decision is still controlling law as to the issue before this Court, namely whether Government violation of its own regulation warrants invalidation or termination of proceedings. Until the Board issues further guidance on this issue, the Court will adhere to the prevailing case law.

8 C.F.R. § 287.8(b) & (c).

Therefore, under the regulation, an immigration officer has the right to question an individual as long as the officer does not restrain the freedom of an individual to walk away. 8 C.F.R. § 287.8(b); see also Orhorhanghe v. INS, 38 F.3d 488, 494 (9th Cir. 1994). However, if an encounter rises to the level of a detention or “seizure,” the officer must have a reasonable, articulable basis for his/her actions. The Ninth Circuit has held that to justify the seizure, the agent must “articulate objective facts providing a reasonable suspicion that [the subject of the seizure] was an alien illegally in this country.” Orhorhanghe, 38 F.3d at 497. In other words, when ICE agents detain an individual for questioning, there must be individualized suspicion that the individual is illegally in the United States. See Martinez v. Nygaard, 831 F.2d 822, 827 (9th Cir. 1987) (“Our own cases hold that to detain a worker short of an arrest, an INS officer must have an objectively reasonable suspicion that the particular worker is an illegal alien.”).

To determine whether a detention or seizure has occurred, the crucial test is whether “taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’” Id. at 494 (citing Florida v. Bostick, 501 U.S. 429). The Ninth Circuit has articulated several factors to be considered, including; (a) whether the individual was faced with the presence of several officers; (b) whether the individual’s physical access to an exit was limited; © whether the officer displayed or otherwise referenced his/her weapon; (d) whether the encounter occurred in a private-nonpublic setting; (e) whether the officers acted an authoritative manner; (f) whether the individual was informed of his rights, or warned that he/she had the freedom to leave or decline to answer the officer’s questions; and, (g) whether the individual was provided misinformation, or led to believe that he was not free to leave. Id. at 494-96.

In INS v. Delgado, 466 U.S. 210 (1984), the Supreme Court considered whether “factory surveys” conducted by INS agents constituted a “seizure” within the meaning of the Fourth Amendment. In Delgado, the respondents claimed that their Fourth Amendment rights were violated when armed INS agents entered their place of employment and systematically began asking each worker several questions regarding his or her citizenship. 466 U.S. at 212-13. INS agents positioned themselves at the building’s exits, and although the agents were armed, no weapons were ever drawn. Id. at 212. Also, during the survey, “employees continued with their work and were free to walk around within the factory.” Id. at 213. Based on these facts, the Supreme Court held that the entire work force was not “seized” as a collective unit. The Court noted that the manner in which the respondents were questioned “could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory.” Id. at 220-21. The Court also held that “unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention.” Id. at 216.

Similarly, in LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985), the Ninth Circuit considered whether INS farm and ranch checks of migrant housing units constituted a “seizure”

under the Fourth Amendment. The Ninth Circuit held that Fourth Amendment seizures occurred when immigration officers “cordoned off migrant housing during early morning or late evening hours, surrounded the residences in emergency vehicles with flashing lights, approached the homes with flashlights, and stationed officers at all doors and windows.” *Id.* at 1321. The agents then proceeded house-to-house, conducting searches without voluntary consent of the residents. *Id.* The Ninth Circuit found that, unlike in *Delgado* where workers were free to move around the factory and were only asked a few questions, the INS agents in *LaDuke* obtained no warrants prior to the raid, had no particularized suspicion that any particular housing units contained illegal aliens, and created a intimidating atmosphere characterized by a substantial showing of force and authority. *Id.* at 1329-30. Also, the Ninth Circuit found it significant that the raids took place in the respondents’ homes as opposed to at their workplace because at a person’s home, there is a higher expectation of privacy. *Id.* at 1328-29. For these reasons, the Ninth Circuit held that this routine practice by INS constituted seizure of the entire housing unit. *Id.* at 1328.

In the present case, Respondent claims that he was detained at the time ICE agents entered the MSE factory, blocked the exits, and ordered all workers to cease working. The Government argues that the ICE agents had a lawful right to be in the factory and did not restrain any person’s freedom for approximately 20 minutes.⁴ The Government argues Respondent subsequently self-identified himself as a person with no authorization to work in the United States, giving agents the legal authority to detain or arrest him in accordance with the regulations.

According to Respondent, approximately 100 ICE agents entered the MSE factory around 3:30 p.m. and ordered all workers to stop working. The agents were visibly armed. They physically blocked all points of entry and exit within the factory, and ordered all workers into a large hallway. According to eyewitnesses, the agents yelled at anyone who attempted to use a cell phone and handcuffed one man who tried to leave the premises. The agents restricted all workers’ movement, separated the men from the women, and prevented any person from using the bathroom. In his declaration, Respondent stated that when the agents shouted at him to stop working and ordered him into the large hallway, “It was obvious that I could not leave.” *See* Respondent’s Motion, Tab B, Para. 7. He also stated, “As I walked out, some of the workers were crying, while other agents shouted at people to stop working and move out to the hallway. It seemed as though nearly all of the workers in the factory were placed in this hallway.” *Id.* at para. 8. Maria Tavares, an employee who was present at the MSE factory on the day of the raid, stated in her declaration that when she and other women were led into the cafeteria, “the agents started screaming at us and treating us more harshly. The [sic] told us ‘don’t you understand, you have to get in line, you can’t go anywhere.’” *See* Respondent’s Motion, Tab C, Para. 5. Ms. Tavares also stated that agents told them that they had to answer their questions and say what country they were from or the agents would pick a country for them and could arrest them for up

⁴ The government’s assertion here is in conflict with Respondent’s factual allegations, and has not been supported by evidence. *See Sembiring v. Gonzales*, 499 F.3d 981, 984 (9th Cir. 2007) (“statements in motions are not evidence and are, therefore, not entitled to evidentiary weight.”).

to 30 days. Id. at para. 6. Other declarants stated that the agents loudly issued commands, had their hands on their holstered weapons, and told every worker where to go or where to stand. See e.g. Respondent's Motion, Tab G, Para. 6 & 7. The Government has not offered any evidence to rebut Respondent's version of the facts. Therefore, based on Respondent's undisputed account and the undisputed accounts of others who submitted declarations in support of his motion, the Court finds that Respondent was detained in violation of 8 C.F.R. § 287.8(b).

First, the Court finds that Respondent was detained at the time ICE agents entered the MSE factory, blocked all exits, ordered all workers to stop working, and forcefully guided all workers into a large hallway, thereby restricting their movement within the factory. Under these circumstances, the Court finds that a reasonable person would not feel free to leave. The course of action taken by INS agents upon entry to the factory would have "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." See Orhorhanghe, 38 F.3d at 494. The Court finds it significant that 1) approximately 100 agents entered the factory, 2) the agents were in uniform and visibly armed, 3) the agents blocked all exits to the factory, 4) no evidence suggests that agents initially informed any person that they had the right to leave, and 5) the agents spoke and behaved in an authoritative and forceful manner. See Orhorhanghe, 38 F.3d at 494 (specifying the relevant factors to consider to determine if a seizure occurred).

Unlike the workers in Delgado, Respondent was not free to move around the factory while ICE agents systematically questioned all individuals. Instead, he was ordered to stop working and move into a designated area of the factory by armed individuals who shouted orders in an authoritative, forceful, and intimidating manner. Although in the present case, the raid did not occur at a private home in early morning or late evening as in LaDuke, the Court finds that the facts of Respondent's case are more akin to the facts in LaDuke than those in Delgado. As in LaDuke, all points of entry or exit were cut off to Respondent and the manner in which the ICE agents conducted their sweep was sudden, intimidating, and forceful so that a reasonable person would not believe they had any option but to comply with an agent's orders. Just as the Ninth Circuit in LaDuke held that the circumstances of the encounter were so intimidating so as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, so here the Court finds that the circumstances surrounding the ICE raid, as recounted by Respondent and other declarants, were such that Respondent's freedom of movement was restrained and a reasonable person would not have felt free to leave. Therefore, the Court finds that Respondent was detained as defined by prevailing case law.

Second, the Court finds that Respondent's initial detention was illegal. Under the regulations, an immigration officer may briefly detain an individual for questioning if the officer has a reasonable suspicion, based on specific articulable facts, that the person is illegally in the United States. 8 C.F.R. § 287.8(b). The officer's suspicions must be particularized towards each individual worker whom he or she seeks to detain. See Orhorhanghe, 38 F.3d at 497; Nygaard, 831 F.2d at 827. Here, there is no evidence that ICE had a warrant for Respondent's arrest or any other pertinent information regarding Respondent's immigration status. Nor is there any evidence that ICE agents had any particularized reason to suspect that Respondent, as an individual apart from all other workers in the factory, was in the United States illegally. Instead,

ICE agents entered the factory and ordered all individuals to stop working and gather in a large hallway, regardless of their citizenship or immigration status. After detaining all individuals, agents then asked all workers to self-identify themselves as citizens, legal permanent residents, or those without any work authorization. By making this request, ICE agents demonstrated that they possessed no individualized suspicion regarding the status of any particular worker. The agents had to rely on the workers themselves to indirectly communicate their immigration status, and this did not take place until after they had been detained by ICE. This practice is in violation of 8 C.F.R. § 287.8(b); thus, the Court finds that ICE violated its own regulation when it detained Respondent without reasonable suspicion that he was in the United States unlawfully.⁵

2. 8 C.F.R. § 287.3

In addition, Respondent argues that his case should be terminated because ICE agents failed to provide him the requisite advisals in violation of 8 C.F.R. § 287.3©, which states in relevant part:

© *Notifications and information.* Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services . . . The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

The regulations also state that when an officer makes a warrantless arrest, an officer must adhere to the procedures set forth in 8 C.F.R. § 287.3(c). 8 C.F.R. § 287.8(c)(2)(iv).

In deRodriguez-Echeverria v. Mukasey, 534 F.3d 1047 (9th Cir. 2008), the Ninth Circuit addressed the issue of when advisals must be given to an alien. In that case, the respondent, a legal permanent resident, was stopped by Customs and Border Patrol agents as she attempted to enter the United States from Mexico. *Id.* at 1048-49. She was escorted into a building, fingerprinted, photographed, and made to remove her belt and shoelaces. *Id.* at 1048. After spending the night in a locked room, the respondent was taken to an office to give her declaration. *Id.* At her immigration hearing, the respondent claimed that immigration officers never informed her that she had a right to an attorney or that her statements could be used

⁵ The Court recognizes that it is a reasonable assumption that in a factory setting, there may be illegal workers present. However, as stated in the Court's legal analysis, generalized reasonable suspicion is insufficient to justify detention of an entire workforce. The Court finds that to allow such a sweeping detention of all employees of a factory would be to promote the policy that unlawful detention of citizens is permissible so long as the odds are good that a percentage of those detained will in fact be illegal workers. The Court does not find a regulatory or Constitutional basis for such a policy.

against her, and she asked the Court to suppress the Form I-213 which contained any statements she made to officers during her interrogation. *Id.* at 1050. The Ninth Circuit found that the respondent's overnight detention at the border constituted a warrantless arrest because her freedom to walk away was clearly restrained. *Id.* at 1051. After finding that the respondent had been arrested rather than merely detained, the Ninth Circuit held that "the arresting officers were accordingly obligated to comply with the requirements of § 287.3(c)." *Id.* However, the Ninth Circuit remanded the case to the Board to determine "whether § 287.3(c) requires the officers to warn [the respondent] prior to interrogation that she had a right to counsel and that her statements could be used against her." *Id.*

Similar to the respondent in de Rodriguez-Echeverria, Respondent was taken by bus in handcuffs to downtown Los Angeles, where he was placed in a cell and held. The Court thus finds that Respondent was under warrantless arrest and was therefore entitled to the advisal of his rights pursuant to 8 C.F.R. § 287.3.

Respondent claims, and the Government has not disputed, that no ICE agent ever advised Respondent of the reason for his arrest, his right to hire an attorney, or that any statement he made could be used against him in subsequent proceedings. The Government argues that Respondent, even if placed under arrest, was not entitled to the requisite advisals because the regulation states that advisals are only required once an alien is placed in removal proceedings. Because Respondent was not formally served the NTA until March 17, 2008, the Government argues that ICE agents were not required to advise him of his rights during detention. Respondent argues that to interpret the regulation in such a manner is impractical because "the regulation would serve no purpose if it required officers to tell suspects that their statements may be used against them *after* the statements have been taken." *See* Respondent's Motion, page 21. Neither the Board nor the Ninth Circuit has published a decision clearly interpreting 8 C.F.R. § 287.3(c) as to when the advisals are required. In de Rodriguez-Echeverria, the Ninth Circuit remanded to the Board to determine whether advisals must be given prior to interrogation. 534 F.3d at 1051. The Board has yet to publish an authoritative decision on this issue.

Therefore, in the absence of settled law, the Court will adopt an interpretation of the regulation based on its plain meaning and practical purpose. Based on the language of the regulation, the Court finds a reasonable interpretation to be that unless an alien is subject to expedited removal (and is thus subject to placement in removal proceedings in the alternative), any alien who is arrested without a warrant is entitled to the requisite advisals prior to being interrogated. The Court agrees with Respondent that to advise an alien that any statement he makes may be used against him in subsequent proceedings would afford no protection to the alien if that advisal is not required until after he has already been questioned or interrogated. Thus, the Court finds that Respondent was entitled to the advisals set forth in § 287.3(c) after his arrest but before his interrogation. The Court therefore finds that ICE violated its own regulation when ICE agents failed to advise Respondent of his rights at any time while he was detained or interrogated.

The Court notes that, in this case, it may be irrelevant whether advisals are required before interrogation as Respondent contends or upon service of the NTA as the Government argues. Here, there is no evidence that Respondent was given advisals at *any* time. The NTA

was sent to Respondent via certified mail over one month after he was released from detention, and while the NTA informs Respondent of the charge against him and that he has the right to hire an attorney, it does not contain a warning that any statement made by Respondent can be used against him in later proceedings. Thus, according to either interpretation of the regulation, the Court finds that ICE violated 8 C.F.R. § 287.3(c) in Respondent's case due to its failure to provide him complete advisals at any time.

3. *Termination due to Regulatory Violations*

Although the Court has found that ICE violated both 8 C.F.R. §§ 287.3(c) & 287.8(b) in Respondent's case, the Board has held that regulatory violations, standing alone, do not automatically warrant termination of proceedings. See Matter of Garcia-Flores, 17 I&N Dec. 325, 327 (BIA 1980). To determine whether termination is appropriate, the Court must consider 1) whether the regulations serve a purpose of benefitting Respondent, and 2) whether the violations prejudiced the interests of Respondent which were protected by the regulations. Id. at 328.

Here, Respondent contends and the Government does not dispute that both § 287.3(c) & § 287.8(b) serve a purpose of benefitting Respondent. Section 287.8(b) serves to protect individuals from unlawful detention in instances where an officer does not have either an arrest warrant or any reasonable suspicion based on articulable facts that may serve as a lawful basis for even a brief detention. Section 287.3(c) similarly serves to protect individuals from unlawful or coercive interrogation tactics by informing them that any statement may be used against them at a later time and that they have the right to hire an attorney. See also Matter of Garcia-Flores, 17 I&N Dec. at 329 ("We are satisfied, however, that 8 C.F.R. 287.3 was intended to serve a purpose of benefit to the alien.").

The Court must then determine whether Respondent has met his burden of proof that he was prejudiced by the Government's regulatory violations. To meet his burden, Respondent must specifically demonstrate that the violation harmed the alien's interests in such a way as to potentially affect the outcome of his deportation proceeding. See Matter of Garcia-Flores, 17 I&N Dec. at 328-29. Respondent states in his declaration, "This agent also did not advise me of any rights, tell me why I was arrested, or let me know that the answers I gave could be used against me. Had I been given this advice at any point, I would not have answered the questions." See Respondent's motion, Tab B, para. 28. Respondent thus contends that he would not have responded to any questions posed by ICE agents if he knew that his statements could later be used against him. This contention is significant, for Respondent was placed in formal removal proceedings based exclusively upon the information Respondent provided to ICE agents during his interrogation. The Form I-213 states:

Perez freely admitted that he was born in Puebla, Mexico on 9/6/1985. Subject stated that he was brought illegally into the U.S. through an unknown place when he was about 9 years old. Subject stated that he does not have any permission to enter or reside in the U.S., nor does he have any applications pending with the U.S. Citizenship and Immigration Services.

As a result, the Form I-213 indicates that the “Disposition” in Respondent’s case was “Warrant of Arrest/Notice to Appear,” thereby placing Respondent in formal removal proceedings. In fact, the factual allegations contained in the NTA closely mirror the information reportedly given by Respondent during his interview, showing that Respondent’s answers to ICE questions served as the basis for his placement in removal proceedings. Moreover, the Form I-213, which the government relies on to meet its burden of proof rests entirely on information obtained from Respondent after the illegal detention, arrest, and interrogation. Thus, as the evidence shows, had Respondent known that his statements could later be used against him, he would not have answered the ICE agents’ questions, thereby changing the government’s decision and ability to place Respondent in removal proceeding or subject him to a finding of removability based solely on his own statements.

In addition, the conditions under which Respondent was placed during his detention and subsequent interrogations demonstrate that Respondent was subjected to an intimidating and coercive environment in which a reasonable person would feel more compelled to provide answers or information that one might not otherwise provide under different circumstances. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973) (holding that a combination of circumstances, such as food or sleep deprivation, length of detention, or absence of counsel, can comprise an inherently coercive environment in which an individual's will may be overborne); Navia-Duran v. INS, 568 F.2d 803, 810 (1st Cir. 1977) (finding that if INS agents had complied with 8 C.F.R. § 287.3, "the atmosphere of coercion would have vanished"); Matter of Garcia-Flores, 17 I&N Dec. at 327 (finding that failure to comply with 8 C.F.R. § 287.3 bears on the question of whether a respondent's statements were given voluntarily). Respondent states that he was held in a cold cell overnight and forced to sleep on the concrete flooring. He was also deprived of food and drinking water for approximately 18 hours. Under these conditions, ICE agents questioned Respondent without informing him the reasons for his arrest or that his statements could be used against him in removal proceedings. In this case, the government’s numerous violations of the regulations, that are intended to protect the interest of Respondent and integrity of subsequent court proceedings, prejudiced the very interests of Respondent that the regulations seek to protect; namely his right to be free from an illegal detention, arrest and interrogation resulting in evidence used against him to meet the government’s burden of proof in removal proceedings. Thus, the Court finds that Respondent was prejudiced by the Government’s violations of the regulations under 8 C.F.R. § 287.3(c) & § 287.8(b).

As a final note, the Court recognizes that any claim of prejudice would be diminished upon evidence that Respondent made statements to ICE agents at any time before his unlawful detention or interrogation that would establish a basis for the charge of removability against him. See Matter of Garcia-Flores, 17 I&N Dec. at 329 (remanding to the Immigration Judge to determine whether evidence supporting a finding of deportability arose prior to the apparent regulatory violation). However, here, neither Respondent nor the Government has submitted any evidence to show that the charge of removability can be independently established apart from Respondent’s statements made after his illegal detention or during his illegal interrogation. The Government has provided a copy of Respondent’s birth certificate, which the Government admits was obtained using information such as Respondent’s birthday and place of birth.


However, the Court finds that these facts were also obtained as a result of Respondent's unlawful detention and interrogation and fall outside the scope of "identity" evidence. Lopez-Mendoza, 468 U.S. at 1039 (distinguishing between "body" or "identity" of an alien and information relating to "alienage"). Therefore, the birth certificate cannot serve as independent evidence to establish removability. Thus, the Court finds that Respondent suffered prejudice as a result of the Government's regulatory violations, for all statements and evidence obtained as a result of statements he made after his initial unlawful detention and during an unlawful interrogation served as the basis for placing him in removal proceedings.

The Court therefore finds that the two-prong test set forth in Matter of Garcia-Flores has been met in Respondent's case. 17 I&N Dec. at 328. The Court will grant Respondent's motion to terminate.⁶

ORDER

IT IS HEREBY ORDERED that Respondent's motion to terminate proceedings be GRANTED with prejudice.

DATE: 2/10/2009



A. Ashley Tabaddor
Immigration Judge

⁶ To the extent that Respondent's motion to terminate is granted, the Court finds it unnecessary to address his remaining claims and arguments. See Jean v. Nelson, 472 U.S. 846, 854-55 (1985) (finding that if a case can be resolved by interpreting the relevant immigration statutes or regulations, there is no need to address Constitutional issues).