Yale Law School
Immigration Litigation Roundtable
November 30 – December 1, 2012

Session III:

Litigating Border Issues
May 9, 2012

Tamara Kessler
Acting Officer for Civil Rights and
Civil Liberties
Department of Homeland Security
Office of Civil Rights and Civil Liberties
245 Murray Lane, SW
Building 410
Washington, D.C. 20528

Charles K. Edwards
Acting Inspector General
Department of Homeland Security
Office of Inspector General
245 Murray Lane, SW
Building 410
Washington, D.C. 20528

via Federal Express

Re: Complaint and request for investigation of abuse of power, excessive force, coercion, and unlawful confiscation of property by Customs and Border Protection at ports of entry along the U.S.-Mexico border.

Dear Ms. Kessler and Mr. Edwards:

We write to express serious concerns about abuses committed by U.S. Customs and Border Protection (“CBP”) officials against travelers at ports of entry (“POEs”) on the United States’ border with Mexico. We represent the four southern border affiliates of the American Civil Liberties Union, the ACLU Immigrants’ Rights Project (“IRP”), and the ACLU Human Rights Program (“HRP”) (collectively “ACLU”). The ACLU is a non-partisan, non-profit, nation-wide organization that works daily in courts, communities, and legislatures across the country to protect and preserve the rights and liberties established by the Bill of Rights and state and federal law.

The ACLU has a particular commitment to ensuring that fundamental constitutional protections of due process and equal protection are extended to every person, regardless of citizenship or immigration status. While the federal government has the unquestioned authority to control our nation’s borders and to regulate immigration, it must do so in compliance with national and international legal norms and standards. It is imperative that CBP officials, as employees of the nation’s largest law enforcement agency, are trained in and held to the highest professional law enforcement standards.
A number of very serious incidents have recently drawn public awareness to the conduct of CBP officers at or near the POEs on the U.S.-Mexico border. For example, in May 2010, Anastasio Hernandez-Rojas, a 42-year-old construction worker and father of five died after being beaten and then shocked by a Taser by a group of CBP officers at the San Ysidro POE near San Diego. One online videotape shows bystanders calling on the officers to stop beating Mr. Hernandez-Rojas as he pleads for help; another shows an officer firing a Taser at Mr. Hernandez-Rojas as he lies handcuffed on the ground surrounded by more than a dozen officers. Mr Hernandez-Rojas’ death was ultimately ruled a homicide. In June 2010, Sergio Adrián Hernández Güereca, a 15-year-old boy, was fatally shot by a CBP officer after reportedly throwing rocks at officers near the El Paso POE. Online videotape of the incident is inconsistent with the government’s assertion that the boy was threatening the officers. The Mexican government formally requested an “in depth, impartial and objective” investigation into the deaths and the families of both Mr. Hernandez-Rojas and Adrian Hernandez Güereca have filed lawsuits against the U.S. government.

In addition to these high-profile cases, the ACLU is disturbed by an increase in first-hand reports indicating that CBP officers engage in widespread abuse of travelers at POEs along the U.S.-Mexico border. Specifically, the ACLU has become aware of multiple complaints about incidents at southwest-border POEs involving excessive force; unwarranted, invasive and humiliating personal searches; unjustified and repeated detentions based on misidentification; and the use of coercion to force individuals to surrender their legal rights, citizenship documents, and property. A number of these complaints are recited in detail below, along with the applicable legal framework and a case study on the lack of effective procedures for travelers to seek redress.

---

1 As you know, there are 24 designated land Ports of Entry (“POEs”) on the U.S. – Mexico border, five of which are in California; six in Arizona; two in New Mexico; and eleven in Texas. The California Ports of Entries are: Andrade, Calexico, Otay Mesa, San Ysidro, and Tecate. The Arizona POEs are: Douglas, Lukeville, Naco, Nogales, San Luis, Sasabe. The New Mexico POEs are: Columbus and Santa Teresa. The Texas POEs are: Brownsville; Del Rio; Eagle Pass; El Paso; Fabens; Hidalgo; Laredo; Presidio; Progreso; Rio Grande City; and Roma. The greatest number of crossings occurs in Texas, with more than 80 million passenger/pedestrian crossings reported in 2010, followed by California, with more than 60 million passenger/pedestrian crossings during the same period; Arizona with more than 22 million passenger/pedestrian crossings; and New Mexico with more than two million passenger/pedestrian crossings. See U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, based on data from the Department of Homeland Security, U.S. Customs and Border Protection, Office of Field Operations, http://www.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html.


We request that you promptly investigate these individual allegations of abuse and undertake a comprehensive investigation of POE complaints involving CBP officers to determine whether CBP Office of Field Operations officers are complying with their obligations under the U.S. Constitution, international law, and agency guidelines. We believe that significant changes in CBP training, oversight, and accountability are needed, and we urge you to make recommendations for such changes consistent with your institutional mission in order to prevent further abuses.

I. Individual Complaints of Abuse

A. Abuse of Power and Lack of Due Process

1. Calexico/Mexicali, CA POE: Edith Collins-George

On March 23, 2010, at around 5:30 p.m., Edith Collins-George, a U.S. citizen, drove into the Calexico/Mexicali POE. She was returning from visiting her mother in Mexico where she had also picked up a desk chair for her home. CBP Officer Lopez asked Ms. Collins-George what was in the back of her car and Collins-George told her it was a desk chair. Officer Lopez referred her to secondary inspection.

At secondary, Officer Handy asked Ms. Collins-George for her passport. When Ms. Collins-George gave it to him, he asked her to pull over and park. A canine unit approached and the officer with the canine asked Ms. Collins-George to open her trunk and step out of the car. The officer had the canine enter Ms. Collins-George’s car without permission. The dog grew excited inside the car.

Suddenly, Ms. Collins-George felt a strong pull from behind and her arms go behind her back as handcuffs slipped over her wrists. Another officer had handcuffed Ms. Collins-George and began pushing her into the office. Ms. Collins-George was shocked and could not walk, but the officer kept pushing her to move. Ms. Collins-George kept asking why they were arresting her, growing frustrated when they refused to answer and kept pushing her.

Once inside the office, nobody answered Ms. Collins-George’s questions and officers pushed her into a small room. She became afraid and told the officers that she was an U.S. citizen with rights. “You don’t have rights here,” a different Officer Lopez responded.

In the room, both Officers Lopez and another unknown officer questioned Ms. Collins-George, asking her why she had been in Mexico and what she had brought back. Ms. Collins-George became weak and afraid, and unable to answer any questions, said she had to sit down. Officer Lopez asked Ms. Collins-George if she was taking any medication, but she did not respond. When Ms. Collins-George did not reply, the officers picked her up, pushed her against the wall and searched her body, touching her breasts and genitals. Ms. Collins-George, feeling molested, began crying, and praying.

The officers tried to calm Ms. Collins-George down but she could not stop crying and was no longer able to respond to them. She continued to cry for about an hour. Afterwards,
officers took her out of the room and sat her on a bench, handcuffing her ankle to a pole. Ms. Collins-George asked to speak to a lawyer, but received no response.

Ms. Collins-George sat on the bench for another hour, crying, until an officer approached and told her she could leave. Ms. Collins-George, now outraged, demanded to speak to a supervisor. Officer Handy approached, told Ms. Collins-George they had found nothing in her car, that there was no report, and that she was free to go. Officer Handy turned and walked away without answering any more of her questions.

Frustrated and in pain, Ms. Collins-George drove to the hospital. A doctor told her she had suffered a panic attack. At home, Ms. Collins-George told her husband what happened. He tried calling the POE, but an officer hung up on him when he mentioned his wife’s name. Ms. Collins-George was traumatized by the ordeal and continues to have nightmares about it.

2. El Paso, TX POE: Jane Doe

On July 15, 2011, Jane Doe arrived at the CBP offices at the Ysleta-Zaragoza POE. She was there to meet with Sgt. Felipe Gonzalez, a New Mexico State sheriff, about an ongoing criminal investigation into an alleged sexual assault that had been perpetrated on her by a CBP officer while detained at a fixed checkpoint near Truth or Consequences, NM. The meeting had been arranged in advance with CBP officials at the POE by Sgt. Gonzalez, thus CBP was aware of the nature of the meeting (as Ms. Doe is not able to cross into the United States legally, and Sgt. Gonzalez is prohibited from crossing into Mexico, the POE was the only feasible location for their meeting).

This marked Ms. Doe’s second meeting at the Zaragoza POE. Both times, Ms. Doe had traveled from Chihuahua, Mexico to attend the meetings. The first meeting had occurred on June 8, 2011, during which time Ms. Doe had met with investigators from ICE’s Office of Professional Responsibility (OPR) who were conducting an internal investigation into the alleged assault. That meeting transpired without incident.

On the morning of July 15, 2011, Ms. Doe arrived for a second meeting at the Zaragoza POE. She was accompanied by her husband, aunt and a representative from the ACLU. Ms. Doe sat with her husband and aunt in a waiting room just outside the offices while the ACLU representative notified an officer at one of the service windows of their arrival and the purpose of the visit. Ms. Doe was nervous, both because she was about to have to recount her ordeal in detention and because, since the incident, she felt extremely uncomfortable around CBP officers.

Sgt. Gonzalez arrived a couple of minutes later, and joined them in the waiting room. The CBP officer at the window then notified the ACLU representative that they would have to undergo a “pat-down” prior to entering the offices. When the ACLU representative asked the officer why they had not been searched during their previous visit to the offices on June 8, he responded that there had been a “policy change.” The ACLU representative then notified Ms. Doe that they would all be patted down prior to entering the offices, and Ms. Doe hesitantly nodded her head “okay.” The ACLU representative told her not to worry and assured her that everything would be fine.
Ms. Doe, her relatives, the ACLU representative and Sgt. Gonzalez then entered the CBP offices and were asked to sit in some chairs right near the entrance. At that point, it was made clear that only Ms. Doe and her relatives would be patted-down in a private, enclosed and windowless room adjacent to the main entrance. Ms. Doe began to cry at the thought of being left alone again with CBP officers while they searched her. Roughly six to eight CBP officers stood nearby, surrounding the seated group and staring at them in a menacing fashion, and with their arms crossed. The ACLU representative got up to go over to Ms. Doe and comfort her, but one officer commanded her to “sit back down.”

The ACLU representative tried to intervene on Ms. Doe’s behalf, telling the CBP officer who seemed to be in charge, an older gentleman with gray hair, that Ms. Doe had been the victim of a crime, and asked if they could forego searching her for that reason. He refused. Sgt. Gonzalez then took the same officer aside and told him the nature of the investigation – that he was investigating an alleged sexual assault by a CBP officer – to try to persuade him not to search Ms. Doe. He still refused. The ACLU representative then asked if she could be present during the search. That request was refused as well.

Ms. Doe was taken into a private room by two female Border Patrol officers. Both officers had on reflective sunglasses so that Ms. Doe was unable to see their eyes. They were both much bigger than the petite, five foot Ms. Doe. Ms. Doe was in the room with them for about five minutes. Their demeanor was intimidating. They interrogated her several times about the reason for her visit. They asked her how she had traveled there, and with whom she had traveled. They asked her the same questions over and over again, and told her not to lie to them. They patted her down, searched the inside of her pockets and counted all of the money in her pockets. They made her take off her sneakers and searched the insides. When Ms. Doe finally emerged, tears were streaming down her face. The officers next searched Ms. Doe’s husband and aunt in a similar fashion.

After all three individuals had been searched, they escorted the group to the conference room for their meeting, after which Sgt. Gonzalez escorted Ms. Doe and her relatives back out to the Mexican side of the POE, and they went on their way. Following that meeting, Ms. Doe, traumatized by what had occurred on that day, no longer wanted to proceed with the criminal investigation. She asked Sgt. Gonzalez to close the investigation, which he did.

3. Calexico/Mexicali, CA POE: Hernan Cuevas

Hernan Cuevas is a Chilean businessman who has lived lawfully in the United States in the past and frequently travels here in his current capacity as vice president for the U.S. market for INDURA, a Chilean multinational corporation. On May 19, 2011, he crossed from the United States into Mexico at Calexico, giving his I-94 to CBP Officer Lopez at the POE. The next day, May 20, he sought to return to the United States at Calexico after visiting a prospective client in Mexico. He requested a new I-94 to enter the country on his valid visa and was referred to the secondary inspection area.
At the secondary inspection area, Mr. Cuevas’ car was inspected by a canine unit without incident and he was told to wait for an officer to arrange his entry document. A CBP officer began questioning Mr. Cuevas about his car and inspecting the contents of his car and wallet. The officer threw the contents of Mr. Cuevas’s wallet and other of Mr. Cuevas’s documents into a pile. The officer became visibly frustrated as he failed to find anything suspicious and began pulling up the carpets and liners of Mr. Cuevas’ car. Mr. Cuevas told the officer that he was damaging the car and asked to speak to a supervisor. In response, the officer handcuffed Mr. Cuevas. Mr. Cuevas tried to reason with the officer, telling him that his actions were completely unnecessary given that Mr. Cuevas was cooperating and had only requested to speak to a supervisor to file a complaint. The officer told him that he was moving him to a “secure facility” and took him to what appeared to be an interrogation room.

In the interrogation room, the officer strip searched Mr. Cuevas. The officer told Mr. Cuevas this was the “normal procedure” because he believed that he was trying to “enter the country illegally.” He then took Mr. Cuevas into the main office, made him kneel painfully on a metal bench while removing his handcuffs, and then chained his big toe to a metal bench. Mr. Cuevas requested a phone call to his attorneys or the Chilean consulate but was informed that he was not allowed any phone calls.

Mr. Cuevas remained chained to the bench for over 90 minutes without explanation. Even though it was a hot day, CBP officers ignored his requests for water. The officer who detained him refused to release him even when Officer Lopez arrived and confirmed that Mr. Cuevas had given him an I-94 the previous day. When a supervisor arrived she told Mr. Cuevas that he was not in violation of his visa, but that the officer who detained him had sole discretion to decide whether to allow him to enter the United States. One of the officers finally gave him water after he had been detained for more than two-and-a-half hours.

Since CBP would not allow Mr. Cuevas to enter the United States, he suggested that they release him back into Mexico. He was finally released after about three-and-a-half hours of detention, but not before the officer who initiated his detention told him, “I don’t give a fuck for your educated manners and all your corporate bullshit. This is my country now and when you are here, you listen to me. I don’t like your kind that takes our jobs and uses our system.”

The next day, Mr. Cuevas drove to Tijuana and sought entry there. He was provided an I-94 and admitted to the country after explaining to the CBP officer there what had happened in Calexico. Mr. Cuevas’s attempts to receive an explanation through diplomatic channels have proven unsuccessful.

4. Brownsville, TX POE: Castro Family, Alanis Family, and Rodrigo Ortiz

CBP officers at the Brownsville & Matamoros International (B&M) Bridge POE in Brownsville, Texas have repeatedly coerced United States citizens into “confessing” that they were not born in the United States during lengthy, abusive interrogations; denied them entry; and confiscated their documents, without ever providing them a hearing or any form of due process.
On August 24, 2009, Trinidad Muraira de Castro, her daughters Yuliana and Laura, and Yuliana’s four-week old daughter Camila Abigail Gonzalez presented their documentation for entry at the B&M Bridge POE in Brownsville, Texas. Ms. Muraira de Castro is a Mexican citizen with a border crossing card (or “laser visa”) permitting her entry to the United States. Laura, Yuliana, and Camila are all U.S. citizens. CBP Officer Eliseo Cabrera sent the family to secondary inspection, allegedly because Yuliana’s Texas birth certificate indicated that she was delivered by a midwife. The family was detained and interrogated, during which time CBP officer Cabrera intimidated them, threatened to separate them, and made false representations to coerce Laura and Yuliana to “admit” they were not U.S. citizens and to force Trinidad to admit her daughters were not born in the United States. After approximately ten hours, Ms. Muraira de Castro broke down and “confessed” that her daughters were not born in the United States even though her daughters were in fact born in the United States. Based on this coerced confession, Laura and Yuliana were denied entry to the United States and Ms. Muraira de Castro’s laser visa was confiscated.

On September 17, 2009, Rodrigo Sampayo Ortiz, a U.S. citizen, presented his documentation for entry into the United States at the B&M Bridge POE in Brownsville, Texas. Mr. Ortiz was detained for more than eight hours while a CBP officer threatened and intimidated him into falsely confessing he was not born in the United States, even though he was in fact born in the United States. Mr. Ortiz’s documents were confiscated.

On October 31, 2009, Ana Maria Alanis and her daughter Jessica Alanis Garcia presented their documentation for entry at the B&M Bridge POE. Like the Castro family and Mr. Ortiz, Ms. Alanis and her daughter were detained for hours and threatened with separation. Ms. Alanis refused to “confess” that her daughter was not born in the United States because Jessica was in fact born in the United States. The CBP official denied Jessica entry into the United States until her citizenship was adjudicated by an Immigration judge.

The Castro family, the Alanis family, and Mr. Ortiz have filed suit in the Southern District of Texas, alleging that their Fourth and Fifth Amendment rights were violated.5

B. Unwarranted and Excessive Use of Force

1. San Ysidro, CA POE: Marc Ballin

On February 25, 2011, at about 4:15 p.m., Marc Ballin, a U.S. citizen returning from Mexico, was in the pedestrian line at the San Ysidro POE. The line was moving slowly and Mr. Ballin was in a hurry so he attempted to cut in line. CBP officers Vargas and Trabucco saw him, approached, and asked Ballin to step out of line so they could speak to him. Mr. Ballin apologized and handed Officers Vargas and Trabucco his passport. The officers told Mr. Ballin to go to the back of the line.

While Mr. Ballin waited to retrieve his passport, Officers Vargas and Trabucco, unprovoked, placed Mr. Ballin’s arms behind his back, handcuffed him, and slammed his head down on a desk. Vargas and Trabucco then pushed Mr. Ballin against a concrete wall.

officers punched and kicked Mr. Ballin even though he was already in handcuffs. Mr. Ballin sustained a shoulder injury and his wrists began to bleed.

Unknown officers moved Mr. Ballin to another building across the street from the checkpoint, out of public view. Mr. Ballin sat on a bench for about an hour, until Officer Novinsky approached and threatened to shock him with a Taser if he did not provide fingerprints and submit to a photograph. Afraid, Mr. Ballin complied.

Officers then escorted Mr. Ballin out of the building, back to the original pedestrian checkpoint, and gave him a card that said he was free to go. No charges were filed. Mr. Ballin went straight to the hospital where he was treated for his shoulder and wrist injuries. He has medical records to substantiate his injuries.

2. Otay Mesa, CA POE: Trosky Vasquez

On April 4, 2009 at about 10:30 p.m., Trosky Vasquez, a U.S. citizen and former Marine, was returning from a dentist’s appointment in Mexico. He crossed at the Otay Mesa POE by car with his wife and a friend.

At the checkpoint, CBP officers asked Mr. Vasquez who owned the vehicle. Mr. Vasquez said he did. An officer asked for the registration. Mr. Vasquez did not have his registration, but he did have his proof of insurance and the contract from the dealer. Mr. Vasquez attempted to hand these documents to the officer, but the officer did not take the documents. Instead, the officer asked Mr. Vasquez to pull into secondary inspection. Mr. Vasquez complied.

At secondary, an officer asked Mr. Vasquez and his passengers to step out of the car. Mr. Vasquez asked why and the officer responded, “Do what you’re told and shut up.” Mr. Vasquez complied and the officer asked him who owned the vehicle. Mr. Vasquez told the officer he’d already answered that question. The officer responded by grabbing Mr. Vasquez, turning him around, and slamming Mr. Vasquez’s body onto his car. Then the officer twisted Mr. Vasquez’s arm to handcuff him, causing Mr. Vasquez to fall to the ground in pain.

Hoisting Mr. Vasquez up by his now injured wrist, officers took Mr. Vasquez and his passengers inside a building and searched them. An officer again asked Mr. Vasquez who owned the car and Mr. Vasquez recounted the ordeal, including how he had tried to hand an officer his proof of insurance and dealer contract. The officers responded by placing Mr. Vasquez in a small room. There, they again asked Mr. Vasquez who owned the car. When Mr. Vasquez gave the same response, an officer pushed him against a wall and yelled at him to come clean. Mr. Vasquez had no other response.

After about 30 minutes, officers released Mr. Vasquez from the room and reunited him with the rest of his party. Mr. Vasquez and his party sat on wooden benches, but Mr. Vasquez sat on the bench with his legs tucked underneath his body, shins resting against the wood. An officer told Mr. Vasquez to “sit properly.” “What exactly is sitting properly?” Mr. Vasquez asked. The officer then sprung at Mr. Vasquez and struck him in the face. The officer struck
Mr. Vasquez in the face and chest a few more times and then threw him onto the floor. Other officers surrounded Mr. Vasquez, who now lay on the ground in the fetal position, hands covering his face. One officer told Mr. Vasquez that he would do as he’s told or that he’d be tasered.

Mr. Vasquez sat back up on the bench. Officer Hernandez came over and asked if Mr. Vasquez had reported his license plate stolen. Mr. Vasquez replied that he had not. Officer Hernandez told Mr. Vasquez that his plates were reported stolen and that was what caused his detention. Officer Hernandez then told him he should see to the problem but that he was free to go.

Before leaving, Mr. Vasquez asked to speak to Officer Hernandez again. Officer Hernandez apologized for the way the other officers treated him, but said that if she went against them it could jeopardize her career. Mr. Vasquez asked her if she could give him the other officers’ names. At that point, Officer DeJesus walked over and identified himself as a supervisor. Mr. Vasquez asked DeJesus for the names of the other officers responsible. Officer DeJesus said he would not divulge names and that there was nothing Mr. Vasquez could do about it. “The rules are different here,” Officer DeJesus said. “We’re protected by the Patriot Act.”

Mr. Vasquez went directly to the VA Medical Center in La Jolla. He received treatment for bruises on his chest, face, and eye, and doctors placed his wrist in a cast. He has medical records to substantiate this treatment.

3. Otay Mesa, CA POE: Michael Studdard

Michael Studdard, a U.S. citizen, was crossing southbound through the Otay Mesa Port of Entry on foot on June 7, 2011, at about 6:30 a.m., on his way to work. Officers tried to stop Mr. Studdard and he asked the officers for a reason. The officers responded that they did not need to provide a reason. Mr. Studdard asked again and the officers said they were allowed to make stops for various reasons, such as to search people for weapons. During this encounter, Mr. Studdard held a voice recorder in his hand because he was concerned about the possibility of his rights being violated.

After about five minutes of this discussion, an officer tried to take Mr. Studdard’s voice recorder from his hand. Mr. Studdard jerked his arm back to avoid this. Another officer grabbed Mr. Studdard and threw his body onto a table. A group of officers gathered and handcuffed Mr. Studdard. The handcuffs were applied so tightly that they left marks on his wrists, which remained sore for weeks afterward.

The officers moved Mr. Studdard to a room, asked him to remove his shoes and belt, and then patted him down. Mr. Studdard asked when he could leave and an officer responded that if Mr. Studdard said another word, he would put him into a cell. Mr. Studdard said, “Wait a minute,” and was immediately placed in a cell.
About 40 minutes later Mr. Studdard was released without charges or explanation. The initial conversation with CBP officers on his voice recorder had been deleted.

C. Repeated Detention and Interrogation Based on Mistaken Identity

1. San Ysidro, CA POE: Juan Estrada

Juan Estrada has had a recurring problem at the San Ysidro POE. When his passport is scanned, the record of another man (a wanted criminal) appears, resulting in Mr. Estrada’s detention and questioning. Despite officers consistently telling Mr. Estrada that they would resolve the problem, he was been detained and questioned numerous times over the last several years.

The most recent incident occurred on the afternoon of April 9, 2011, as Mr. Estrada arrived to the San Ysidro POE after visiting his family in Mexico. When a CBP officer scanned Mr. Estrada’s passport, Mr. Estrada noticed the officer’s expression change. Mr. Estrada began protesting that it was not him, aware that the other man’s criminal record had likely appeared on the computer screen. Nonetheless, Mr. Estrada was surrounded by about ten officers, with guns drawn and pointed at him. The officers told Mr. Estrada to get out of the car, onto his knees, and to place his hands behind his head. Mr. Estrada complied while protesting that they had mistaken his identity.

Once Mr. Estrada was on his knees, officers approached, handcuffed him, and lifted him up. They walked him into a detention area where officers questioned him. Mr. Estrada told the officers that it was not him, that this has been happening for the last four or five years and that it was all a mistake. One of the officers Mr. Estrada spoke to was Officer Gonzalez.

Eventually, the officers let Mr. Estrada go. However, Mr. Estrada is still traumatized by the incident. He is afraid of police, and afraid of crossing the border. Although he has family in Mexico, and previously visited them often, Mr. Estrada has not been back to Mexico since this incident, and is not sure if he will ever again feel comfortable crossing the border.

2. Lukeville and Nogales, AZ POEs: Alberto Garcia

Alberto Garcia is a resident of Phoenix and a naturalized U.S. citizen. He is married and has two U.S. citizen children. On four separate occasions over the summer of 2011 Mr. Garcia was forcefully detained and subjected to harsh and improper treatment by CBP officials upon his return to Arizona following family visits and dental appointments in Mexico.

On each of these occasions Mr. Garcia arrived at the Lukeville or Nogales POEs and promptly presented his U.S. passport to the screening officer. On each of these occasions, after scanning his passport, but without any further questioning, CBP officials abruptly dragged Mr. Garcia out of his vehicle and onto the ground and forcefully handcuffed him. Each time, Mr. Garcia was interrogated by CBP officers for approximately four hours concerning his alleged involvement in a drug cartel and remained handcuffed throughout the duration of his detention in a holding cell. At no point during any of these detentions was Mr. Garcia provided
documentation of his arrest and no photographs or fingerprints were taken. On multiple occasions, Mr. Garcia asked to go to the restroom but was denied, and no water or food was provided to him. On at least one of these occasions, Mr. Garcia asked to speak to an attorney but was denied a phone call. During each of these incidents CBP officers inspected Mr. Garcia’s vehicle, and each time Mr. Garcia was released with no charges filed.

During one of these arrests at the Lukeville POE, Mr. Garcia was chained by one foot to a concrete bench and one hand to a wall for the entire duration of his detention. On another occasion at the Nogales POE, Mr. Garcia was pulled from his truck, thrown to the ground, handcuffed, taken to a cell for interrogation, and shackled by hand and foot to a concrete bench for four hours. He was not allowed to sit or use the restroom, nor was he given water. While Mr. Garcia was detained, his young son sat alone in a room, crying.

The most recent of these incidents occurred on September 24, 2011, when Mr. Garcia was returning to Arizona following dental appointments with his son and daughter. Once again, when he arrived to the Lukeville POE, Mr. Garcia’s passport was scanned and he was promptly taken into an office where he was questioned by several officers. Eventually, he was told by one of the officers that his case was one of mistaken identity. When asked what he should do to resolve this problem, the officer replied to Mr. Garcia that he should change his name.

Mr. Garcia is severely traumatized by these experiences and is afraid of what will happen to him or his family during future trips to Mexico.

D. Seizure of Documents and Property

1. Brownsville, TX POE: Luis Espinoza

On June 7, 2009, Luis Espinoza, a 16-year old boy, was crossing the Gateway International Bridge from Matamoros to Brownsville. He presented a wallet-sized Texas Birth Certificate and a receipt from the U.S. Post Office showing that he had applied for his passport. The CBP officer sent Luis to secondary, and kept him in detention for more than two-and-a-half hours during which time officers interrogated him about the validity of his documents. The officer confiscated Luis’ birth certificate, declared it fraudulent, and told Luis to “go back to Mexico,” leaving Luis without any identification documents and unable to return to his home in the United States. Luis’ attorneys filed a writ of habeas corpus and a federal court ordered that he be admitted into the United States to be allowed to prove his citizenship on August 20, 2009. However, the CBP Port Director, Michael Freeman, refused to admit Luis and failed to return to him the confiscated birth certificate as ordered by the court until a motion for contempt was filed and he was ordered to show cause. Luis’ citizenship was confirmed, and he was issued a passport on July 20, 2011. The ACLU of Texas has received similar accounts of CBP document seizure from organizations that work with border communities.

2. Nogales, AZ: María Dalia Ascencio Carrillo

María Dalia Ascencio Carrillo, a 35-year-old Mexican national, arrived to the Nogales, Arizona POE on April 1, 2012, with what she thought was a valid tourist visa. At the border,
Ms. Ascencio was removed from her bus and taken to a room where two female officers interrogated her about her immigration documents while shouting obscenities and racist slurs. The officers referred to Ms. Ascencio as “another Mexican whore” and told her, “shut up or it will go worse for you, stupid Mexican.” During the interrogation, the officers pushed and groped Ms. Ascencio and broke her glasses. The officers then moved Ms. Ascencio to another room where they handcuffed her hands and feet. Ms. Ascencio was then transported to the Santa Cruz jail in Nogales where she was held in a cold jail cell for two days. No one explained to her why she had been detained or allowed her to make a phone call.

Ms. Ascencio was then transported to a Border Patrol short-term detention facility. There, Ms. Ascencio was held in a small cell with approximately 80 other people. Many of the people in Ms. Ascencio’s cell had been detained after many days in the desert and were in need of water, medical attention, and hygiene supplies. Detainees were crying and pleading for medical assistance but were ignored. Instead, Border Patrol officers mocked and yelled insults, calling them “damn wetbacks” and “stupid, ignorant bastards” and telling them, “you’re invading my country,” and “just die you sons of bitches.”

After two days in a crowded cell, Ms. Ascencio was taken to Eloy Detention Center where she was detained for approximately two weeks. Officials told her that her only choice was to fight an asylum case from detention or agree to a voluntary departure. Ms. Ascencio never saw a judge. She signed the paperwork she was given – which was not explained to her and which she now believes was actually a deportation order – and was returned to Mexico around April 20. Her Mexican passport, birth certificate, and other personal documents were confiscated and not returned to her. She is still trying to retrieve them.

II. Confiscation of Property of Mexican Nationals: Case Study on Lack of Effective Redress

Not only are travelers too often subjected to abusive practices at POEs, but, as illustrated by several of the stories above, victims of abuse find themselves without effective means of seeking redress. CBP’s failure to create effective procedures for individuals to recover property that has been taken by CBP officers in El Paso illustrates this problem.

As described to the ACLU’s southern border affiliates by Mexican consular officials and the staff of migrant shelters in northern Mexico, CBP makes it difficult for travelers who wind up in detention to recover their belongings. For example, at El Paso POEs, CBP officials take belongings and provide the owner with an itemized receipt of the belongings taken and a “baggage check.” Assuming the items’ owners are detained, two weeks after detention they will receive a notice (in English) that unclaimed property will be disposed of by CBP after 30 days. Many detainees do not speak or read English well, so they have difficulty taking advantage of the procedures outlined in the notice.

The paperwork they receive requires them to assign a person to pick up their belongings within 30 days. According to the Mexican Consulate, this form is required to be notarized and given to the person designated to pick up the belongings. But in many detention centers, there are no public notaries to assist with this process.
If detained individuals are able to get the form notarized, their designees face the following runaround from CBP when attempting to recover the belongings:

- The designee will arrive at one of the POEs and be told that the belongings are a different port of entry, generally the Ysleta-Zaragoza Bridge.
- At the Ysleta-Zaragoza Bridge, designees are referred to the Bridge of Americas just to be told they need to make an appointment to talk to a CBP Fines, Penalties and Forfeiture (“FPF”) agent.
- Even at an appointment with a FPF agent, the property may not be released to the designee, with the excuse being that only direct family members can pick up items.

In short, the process for reclaiming property is often complicated and hinges on the apparent discretion of CBP officials, making the 30-day limit nearly impossible to satisfy. The result is that personal property is commonly destroyed by CBP. While this issue may seem inconsequential, it has huge repercussions for the owners who are eventually deported to Mexico. Without IDs, cell phones and debit cards, these individuals are extremely vulnerable to exploitation and abuse, and are often left homeless, unable to get a job, and unable to return to their original hometowns in Mexico.

III. Applicable Law

A. U.S. Constitution (Fourth and Fifth Amendments)


CBP practices that result in unjustified, extended, and harsh detention are unconstitutional. The Supreme Court recognizes that persons subjected to non-criminal detention are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982); cf. Agyeman v. Corrections Corp. of Amer., 390 F.3d 1101, 1104 (9th Cir. 2004) (noting that detention for noncriminal charges “may be a cruel necessity of our immigration policy; but if it must be done, the greatest care must be observed in not treating the innocent like a dangerous criminal”).

While non-citizens who have never entered the United States may have diminished due process protections in their immigration proceedings, they are at the very least protected against physical abuse and similar harms. See Wong v. Imm. & Naturalization Servs., 373 F.3d 952, 972-75 (9th Cir. 2004); Lynch v. Cannatella, 810 F.2d 1363, 1373-74 (5th Cir. 1987).
In the accounts recited above, many of those stopped and detained by CBP were subjected to unnecessary pain and suffering through the use of needless handcuffing, physical and verbal assaults, and other rough treatment. Others were deprived of basic human needs like food and water during their detentions by CBP, or subjected to coercive interrogation. Most of them clearly should never have been subject to prolonged detention in the first place.

While in some instances, Fourth Amendment rights are circumscribed at POEs, see, e.g., United States v. Flores-Montano, 541 U.S. 149 (2004) (noting expanded authority to search automobiles at the border), government officials enjoy no expanded authority to use excessive force at the border, even against non-citizens with no prior connection to the United States. In Lynch, the Fifth Circuit held that even excludable aliens have a right to humane treatment and “to be free of gross physical abuse at the hands of state or federal officials.” 810 F.2d at 1373-74. In a later case, the Fifth Circuit extended Lynch in an excessive force claim when the alleged excessive force occurred just outside a port of entry. Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (5th Cir. 2006) (holding that aliens stopped at the border have a right to be free of excessive force). As that court noted, there are “no identifiable national interests that justify the wanton infliction of pain” by CBP officers. Id.

The doctrine that limits the extraterritorial application of the Fourth Amendment, announced in United States v. Verdugo-Urquidez, has no relevance to excessive force claims at POEs. 494 U.S. 259, 274-75 (1990) (no extraterritorial application of the Fourth Amendment to searches of non-citizens “with no voluntary attachment to the United States.”). In contrast with Verdugo-Urquidez, where the constitutional violation takes place “solely in Mexico,” id. at 264, constitutional violations at POEs take place in the United States. Moreover, unlike in Verdugo-Urquidez, border-crossers do have a “voluntary connection with . . . the United States.” Id. at 264, 273.

Fourth Amendment excessive force claims turn on whether the use of force is reasonable given the totality of the circumstances, weighing the force used against “the countervailing governmental interest at stake.” Graham v. Connor, 490 U.S. 386, 396 (1989). Three factors determine the governmental interest: (1) whether the suspect poses an immediate threat to the safety of the officers or others, (2) whether the suspect is actively resisting arrest or attempting to evade arrest by flight, and (3) the severity of the crime. Id. at 396-97. In none of the above examples did the individuals involved pose any threat to the safety of the officers or others, resist arrest or attempt to evade arrest, or commit a crime. The excessive treatment to which all of these individuals were subjected was unjustified and likely unconstitutional.

B. International Human Rights Law

obligations in its operations at POEs. The U.S. is obligated to respect and protect the human rights of all persons who cross or attempt to cross U.S. borders, regardless of nationality or immigration status. When individuals are detained by CBP officers, they must always be treated with humanity and respect for their dignity and must not be subjected to physical or psychological treatment amounting to torture or other cruel, inhuman or degrading treatment, including the use of excessive physical restraint or excessive or inappropriate body searches. Additionally, their rights to health and adequate food while in detention must be guaranteed. Special care and attention must be given to vulnerable populations including children, pregnant women, persons with disabilities, and victims of violence and trafficking. The United States is also obligated to “keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons” in CBP facilities with the view of preventing abuse and ill-treatment.

Many of the stories described above suggest that with regards to CBP the U.S. is not acting in accordance with its treaty obligations and Executive Order 13107. Furthermore, these abuses and lack of full, independent and thorough investigation into them stand in stark contrast to repeated bilateral commitments between the governments of the United States and Mexico throughout the past three administrations to treat all migrants in a manner that respects their human rights and dignity, particularly in repatriation arrangements.

---


8 See Articles 2 and 16 of CAT and Article 7 and 10 of the ICCPR. The UN Basic Principles on the Use of Force and Firearms stipulate that law enforcement officials “shall, as far as possible, apply nonviolent means before resorting to the use of force” and may use force “only if other means remain ineffective.” When the use of force is unavoidable, law enforcement officials must “exercise restraint in such use and act in proportion to the seriousness of the offence.” http://www2.ohchr.org/english/law/firearms.htm.


11 Article 11 read together with Article 16.1 of CAT.

In recent years, multiple international bodies have expressed grave concerns about CBP abuses in relation to U.S. human rights treaty obligations. In 2008, the U.N. Committee on the Elimination of Racial Discrimination reviewed U.S. compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and expressed concerns “about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons belonging to racial, ethnic or national minorities, in particular Latino and African American persons and undocumented migrants crossing the U.S.-Mexico border.”

The Committee recommended that the U.S. increase “significantly its efforts to eliminate police brutality and excessive use of force” against such persons by establishing adequate systems for monitoring police abuses and developing further training opportunities for law enforcement officials.” The Committee requested that the U.S. ensure that reports of police brutality and excessive use of force are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished. Again, the stories described above indicate that the Committee’s concerns have not been adequately addressed. CBP provides minimal training and, as the accounts stated herein demonstrate, oversight and accountability mechanisms are inadequate at best.

The abuses documented herein, though confined to incidents arising at POEs, are nonetheless consistent with a pattern of CBP abuse along the border, in detention facilities, and in other parts of the interior. In December 2010, the Inter-American Commission on Human Rights noted in its report on United States immigration detention “the terrible effects of certain immigration policies along the border and to the abuses and excesses committed by officers charged with enforcing the law.” In March 2012 the Commission held a general hearing on “the human rights situation of migrants detained and repatriated at the Southern Border of the U.S.” During this hearing, members of the Commission heard about human rights violations


committed against migrants by CBP officers with impunity, as the result of inadequate policies for prosecuting and punishing members of the Border Patrol who commit such acts.  

IV. Conclusion

The government has rightly dedicated significant resources to investigating allegations of corruption among CBP officers. But a similar commitment to investigating abuse of power, and the resulting civil and human rights abuses, by CBP officers is long overdue.

We request that your offices immediately undertake both an investigation of the individual complaints of abuse outlined above and a comprehensive investigation of whether CBP Office of Field Operations officers are complying with their obligations under the U.S. Constitution, international law, and agency guidelines. Consistent with the critical functions performed by your offices, we urge you to make recommendations for institutional changes to CBP training, oversight and accountability mechanisms consistent with your findings in order to prevent further abuses by agency personnel.

Please do not hesitate to contact Vicki Gaubeca at (575) 527-0664 or Sean Riordan at (619) 398-4485 with any questions about this complaint.

Sincerely,

Terri Burke
ACLU of Texas

Vicki Gaubeca
ACLU of New Mexico Regional Center for Border Rights

Sean Riordan
ACLU of San Diego & Imperial Counties

James Duff Lyall
ACLU of Arizona

Judy Rabinovitz
ACLU Immigrants’ Rights Project

Jamil Dakwar
ACLU Human Rights Program

cc: Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

---

Federal Agency’s Use of Border Patrol for Interpretation Assistance Violates Civil Rights

“It is axiomatic that a policy that causes individuals to actually flee from the service being provided does not provide meaningful access.” OASCR, Complaint No. FS-11-5171, p. 28.

May 31, 2012 - The U.S. Department of Agriculture’s Office of the Assistant Secretary for Civil Rights (OASCR) issued an order and findings in a complaint filed by Northwest Immigrant Rights Project (NWIRP) on behalf one of its clients. Specifically, OASCR found that the U.S. Forest Service discriminated against the complainant on the bases of her race (Latina), and national origin (Guatemalan), when the Forest Service subjected her to immigration enforcement action by calling the U.S. Border Patrol with the pretext that the official was seeking interpretation assistance and/or law enforcement backup. In addition, OASCR found that the U.S. Forest Service discriminated against the complainant by failing to provide adequate service to a Limited English Proficient (LEP) individual.

The 39-page ruling by the federal agency came in response to an incident that tragically resulted in the death of one individual. NWIRP’s client was stopped along with her partner by a Forest Service officer in the Olympic Peninsula in May 2011. The Forest Service officer made the traffic stop presumably to investigate whether the occupants of the vehicle had a permit to harvest salal. However, the Forest Service officer had called Border Patrol agents before even interacting with the occupants of the vehicle. NWIRP’s client and the driver of the vehicle both answered the Forest Service officer’s questions, but both fled their vehicle on foot when a Border Patrol car pulled up to the scene shortly thereafter. The driver of the vehicle died after running from the scene and getting swept into a nearby river. NWIRP’s client was detained by the Forest Service officer, cited for “interfering and resisting a law enforcement officer” and then turned over to Border Patrol agents, who placed her in deportation proceedings. Federal officials later agreed to release her from immigration detention and dropped the deportation case against her.

OASCR reviewed the complaint under the terms of 7 C.F.R. § 15d, prohibiting discrimination based on membership in a protected class. The agency clarified that in evaluating a claim of disparate treatment based on membership in a protected class, it relies on the burden shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In addition, OASCR found that 28 C.F.R. § 42.405(d)(1) and Executive Order 13166 establish ample authority that “the significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies’ implementing regulations.” (p. 20-21, citing 65 Fed.Reg. 50123, 50124 (Aug. 11, 2000). OASCR concluded, “similar to the fact that the right to LEP access derives from Title VI, the right to LEP access in conducted programs derives
from 7 C.F.R. § 15d. Accordingly, failure to provide meaningful access can also be construed as national origin discrimination under 7 C.F.R. § 15d.” (p. 21.)

Accordingly the agency reviewed the evidence to determine whether the Forest Service discriminated against NWIRP’s client based on race and national origin by subjecting her to immigration enforcement action and by failing to provide meaningful access to an LEP individual.

OASCR’s decision made a number of important findings:

- OASCR found that the use by Forest Service officers of Border Patrol agents for interpretation assistance is “discriminatory on its face, and not solely in the circumstances of this case.” (p. 29)
- OASCR found that that the use of Border Patrol agents for interpretation violates applicable civil rights policies and regulations because “Spanish-speaking visitors are entitled not to experience an escalation in their interaction with law enforcement that their English-proficient counterparts would not experience.” (p. 22)
- OASCR concluded that the use of Border Patrol (”BP”) agents for interpretation violates applicable civil rights policies and regulations because it “does not provide meaningful access, as the increased threat associated with BP interaction, for both Hispanic lawful residents and undocumented individuals, discourages LEP individuals from accessing [Forest Service] services, and may actively harm them when BP interpretation services are utilized.” (p. 24) (see also p. 31 “this argument holds true for all Latino individuals, regardless of their immigration status. A citizen or other lawful resident still runs the risk of an interrogation into their status, which OASCR notes could quickly turn into a humiliating experience. This humiliation goes beyond whatever general embarrassment an individual feels during a custodial stop. . . and is a result of a person’s membership in a protected class.”)
- OASCR found that the complainant “was not afforded the opportunity to (1) communicate effectively with [the Forest Service Officer (FSO)] during the stop, and (2) undergo a law enforcement stop without the escalated threat of BP involvement.” (p.23) (see also p. 23 “Specifically, Hispanic individuals subjected to a law enforcement stop by FSO experienced the additional threat of BP involvement. This involvement is inconsistent with the perceived penalty associated with potential FS law enforcement stops.”
- OASCR found that “[t]he use of BP for interpretation assistance escalates the fear, distrust, and risk of a law enforcement stop.” (p. 28)
- OASCR also held that the “interpretation services” provided by the Border Patrol “do not satisfy the ethical standards of interpretation services; they are not impartial, or confidential, nor do they advise individuals of the potential conflicts of interest and risks.” (p. 28).
- “Given the availability of other low-cost alternatives, such as Language Line, other radio or telephone interpretation services, community volunteers, training and education for
current staff, and hiring a bilingual staff, OASCR does not find FS’s budgetary arguments compelling. We find Complainant has established that FS failed to provide her with interpretation assistance, and concur that FS’s arguments that BP is used due to budgetary and resource restrictions is insufficient to justify a policy that has a discriminatory effect on individuals based on their race and national origin.” (p. 28)

• OASCR found that the Forest Service officer in question called Border Patrol for “backup” only when the individuals stopped were Latino, and concluded that the assertions that Border Patrol was needed for interpretation and backup assistance were “merely an excuse to target Latino individuals for immigration enforcement.” (p. 32-33) (see also p. 28, “The implication of this email was that the practice of requesting interpretation assistance is a guise for initiating an immigration enforcement action”).

• OASCR held that “[b]ecause the interaction with BP often arises in the context of a traffic stop, Complainant, and other Latino individuals, are not free to simply disengage or walk away from the situation. Under traditional circumstances, the frustration and embarrassment visited on LEP individuals where there is a lack of LEP access is limited to an inability to get a question answered, engage in a business transaction, or otherwise persist in a consensual encounter.” (p. 27) (emphasis in original)

• “OASCR finds FS’s statement, that BP was called for ‘backup assistance’ for safety reasons to be not credible.” (p. 32)

OASCR is ordering the Forest Service to take substantial actions to remedy its discriminatory policies and practices:

• At the national level, the Forest Service will be required to develop and implement a language access policy that provides meaningful access to Limited English Proficient (LEP) individuals;
• Also nationally, the Forest Service will be required to develop and implement a policy on law enforcement data collection to reduce instances of racial profiling;
• At the local level, the Forest Service offices in the Olympic National Forest will be required to post notices informing the public that it has been found to have discriminated on the basis of national origin and providing information on how to file civil rights complaints;
• The Forest Service officer who stopped M.N. and his direct supervisor will be required to complete 40 hours of civil rights training within 60 days of the ruling.

The decision by OASCR in this case comes less than a month after NWIRP filed a separate complaint with the U.S. Departments of Justice and Homeland Security regarding the use of Border Patrol agents by other law enforcement agencies throughout Washington State. That complaint remains pending.


694 F.3d 1069
United States Court of Appeals,
Ninth Circuit.

Francisco M. GONZAGA–ORTEGA, Petitioner,
v.
Eric H. HOLDER Jr., Attorney General, Respondent.


Synopsis

Background: Lawful permanent resident (LPR), citizen of Mexico, was charged as inadmissible as alien who had knowingly “encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.” Immigration Judge (IJ) ordered alien removed. Alien appealed. Board of Immigration Appeals (BIA), 2007 WL 4182332, affirmed. Alien petitioned for judicial review.

Holdings: The Court of Appeals, Clifton, Circuit Judge, held that:

[1] border officers were permitted to treat LPR as applicant for admission, without waiting for final administrative determination, based on their conclusion that LPR had engaged in illegal activity and

[2] LPR had not been denied due process.

Petition denied.

Attorneys and Law Firms

*1070 Robert B. Jobe, San Francisco, CA, for the petitioner.

Craig Alan Newell, Jr. (argued), Gregory G. Katsas, Blair T. O’Connor, Briena L. Strippoli, Office of Immigration Litigation, United States Department of Justice, Washington, D.C., for the respondent.

Opinion

CLIFTON, Circuit Judge:

Francisco Gonzaga–Ortega (“Gonzaga”) petitions for review of a decision of the Board of Immigration Appeals (“BIA”) dismissing his appeal of an order of removal. The principal legal question raised by the petition is whether Gonzaga was improperly denied counsel during questioning at the border based on a determination by immigration officers that he had engaged in illegal activity by trying to smuggle his niece across the border. A right to counsel is provided in 8 C.F.R. § 292.5(b), but that regulation expressly states that it does not provide a right to representation to any “applicant for admission” in primary or secondary inspection except under circumstances that did not apply here. Gonzaga was a lawful permanent resident (“LPR”), and an LPR returning to the United States ordinarily is not treated as an “applicant for admission” under 8 U.S.C. § 1101(a)(13)(C). That statute contains six exceptions, though, one of which excludes an LPR who “has engaged in illegal activity after having departed the United States.” 8 U.S.C. § 1101(a)(13)(C)(iii). Gonzaga argues that a finding that he engaged in illegal activity could not properly be made by officers at the border and that he was entitled to counsel until a final administrative determination had been made by an Immigration Judge (“IJ”) and the BIA. We disagree and hold that the border officers were permitted to treat Gonzaga as an applicant for admission based on their conclusion that Gonzaga had engaged in illegal activity, without waiting for a final administrative determination. We also reject Gonzaga’s claims that his statements admitting the attempt to smuggle his niece across the border were coerced and used against him in violation of due process. We therefore deny the petition.

I. Background

Gonzaga is a native and citizen of Mexico. He entered the United States illegally in 1989 but was granted LPR status in 2001.

After a one-week vacation visiting family in Mexico, Gonzaga attempted to reenter the United States at the San Ysidro Port of Entry on May 12, 2004, at approximately 6

p.m. In the car with Gonzaga were his wife, their
eight-month old daughter, and their fifteen-year-old niece,
Marisol Madera Arroyo. Gonzaga presented his resident
alien card, his wife presented her valid visitor visa and a
United States birth certificate on behalf of their daughter,
and the niece orally declared herself to be a United States
citizen. Suspecting the niece of making a false statement,
the officer at the primary inspection point referred the
vehicle and its occupants to secondary inspection for
further investigation. During secondary inspection,
Gonzaga’s niece admitted to being a citizen of Mexico
with no legal documents or benefits to enter, pass
through, or reside in the United States.

After being detained for most of the night, Gonzaga’s
wife and daughter were released early the next morning.
Gonzaga was also detained overnight and was
interviewed the next day by Officer Georgina Rios,
with another officer acting as a witness. Rios later
Testified that it was regular practice to conduct interviews
as soon as possible, but the time delay varied depending
on caseload. In Gonzaga’s case, his formal interview was
conducted approximately 28 hours after he presented
himself at the port of entry. The interview was conducted
in Spanish, Gonzaga’s native language. It was translated,
transcribed and later admitted into evidence by the IJ as a
record of sworn statement.

During the interview Gonzaga disclosed that he agreed to
bring his niece over the *1072 border at the request of her
parents. He said that he knew his niece had no legal
documents to enter the United States, and that he told her
she should say she was a United States citizen if anyone
asked. At the end of the interview, Gonzaga stated that
he had been treated “fine” since arriving at the immigration
station and agreed that he had given his statement
“voluntarily,” not having been forced or threatened in any
way.

Rios recorded information taken from the interview in a
Form I–213, Record of Deportable/Inadmissible Alien. Rios
served Gonzaga with a Notice to Appear, and he was
thereafter paroled into the United States. On May 17,
2004, the Department of Homeland Security initiated
removal proceedings against Gonzaga by filing a Notice
to Appear with the Immigration Court, charging him as
inadmissible under 8 U.S.C. § 1182(a)(6)(E)(i) as an alien
who had knowingly “encouraged, induced, assisted,
betted, or aided any other alien to enter or try to enter the
United States in violation of law.”

Before the IJ, Gonzaga filed a motion to suppress all
physical and testimonial evidence obtained or derived as a
result of his interrogation at the secondary inspection
point. He also submitted a sworn declaration describing
the conditions of his detention. In this declaration,
Gonzaga described being held for approximately 28
hours, kept in a holding room with 15 other men, and fed
only twice with meals consisting of a sandwich, carrots,
and water. He claims that he was not allowed to contact
anyone outside of the facility, and that he feared he would
be kept in detention until he gave his story. Gonzaga
stated that Rios yelled at him and pressured him to tell his
story, and that she never informed him that he had the
right to remain silent or the right to retain counsel. In her
testimony before the IJ, Rios denied ever yelling,
threatening, or pressuring Gonzaga.

The IJ conducted a merits hearing on May 24, 2006, at the
conclusion of which he rendered an oral decision denying
Gonzaga’s motion to suppress, finding Gonzaga
inadmissible as charged, and ordering him removed to
Mexico. Relying on the sworn interview transcript, the
report of the interview contained in the Form I–213, and
testimony by Officer Rios, the IJ concluded that Gonzaga
knowingly attempted to smuggle his alien niece across the
border. The IJ thus found Gonzaga to have engaged in
“illegal activity after having departed the United States,”
so the IJ deemed him an arriving alien and denied him
admission into the United States. See 8 U.S.C. §
1101(a)(13)(C)(iii). In denying Gonzaga’s motion to
suppress, the IJ held that Gonzaga had not been entitled to
have an attorney present during the secondary inspection
because he was properly treated as an arriving alien, so
that 8 C.F.R. § 292.5(b) did not apply even though
Gonzaga was an LPR. The IJ also found that the
conditions in which Gonzaga was held were not
unsatisfactory and that he had not been coerced into
giving his confession. Gonzaga appealed this decision to
the BIA.

The BIA adopted and affirmed the decision of the IJ, with a
citation to Matter of Burbano, 20 I. & N. Dec. 872, 874
(BIA 1994), adding a few comments in support of the
conclusion. The BIA specifically stated that the IJ did not
err in admitting the record of sworn statement and Form
I–213. It also cited Rios’s testimony to further support the
veracity of the information contained in these two
documents. Finally, it held that Gonzaga’s due process
rights were not violated.

II. Discussion

[1] [2] When the BIA adopts the IJ’s decision with a
citation to Matter of Burbano *1073 and also adds its
own comments, as it did here, we review the decisions of
both the BIA and the IJ. See Ali v. Holder, 637 F.3d 1025,
1028 (9th Cir.2011). We review determinations of purely
legal questions, including claims of due process violations, de novo. Cruz Rendon v. Holder, 603 F.3d 1104, 1109 (9th Cir.2010); Hamazaspyan v. Holder, 590 F.3d 744, 747 (9th Cir.2009). Findings of fact, such as whether an individual engaged in alien smuggling, are reviewed for substantial evidence and upheld “unless any reasonable adjudicator would be compelled to conclude to the contrary.”  “ Lopez–Cardona v. Holder, 662 F.3d 1110, 1111 (9th Cir.2011) (quoting 8 U.S.C. § 1252(b)(4)(B)).

A. The Right to Counsel Under 8 C.F.R. § 292.5(b)

[3] Gonzaga contends that he was entitled to counsel during secondary inspection at the port of entry under 8 C.F.R. § 292.5(b), and that any statements made thereafter and all other evidence obtained as a result should have been excluded from consideration because he was denied counsel.

The regulation states:

Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative.... Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

8 C.F.R. § 292.5(b). The IJ, affirmed by the BIA, held that Gonzaga did not have a right to representation at secondary inspection because he fell within the express exception for an “applicant for admission” who had not become the focus of a criminal investigation.

Ordinarily a returning LPR is not treated as an “applicant for admission.” But the statute that provides includes six exceptions, one of which covered Gonzaga. The statute states that “[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien ... has engaged in illegal activity after having departed the United States.” 8 U.S.C. § 1101(a)(13)(C)(iii); see United States v. Tsai, 282 F.3d 690, 696 n. 5 (9th Cir.2002); see also Vartelas v. Holder, ——U.S. ———, 132 S.Ct. 1479, 1484–85, 182 L.Ed.2d 473 (2012).

The IJ concluded that Gonzaga had engaged in illegal activity after departing the United States by his “conscious participation in an unlawful scheme to try to get his niece Marisol across the border illegally.” Such activity constitutes a criminal act under 8 U.S.C. § 1324(a)(2), which provides criminal penalties for “[a]ny person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien.” The IJ noted that Gonzaga had not presented any defense to the substance of the alien smuggling charge.

Gonzaga has not presented any defense or denied his involvement in alien smuggling in his petition to this court, either. Nor has he denied that his participation in the attempt to bring his niece across the border constituted “illegal activity,” though he did note that the government did not thereafter bring any criminal charges against him.

*1074 The thrust of the argument presented to us by Gonzaga is that a determination as to whether an LPR is subject to one of the exceptions set forth in 8 U.S.C. § 1101(a)(13)(C) can only be made by an IJ and the BIA and cannot be made by immigration officers at the border. He does not argue that the later determination by the IJ, affirmed by the BIA, that Gonzaga had engaged in illegal activity was incorrect, though he complains that it was based upon evidence that should not have been considered, including his confession. Instead, he argues, in the words of his opening brief, that “lawful permanent residents like [himself] have ‘the right to be represented by an attorney or other representative’ until there is a final administrative determination that they have engaged in activities which except them from the general rule set forth in INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).” He also argues that such a determination must be based upon clear and convincing evidence.

Gonzaga’s argument is not consistent with the language of the statute or with logic. The statute says that an LPR should not be regarded as an applicant for admission unless he has, among other things, “engaged in illegal activity.” It does not say unless he had already been adjudicated as having engaged in illegal activity. How a person who presents himself for admission into the United States is to be treated—in this instance, whether Gonzaga was entitled to counsel during secondary inspection—is a decision that has to be made at that time, on the spot, by immigration officers at the border. It cannot wait for the ultimate adjudication of that person’s case before an IJ and the BIA many years later. The INA assigns
responsibility to immigration officers to make decisions regarding the admission of persons who present themselves at the border. See, e.g., 8 U.S.C. § 1225(b)(2). Those decisions are subject to review, but the officers are entitled to make them.

If the border officials get the decision wrong—if in this instance Gonzaga later was found not to have engaged in illegal activity—then some remedy might be in order. But in this case, they did not get the decision wrong. As a result, we do not need to reach the question of what remedy, including exclusion of evidence, would be appropriate. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984).

In a letter submitted to us under Fed. R.App. P. 28(j) and at oral argument, Gonzaga cited a decision of the Supreme Court earlier this year, Vartelas v. Holder, — U.S. ——, 132 S.Ct. 1479, 182 L.Ed.2d 473 (2012), in support of his argument. That case involved another one of the six exceptions in 8 U.S.C. § 1101(a)(13)(C) under which an LPR should be treated instead as an “applicant for admission,” specifically the exception in subpart (v). Under that provision, an LPR should not be treated as an applicant for admission, unless he “has committed an offense identified in section 1182(a)(2) of this title.” 8 U.S.C. § 1101(a)(13)(C)(v). Offenses identified in § 1182(a)(2) include “a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.” 8 U.S.C. § 1182(a)(2)(A)(i)(I); see Vartelas, 132 S.Ct. at 1485.

The six exceptions for treating an LPR as an applicant for admission were added to the statute as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), 110 Stat. 3009–546. The holding of Vartelas, that the 1996 amendment should not be applied retroactively to Vartelas based on his 1994 plea of guilty to a felony prior to the adoption of the amendment, does not help Gonzaga. Gonzaga became an LPR after *1075 IIRIRA was enacted, and the illegal activity in which he was found to have engaged similarly took place after the enactment, in 2004, so there is no element of retroactivity involved here.

Gonzaga attempts, nonetheless, to squeeze support from comments made at the end of the majority opinion in Vartelas, in response to the dissent, drawing support from the Supreme Court’s previous decision in INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). In the course of that discussion, the Court said in Vartelas that it saw no practical difference between the statutory provision relevant in St. Cyr, which referred to an alien’s “convict[ion]” of a crime and the provision relevant in Vartelas, “committed an offense.” Those two statutory references in the Court’s decision were followed by a footnote:

After the words “committed an offense,” § 1101(a)(13)(C)(v)’s next words are “identified in section 1182(a)(2).” That section refers to “any alien convicted of, or who admits having committed,” inter alia, “a crime involving moral turpitude.” § 1182(a)(2)(A)(i)(I) (emphasis added). The entire § 1101(a)(13)(C)(v) phrase “committed an offense identified in section 1182(a)(2),” on straightforward reading, appears to advert to a lawful permanent resident who has been convicted of an offense under § 1182(a)(2) (or admits to one).

Vartelas, 132 S.Ct. at 1492 n. 11. The decision then went on to state: “Ordinarily, to determine whether there is clear and convincing evidence that an alien has committed a qualifying crime, the immigration officer at the border would check the alien’s records for a conviction. He would not call into session a piepowder court to entertain a plea or conduct a trial.” Id. at 1492. Another footnote provided a helpful explanation of the term “piepowder court”:

Piepowder (“dusty feet”) courts were temporary mercantile courts held at trade fairs in Medieval Europe; local merchants and guild members would assemble to hear commercial disputes. These courts provided fast and informal resolution of trade conflicts, settling cases “while the merchants’ feet were still dusty.” Callahan, Medieval Church Norms and Fiduciary Duties in Partnership, 26 Cardozo L.Rev. 215, 235, and n. 99 (2004) (internal quotation marks omitted) (quoting H. Berman, Law and Revolution: The Formation of the Western Legal Tradition 347 (1983)).

Id. at 1492 n. 12.

From this discussion Gonzaga seeks to infer support for the proposition that an immigration officer at the border is precluded from making a determination that a returning LPR should be treated as an applicant for admission and is limited to relying upon a prior conviction or an admission by the alien that he had in fact committed the offense. Leaving aside the remoteness of this discussion from the actual holding in Vartelas, we disagree with Gonzaga’s interpretation for two separate reasons.

First, the purported interpretation of § 1101(a)(13)(C)(v) to require a conviction or confession does not speak to the provision that was applied to Gonzaga, subpart (iii), as someone who “has engaged in illegal activity after having
departed the United States.” The Court’s explanation in footnote 10 of the requirement for a conviction or confession was explicitly based on the language of the section of the statute referred to in subpart (v), § 1182(a)(2), as the quotation of footnote 10 above illustrates. There is no similar limiting reference in subpart (iii) requiring a prior conviction or confession. Moreover, if the illegal activity was engaged in after departure from the United States, there presumably *1076 could not have been a conviction, at least not in a United States court, by the time the alien presented himself at the port of entry seeking to reenter the country.

Second, as noted above, the decision as to how Gonzaga was to be treated at the port of entry was necessarily one that had to be made by officers at the border. It was subject to subsequent review by an IJ and the BIA and by this court. The border officers did not need to convene any piepowder court, for that review was available in due course, and Gonzaga has obtained it. If the officers’ determination was held to be incorrect, an appropriate remedy might be considered. But the determination in this case that Gonzaga had engaged in illegal activity after having departed the United States was not incorrect. Treating him as an applicant for admission did not deny him any legal rights.

Because Gonzaga was properly deemed an “applicant for admission” pursuant to 8 U.S.C. § 1101(a)(13)(C)(iii), we conclude that 8 C.F.R. § 292.5(b) did not entitle him to counsel during primary or secondary inspection. Accordingly, because the immigration officers did not obtain Gonzaga’s confession in violation of the regulation, the IJ and BIA did not err in considering it. See Chuyon Yon Hong v. Mukasey, 518 F.3d 1030, 1036 (9th Cir.2008).

B. Due Process Violation

Footnotes

* The Honorable Raner C. Collins, District Judge for the U.S. District Court for Arizona, sitting by designation.

[4] [5] [6] “Immigration proceedings ... must conform to the Fifth Amendment’s requirement of due process.” Salgado-Díaz v. Gonzales, 395 F.3d 1158, 1162 (9th Cir.2005). “Expulsion cannot turn upon utterances cudgeled from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.” Bong Youn Choy v. Barber, 279 F.2d 642, 646(9th Cir.1960). Gonzaga must demonstrate error and substantial prejudice to prevail on a due process claim. Lata v. INS, 204 F.3d 1241, 1246 (9th Cir.2000).

[7] Gonzaga’s contention that his confession was coerced was rejected by the IJ and the BIA. The IJ concluded that there was no basis for believing that Gonzaga had been cajoled into giving the officers a statement against his will. The IJ cited Gonzaga’s own statements in the transcribed interview that he had been treated “fine” and that he made his statements “voluntarily.” The IJ also cited the lack of any indication of physical abuse, and the relatively brief period that Gonzaga was held. He also noted that there was no indication that the facts related by Gonzaga during the interview were false, and that Gonzaga in his declaration never mentioned his niece’s presence or denied his involvement in alien smuggling. The BIA similarly concluded that there was no support in the record for Gonzaga’s claims to have been denied a fair hearing or to have been prejudiced by the admission of his statements. Our conclusion is the same.

PETITION DENIED.

Parallel Citations


Footnotes


Synopsis

Background: Mexican national petitioned for review of the Board of Immigration Appeals’ (BIA’s) summary affirmation of immigration judge’s denial of his application for cancellation of removal.

Holdings: The Court of Appeals, John S. Rhoades, Sr., Senior United States District Judge for the Southern District of California, sitting by designation, held that:

[1] immigration judge’s finding, in denying application for cancellation of removal filed by Mexican national who had illegally entered the United States and allegedly established requisite ten years of continuous physical presence there, that alien had received an administrative voluntary departure which interrupted his continuous presence, was not supported by substantial evidence; and

[2] case had to be remanded to immigration judge for determination of whether alien signed voluntary departure form, and whether he did so knowingly and voluntarily.

Petition granted; case remanded with instructions.

Attorneys and Law Firms

*616 Jaime Jasso, Immigration AppealWorks, Westlake Village, CA, for the petitioner.

William C. Erb (argued) and Russel J.E. Verby, United States Department of Justice, Civil Division, Office of Immigration Litigation, Washington, D.C., for the respondent.


Before GOODWIN and CLIFTON, Circuit Judges, and JOHN S. RHOADES, SR., **District Judge.

Opinion

I. Introduction

This case comes before us on a petition for review of an order of the Board of Immigration Appeals (“BIA”) denying Jorge Ibarra-Flores’ (“petitioner”) application for cancellation of removal. For reasons set forth below, we grant the petition and remand for further proceedings.

II. Statement of Relevant Facts

Petitioner, a native and citizen of Mexico, illegally entered the United States in July 1989. On March 21, 1996, petitioner left the United States to visit family in Tijuana, Mexico. On March 23, 1996, petitioner attempted to return to the United States but encountered immigration officials. According to petitioner’s testimony, immigration officials told petitioner that because he had been in the United States over six years, he could apply for residence, but he first had to sign an unidentified document. After signing the document, petitioner was told that he had no right to request any type of immigration relief because he had signed a document “quitting all [his] rights in the United States.” According to petitioner’s Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, petitioner returned to Mexico that day. On March 26, 1996, petitioner returned to the United States again, this time without detection by immigration officials. Petitioner has since resided in the United States.

In March 1996, “aliens accrued time toward the ‘continuous physical presence in the United States’ requirement until they applied for suspension of deportation.” Guadalupe-Cruz v. INS, 240 F.3d 1209, 1210 n. 3 (9th Cir.2001). “Commencement of deportation proceedings had no effect on this accrual.” Id. Had petitioner been placed in deportation proceedings in March 1996, he could have applied for suspension of deportation in July 1996, as there is little doubt that petitioner’s deportation proceedings would not have concluded prior to July 1996. See H.R. REP. 104-469(I), at 122 (1996) (noting how aliens could “frustrate” their removal by requesting and obtaining “multiple continuances, in order to change the venue of their
hearing, obtain an attorney, or prepare an application for relief" and explaining that "delays can stretch out over weeks and months").

On September 25, 2002, petitioner was served with a Notice to Appear alleging that petitioner is an alien who is present in the United States without being admitted or paroled or who arrived at a time and place other than as designated by the Attorney General.

At the hearing before the immigration judge ("IJ"), petitioner conceded that he is removable as charged and applied for cancellation of removal pursuant to INA § 240A(b)(1), codified at 8 U.S.C. § 1229b(b)(1). To be entitled to cancellation of removal, an alien must have ten years continuous physical presence in the United States. In response to questions by the IJ, petitioner made statements from which the IJ concluded that petitioner had received administrative voluntary departure in 1996. Accordingly, the IJ denied the application for cancellation of removal on the ground that petitioner had failed to amass the requisite ten years continuous physical presence in the United States.

Petitioner appealed to the BIA, which affirmed the IJ’s decision without opinion on March 16, 2004. Petitioner filed a timely petition for review with this court.

III. Analysis

Because the BIA affirmed the IJ’s decision without opinion, “we review the IJ’s decision, which constitutes the final agency determination.” Karouni v. Gonzales, 399 F.3d 1163, 1170 (9th Cir.2005). We “review for substantial evidence the BIA’s non-discretionary factual determinations, including the determination of continuous presence.” Lopez-Alvarado v. Ashcroft, 381 F.3d 847, 850-51 (9th Cir.2004). “Substantial evidence is ‘more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” Monjaraz-Munoz v. INS, 327 F.3d 892, 895 (9th Cir.), amended by 339 F.3d 1012 (9th Cir.2003) (quoting Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971)) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 106, 83 L.Ed. 126 (1938)).

On this record, the IJ’s conclusion that petitioner is ineligible for cancellation of removal because he received administrative voluntary departure is not supported by substantial evidence. We have held that an alien who departs the United States pursuant to the formal process known as administrative voluntary departure interrupts his physical presence in the United States so that, should the alien return, he must begin anew the process of accumulating physical presence for immigration purposes. Vasquez-Lopez v. Ashcroft, 343 F.3d 961 (9th Cir.2003) (per curiam). However, not all departures after contact with immigration officials constitute administrative voluntary departures that interrupt an alien’s continuous physical presence in the United States. As we have recently recognized, when an alien is simply “turned around at the border” by immigration officials, the alien’s departure from the United States does not serve to interrupt the alien’s continuous physical presence. See Tapia v. Gonzales, 430 F.3d 997 (9th Cir.2005).

Here, one can only speculate as to whether petitioner received administrative voluntary departure. No voluntary departure form was produced, and the only testimony that was presented on this issue was petitioner’s own confusing testimony. Specifically, when asked whether he had ever received voluntary departure, petitioner answered:

A. I think once in 1996, but I got no option.

Q. You got what?

A. No option when I was detained by immigration officer and the officer told me to sign off the document, go outside and talk to the immigration officers right at the border and they will help me out because I’ve been here six years and some months, which would allow me apply for residence. So I did what the officer told me. I went outside of the United States, and when I went to the offices the officer told me, I was told that I was crazy and I got no right to request anything, that I had signed document quitting all my rights in the United States.

Although petitioner testified that he signed some type of document, it is far from clear that petitioner signed a voluntary departure form. Petitioner’s testimony is not, by itself, substantial evidence that petitioner did in fact receive administrative voluntary departure.

Moreover, even if petitioner signed a voluntary departure form and departed accordingly, there is not substantial evidence in the present record that would support the conclusion that petitioner knowingly and voluntarily accepted administrative voluntary departure. Although a voluntary departure under “threat” of deportation constitutes a break in continuous physical presence, Vasquez-Lopez, 343 F.3d at 970, as our sister circuits have recognized, “before it may be found that a presence-breaking voluntary departure occurred, the record must contain some evidence that the alien was
informed of and accepted its terms.” Reyes-Vasquez v. Ashcroft, 395 F.3d 903, 908 (8th Cir.2005) (emphasis added). As the Eighth Circuit has explained, the use of the phrase “under threat of deportation” implies that there is an expressed and understood threat of deportation. When an alien is legally permitted to depart voluntarily, he should “leave with the knowledge that he does so in lieu of being placed in proceedings” and therefore has no legitimate expectation that he may reenter and resume continuous presence. In re Romalez-Alcaide, 23 I. & N. Dec. 423, 429 (2002) (en banc).

Reyes-Vasquez, 395 F.3d at 907 (emphasis added) (alteration in original).

*620* [9] Most recently, we have held that the type of agreement to depart that terminates an alien’s continuous physical presence is a formal one “whereby the terms and conditions of [the alien’s] departure were clearly specified.” Tapia, 430 F.3d at 1004 (emphasis added). Although Tapia did not involve a claim that the alien was misled into signing a voluntary departure form and voluntarily departing, Tapia’s reasoning is nonetheless applicable here. As we explained in Tapia, an agreement to accept voluntary departure is akin to a plea bargain in which the alien gives up any expectation that the alien can “illegally reenter and resume a period of continuous physical presence.” Tapia, 430 F.3d at 1002 (quoting Vasquez-Lopez, 343 F.3d at 973 (quoting In re Romalez-Alcaide, 23 I. & N. Dec. at 429)). Moreover, if voluntary departure is accepted in lieu of being placed in deportation or removal proceedings, the alien agrees to relinquish the right to present a claim for relief that might otherwise allow the alien to stay in the United States. Given the consequences of an agreement to accept voluntary departure, such an agreement, like a plea agreement, should be enforced against an alien only when the alien has been informed of, and has knowingly and voluntarily consented to, the terms of the agreement.

Petitioner’s testimony before the IJ suggests that, due to the misrepresentations of immigration officials, petitioner did not knowingly and voluntarily accept administrative voluntary departure in lieu of being placed in deportation proceedings. There was no testimony to the contrary. Petitioner’s testimony is plausible because, due to the state of immigration law at the time, it would have behooved petitioner to be placed in deportation proceedings in March 1996.

At oral argument, petitioner suggested that it would be appropriate to remand this matter for further hearing before the IJ on the issue of whether petitioner accepted administrative voluntary departure and, if so, whether he did so knowingly and voluntarily. We conclude that the IJ should be given the first opportunity to assess the consequences of petitioner’s departure under the “knowing and voluntary” standard we announce today. Cf. Reyes-Vasquez, 395 F.3d at 909 (remanding for specific factual findings on the issue of whether the alien was “simply returned to the border’ without voluntarily departing under an expressed threat of deportation or removal proceedings” after determining that the record was insufficient to establish that a voluntary departure “under threat of deportation’ occurred). Upon remand, the IJ shall take additional evidence and testimony as necessary and shall make factual findings as to whether petitioner received administrative voluntary departure and, if so, whether he knowingly and voluntarily consented thereto.

Finally, petitioner argues that the IJ violated his due process rights by refusing to order the Immigration and Naturalization Service (“Service”) to produce a voluntary departure form for petitioner. Claims of due process violations in deportation proceedings are reviewed de novo. Colmenar v. INS, 210 F.3d 967, 971 (9th Cir.2000). “The Fifth Amendment guarantees due process in deportation proceedings.” Id. Thus, “an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.” Id. The BIA’s decision will be reversed on due process grounds if (1) the proceeding was “so fundamentally unfair that the alien was prevented from reasonably presenting his case,” id. (quoting *621* Platero-Cortez v. INS, 804 F.2d 1127, 1132 (9th Cir.1986)), and (2) the alien demonstrates prejudice, “which means that the outcome of the proceeding may have been affected by the alleged violation,” id.

Here, it was reasonable for petitioner to seek evidence in the Service’s possession in an attempt to meet his burden of demonstrating that he meets the continuous physical presence requirement. Had the Service failed to produce a voluntary departure form for petitioner after being ordered to do so, this would have been further evidence suggesting that petitioner’s continuous physical presence in the United States was not interrupted by an administrative voluntary departure. For this reason, the outcome of these proceedings may have been affected if the requested discovery had been ordered. Accordingly, upon remand the IJ shall order the production of all forms referencing petitioner’s departure from the United States on March 23, 1996.

**IV. Conclusion**

This matter is remanded for further proceedings.
consistent with this opinion.

PETITION GRANTED; CASE REMANDED WITH INSTRUCTIONS.

Footnotes

* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R.App. P. 43(c)(2).

** The Honorable John S. Rhoades, Sr., Senior United States District Judge for the Southern District of California, sitting by designation.

1 The law subsequently changed. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which contained a “stop-time” provision. See INA § 240A(d)(1), codified at 8 U.S.C. § 1229b(d)(1); Guadalupe-Cruz v. INS, 240 F.3d 1209, 1210 n. 3 (9th Cir.2001). Under this “stop-time” provision, “the period of continuous physical presence in the United States shall be deemed to end when deportation proceedings commence.” Guadalupe-Cruz, 240 F.3d at 1210 n. 3. This “stop-time” provision became effective April 1, 1997. See Astrelo v. INS, 104 F.3d 264, 266 (9th Cir.1996).

2 Cancellation of removal is similar to, and has replaced, suspension of deportation. See Alcaraz v. INS, 384 F.3d 1150, 1152-53 (9th Cir.2004).

3 The Attorney General has authority to grant voluntary departures prior to the initiation of removal or deportation proceedings and to grant voluntary departures during the pendency of such proceedings. Prior to 1996, 8 U.S.C. § 1252(b)(4) (1994) provided that “in the discretion of the Attorney General ... deportation proceedings ... need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such an alien voluntarily departs from the United States.” Vasquez-Lopez v. Ashcroft, 343 F.3d 961, 969 n. 1 (9th Cir.2003) (quoting 8 U.S.C. § 1254(b)(4)(1994)). 8 U.S.C. § 1254(e)(1) (1994) provided, in relevant part, that the “Attorney General may, in his discretion, permit any alien under deportation proceedings ... to depart voluntarily from the United States at his own expense in lieu of deportation.” See Vasquez-Lopez, 343 F.3d at 969 n. 1 (quoting 8 U.S.C. § 1254(e)(1) (1994)). After 1996, the authority to grant voluntary departure in both situations was transferred to a single section, 8 U.C. § 1229c(a)(1), which provides, in relevant part, that “[t]he Attorney General may permit an alien voluntarily to depart the United States ... under this subsection, in lieu of being subject to proceedings under section [1229a of this title] or prior to the completion of such proceedings.” Vasquez-Lopez, 343 F.3d at 969 n. 1 (quoting 8 U.S.C. § 1229c(a)(1)). “While the precise terms of the Attorney General’s statutory authority to grant voluntary withdrawal have varied during the period here relevant, the character of departures pursuant to a grant of voluntary departure has not materially changed.” 343 F.3d at 969 n. 1.

4 Although the issue of whether petitioner knowingly and voluntarily accepted administrative voluntary departure is not “specifically and distinctly” raised in the opening brief, we find good cause for addressing this argument. See United States v. Ullah, 976 F.2d 509, 514 (9th Cir.1992) (explaining that we will consider issues raised for the first time in a reply brief for “good cause shown”) (quoting Fed. R.App. P. 2)). The government had an opportunity to address this issue at oral argument. Moreover, the issue of whether petitioner knowingly and voluntarily accepted voluntary departure is inextricably intertwined with the issue of whether there is substantial evidence supporting the IJ’s conclusion that petitioner suffered an administrative voluntary departure that precludes him from meeting the continuous physical presence requirement.
Until an alien who is arrested without a warrant is placed in formal proceedings by the filing of a Notice to Appear (Form I-862), the regulation at 8 C.F.R. § 287.3(c) (2011) does not require immigration officers to advise the alien that he or she has a right to counsel and that any statements made during interrogation can subsequently be used against the alien.

FOR RESPONDENT:
Douglas D. Nelson, Esquire,
San Diego, California

FOR THE DEPARTMENT OF HOMELAND SECURITY:
Ana L. Partida
Assistant Chief Counsel

BEFORE: Board Panel: COLE, PAULEY, and WENDTLAND, Board Members.

In a decision dated April 14, 2010, an Immigration Judge terminated the removal proceedings against both respondents. The Department of Homeland Security (“DHS”) has appealed from that decision. The appeal will be sustained as to the male respondent. The record of the female respondent will be returned to the Immigration Judge without further action.

I. FACTUAL AND PROCEDURAL HISTORY

The respondents are a married couple who are natives and citizens of Guatemala and lawful permanent residents of the United States. The procedural history of their case is complicated.

In a Notice to Appear (Form I-862) dated December 5, 2004, the DHS charged that the respondents were subject to removal under section 212(a)(6)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(E)(i) (2000), for knowingly assisting another alien to enter the United States in violation of law. In a decision dated March 2, 2007, an Immigration Judge declined to terminate the proceedings, finding the respondents removable based on statements they made during interrogation at the border regarding their attempt to smuggle their nephew into the country. The Immigration Judge ordered the respondents removed and denied their application for asylum and their request for withholding of removal under sections 208 and 241(b)(3) of the Act, 8 U.S.C. §§ 1158 and 1231(b)(3) (2006), respectively. The respondents appealed from that decision. On November 30, 2007, we summarily affirmed the Immigration Judge’s decision after rejecting the respondents’ brief as untimely.

The respondents filed a petition for review and a motion for stay of removal with the United States Court of Appeals for the Ninth Circuit. On September 29, 2008, the Ninth Circuit remanded the case to the Board for consideration of the respondents’ untimely brief. We reinstated their appeal on November 12, 2008.

On December 31, 2008, we vacated our November 30, 2007, decision summarily affirming the Immigration Judge’s order of removal. We also granted the respondents’ motion to remand the record to the Immigration Judge in light of the Ninth Circuit’s decisions in Rodriguez-Echeverria v. Mukasey, 534 F.3d 1047 (9th Cir. 2008), and Aguilar Gonzalez v.
Mukasey, 534 F.3d 1204 (9th Cir. 2008). In Rodriguez-Echeverria, the Ninth Circuit found that the alien’s overnight detention at the border qualified as an arrest and that the arresting officers therefore had to comply with the advisal requirements set forth in 8 C.F.R. § 287.3(c) (2004). The Ninth Circuit remanded the record for the Board to determine in the first instance whether 8 C.F.R. § 287.3(c) required the arresting immigration officers to warn the alien before interrogation that she had a right to counsel and that her statements could be used against her and, if so, whether her statements should be suppressed. Rodriguez-Echeverria v. Mukasey, 534 F.3d at 1051. The court strongly suggested that we issue a precedent decision on this issue.

Upon the agreement of both parties, another Immigration Judge administratively closed removal proceedings on March 10, 2009, pending the Board’s review of Rodriguez-Echeverria. On April 10, 2009, the DHS filed a motion to recalendar the respondents’ case in light of Samayoa-Martinez v. Holder, 558 F.3d 897 (9th Cir. 2009), which the Ninth Circuit issued after it remanded Rodriguez-Echeverria to the Board. In that case, the Ninth Circuit held that the obligation to notify an alien of his rights under 8 C.F.R. § 287.3(c) does not attach until the alien has been arrested and formally placed in proceedings. Samayoa-Martinez v. Holder, 558 F.3d at 901-02. The court stated that formal proceedings commence with the filing of the Notice to Appear. Id. The Immigration Judge granted the motion to recalendar.

On April 14, 2010, the Immigration Judge terminated the proceedings against both respondents without prejudice, finding that the decision in Samayoa-Martinez did not overrule or resolve the issue raised in Rodriguez-Echeverria and was therefore not controlling. The Immigration Judge acknowledged that the Board’s decision on remand in Rodriguez-Echeverria was still pending and, because that decision likely would have a direct impact on the respondents’ case, concluded that it would be fundamentally unfair and a waste of resources to proceed without the benefit of the Board’s guidance.

On May 13, 2010, the DHS appealed the termination of proceedings for both respondents. On August 19, 2010, however, the DHS withdrew its appeal regarding the female respondent. Pursuant to 8 C.F.R. § 1003.4 (2011), there is nothing now pending before the Board regarding that respondent. Her record will therefore be returned to the Immigration Judge without further action. Accordingly, we will address the DHS’s appeal from the termination of proceedings in the male respondent’s case and the Immigration Judge’s denial of his asylum application.

II. ANALYSIS

A. Termination of Proceedings

The regulation at issue in this case provides in pertinent part as follows:

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 officer will also advise the alien that any statement made may be used against him or her.

8 C.F.R. § 287.3(c) (emphasis added).

The DHS argues that under the holding in Samayoa-Martinez v. Holder, 558 F.3d at 901-02, the respondent’s statement during interrogation that he knowingly used his son’s United States birth certificate to try to smuggle his nephew into the country is admissible because 8 C.F.R. § 287.3(c) requires notice of the alien’s procedural rights only after a Notice to Appear has been filed.

The respondent, relying on a brief previously submitted to the Immigration Judge, argues that his case is factually similar to Rodriguez-Echeverria. In particular, the respondent asserts that, like the alien in that case, his liberty was restricted when he was detained at the border and that he should have been advised of his rights prior to any questioning.

The Form I-213 (Record of Deportable/Inadmissible Alien), the contents of which the respondent does not contest, indicates that he was referred to secondary inspection on December 5, 2004, where he admitted that he knowingly used his son’s birth certificate to try to smuggle his nephew into the United States. The documents of record show that the respondent was arrested approximately 8 1/2 hours after applying for admission, but they do not indicate that the officers informed the respondent that he had the right to have an attorney or that his statements could be used against him. Thus, according to the
respondent, the Form I-213 should be suppressed.

**4 We agree with the DHS. The phrases “arrested without a warrant” and “placed in formal proceedings” in 8 C.F.R. § 287.3(c) describe the subset of aliens who “will” be given advisals. Thus, under the plain language of the regulation, an alien who is arrested without a warrant is not entitled to advisals until he or she is “placed in formal proceedings.” We therefore read the current regulation to require the initiation of formal proceedings as a necessary precondition to the mandatory issuance of the advisals. See Matter of E-L-H-, 23 I&N Dec. 814, 823 (BIA 2005) (citing Matter of Artigas, 23 I&N Dec. 99 (BIA 2001), and stating that under the elemental rules of construction, we apply the plain meaning of regulatory provisions).

As the Ninth Circuit found in Samayoa-Martinez v. Holder, 558 F.3d at 902, the history of the regulation supports this conclusion. See Matter of F-P-R-, 24 I&N Dec. 681 (BIA 2008) (relying on regulatory history to interpret the meaning of a regulation). In Matter of Garcia-Flores, 17 I&N Dec. 325, 326 (BIA 1980), we quoted the 1977 version of 8 C.F.R. § 287.3, which provided in relevant part: An alien arrested without warrant of arrest shall be advised of the reason for his arrest and his right to be represented by counsel [sic] of his own choice, at no expense to the Government. He shall also be advised [sic] that any statement he makes knowingly used his son’s birth certificate to try to smuggle his nephew into the United States. Although he was arrested approximately 8 1/2 hours after applying for admission, this is far different from the situation of the alien in Rodriguez-Echeverria v. Mukasey, 534 F.3d at 1051 (quoting 8 C.F.R. § 287.8(b)).

We noted there that this earlier version of 8 C.F.R. § 287.3 was unclear regarding whether the advisal of the right to counsel was required at the onset of the interview or only after it was determined that a prima facie case of deportability existed. Id. at 327 n.3.

The regulation was amended in 1979 to specify that “[a]fter the examining officer has determined that formal proceedings under section 236, 237, or 242 of the Act, will be instituted, an alien arrested without warrant shall be advised” of his rights. 8 C.F.R. § 287.3 (1980). In 1997, the regulation was amended to its current form to change the timing of the required advisals from the point at which the officer determined that proceedings “will be instituted” to the time when the alien is actually “placed in formal proceedings.” See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,390 (Mar. 6, 1997) (codified at 8 C.F.R. § 287.3(c) (1998)).

**5 In this case, the respondent gave his statement to the interviewing immigration officers on December 5, 2004. The Notice to Appear was issued on December 5, 2004, but was not filed until January 13, 2005. Thus, the statement was made before the initiation of formal removal proceedings. Moreover, because the required advisals are contained in the Form I-862, the respondent was advised of his rights when he was served with the Notice to Appear. We therefore conclude that the respondent’s statements were not obtained in violation of 8 C.F.R. § 287.3(c) and that the documents containing his statements are admissible in removal proceedings. Samayoa-Martinez v. Holder, 558 F.3d at 901-02. We note in this regard that the respondent did not object to the admission of the Form I-213 during his removal proceedings.

We are also unpersuaded by the respondent’s argument that his case is factually similar to Rodriguez-Echeverria. As we stated previously, the record indicates that the respondent was referred to secondary inspection, where he admitted that he knowingly used his son’s birth certificate to try to smuggle his nephew into the United States. Although he was arrested approximately 8 1/2 hours after applying for admission, this is far different from the situation of the alien in Rodriguez-Echeverria. In that case, the alien had been arrested 16 hours before she gave her statement, during which time she “was placed in a locked room overnight and made to remove her shoes and belt, actions which undoubtedly ‘restrain the freedom of an individual … to walk away.’” Rodriguez-Echeverria v. Mukasey, 534 F.3d at 1051 (quoting 8 C.F.R. § 287.8(b)).

Furthermore, regardless of whether there are factual similarities, Rodriguez-Echeverria does not require immigration officers to give the pertinent advisals before the initiation of formal immigration proceedings. Rather, the Ninth Circuit held only that the general provisions for disposition of cases of aliens arrested without warrant under 8 C.F.R. § 287.3 applied because the alien’s overnight detention at the border was a warrantless arrest. Importantly, however, the Ninth Circuit remanded the case to the Board to decide in the first instance whether 8 C.F.R. § 287.3 requires that advisals be given before an immigration officer interrogates an alien. We conclude that the regulation only requires immigration officers to advise the alien of his or her rights after the alien is placed in formal proceedings by the filing of a Notice to Appear.
The Immigration Judge determined in his March 2, 2007, decision that the Form I-213 clearly established the respondent’s inadmissibility on the alien smuggling charge. We agree. For the reasons stated above, we conclude that the proceedings against the respondent were incorrectly terminated on April 14, 2010. The DHS’s appeal will therefore be sustained.

**6 The Immigration Judge determined in his March 2, 2007, decision that the Form I-213 clearly established the respondent’s inadmissibility on the alien smuggling charge. We agree. For the reasons stated above, we conclude that the proceedings against the respondent were incorrectly terminated on April 14, 2010. The DHS’s appeal will therefore be sustained.

B. Asylum

Because we previously vacated our November 30, 2007, decision summarily affirming the Immigration Judge’s denial of relief and reinstated the respondent’s appeal, we now address his challenge to the Immigration Judge’s March 2, 2007, determination that he did not sufficiently demonstrate past persecution or a nexus between the harm experienced and a protected ground. In this regard, we note that the Immigration Judge made the following findings of fact concerning the relevant aspects of the respondent’s asylum claim. Except with respect to the issue of the alleged persecutors’ motivation, addressed below, the respondent does not assert that the Immigration Judge’s factual findings are clearly erroneous. Nor do we discern any such error. See 8 C.F.R. § 1003.1(d)(3)(i) (2011).

During the 1960s, the respondent’s father was a member of the judicial police in Guatemala. The respondent’s father was aware of, and was set to disclose, the problem of public corruption. In 1966, the respondent’s father and an aunt were shot to death as they were walking in the street. The respondent believed that the Guatemalan Government was responsible for the shooting because in the days prior to the incident, the family saw a military vehicle roaming the area around the family’s residence.

The respondent entered a Government military academy as a cadet in the 1980s. Shortly after enrolling, he started to receive notes in his personal belongings signed by the Guerilla Army of the Poor (“EGP”) asking for information about the location of keys to an arms storage warehouse. The notes threatened harm to the respondent and his family if he did not collaborate with the EGP. The respondent agreed to cooperate, but stopped after 1 1/2 years because he realized that the EGP was opposed to the Government. After he stopped cooperating, the EGP delivered more aggressive notes to his home threatening harm to him and his family.

In 1985, the respondent withdrew from the military academy and moved in with his mother. The threatening notes continued. To protect his mother from harm, the respondent decided to move in with his then fiancée’s family in 1988. That year he learned that his mother had been killed by a blow to her head and that her home had been burned down. The respondent believed that the EGP was responsible for his mother’s death. Notes discovered at the scene of the fire warned that the same would happen to other family members. The respondent then left Guatemala.

**7 The respondent argues that the death of his father in 1966 by Government agents, the threats to the respondent by the EGP guerilla group, and the killing of his mother in 1988, considered cumulatively, amount to past persecution. He also asserts that the EGP guerilla group interpreted his decision to stop cooperating with them as a political act, which created a nexus for purposes of the Act.

We find no reason to disturb the Immigration Judge’s ruling. First, even if the Government killed the respondent’s father in 1966 to keep him from speaking out against its corruption, the record does not indicate that the Government carried a vendetta against the respondent or his family members. In fact, there is no indication that the Guatemalan Government threatened or harmed the respondent or his family. We are not persuaded that the father’s death in 1966 warrants a determination of past persecution or a well-founded fear of persecution under the Act with respect to the respondent.

Second, the record does not indicate that the EGP imputed a political opinion to the respondent or threatened him because he was following in his father’s footsteps by enrolling in a Government military school. The record shows that the EGP initially left threatening notes for the respondent in his belongings at military school to get information regarding the location of Government arms. The respondent initially agreed to cooperate with the EGP guerilla group and did so for 1 1/2 years. When he decided to stop cooperating, the EGP resumed their threats by leaving threatening notes at his house. The notes, which were sometimes anonymous and sometimes “signed by the EGP,” indicated that the respondent should be “fighting for the poor” instead of “helping and cooperating with the government.” However, the content of the notes is not sufficient to substantiate the respondent’s assertion that the EGP’s threats were motivated, even in part, by an actual or imputed political
opinion.

We emphasize that a “persecutor’s actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error.” Matter of N-M-, 25 I&N Dec. 526, 532 (BIA 2011). As the Immigration Judge found, the resumption of the threats seems to indicate that the EGP was angered by the respondent’s decision to stop helping them, but it does not sufficiently support the respondent’s claim that the EGP interpreted his decision not to help them as a pro-Government political stance. In this regard, we note that the respondent did not claim to have spoken out against the EGP.

We acknowledge that the respondent’s mother was apparently killed by a blow to the head and that her home was burned down. We also acknowledge that a note discovered after her death referenced her killing and intimated that the respondent would suffer the same fate. The respondent’s mother’s death was tragic and horrifying. Nonetheless, based on the record before us, the threatening notes appear to relate to the respondent’s decision not to cooperate with the EGP rather than being on account of an actual or imputed political opinion. Thus, we find no clear error in the Immigration Judge’s finding that the respondent did not demonstrate that the threats of harm were motivated by a protected ground. See INS v. Elias-Zacarias, 502 U.S. 478 (1992). 7

**8 For these reasons, we conclude that the respondent did not meet his burden of proof to establish his eligibility for asylum. It follows that the respondent also failed to meet the higher burden for withholding of removal under section 241(b)(3) of the Act.

*588 III. CONCLUSION

Under 8 C.F.R. § 287.3(c), an alien who is arrested without a warrant must be “placed in formal proceedings” by the filing of a Notice to Appear before he is entitled to be advised that he has a right to counsel and that any statements made during interrogation can subsequently be used against him. Consequently, any statements made prior to the initiation of formal proceedings are not obtained in violation of 8 C.F.R. § 287.3(c), and the fact that no advisals were given at that time does not render the documents containing those statements inadmissible in removal proceedings.

The respondent’s statements were made before the initiation of formal removal proceedings and were therefore not obtained in violation of 8 C.F.R. § 287.3(c). Consequently, in the decision on March 2, 2007, the Immigration Judge properly determined that the Form I-213 containing the respondent’s statements was admissible and established his removability. Because the proceedings against the respondent were incorrectly terminated in the April 14, 2010, decision, the DHS’s appeal will be sustained, the decision of the Immigration Judge will be vacated, and the proceedings will be reinstated. Furthermore, the respondent’s appeal from the denial of his applications for relief will be dismissed, and he will be ordered removed from the United States.

ORDER: The appeal of the Department of Homeland Security from the termination of proceedings in the male respondent’s case is sustained, the April 14, 2010, decision of the Immigration Judge is vacated, and the removal proceedings against the male respondent are reinstated.

FURTHER ORDER: The male respondent’s appeal from the Immigration Judge’s March 2, 2007, denial of relief is dismissed, and he is ordered removed from the United States to Guatemala pursuant to the order of removal issued on that date.

FURTHER ORDER: The record of the female respondent is returned to the Immigration Judge without further action.

Footnotes


2 The DHS agreed with the respondents that a remand was warranted. We note that the decision in Aguilar Gonzalez v.
Mukasey is no longer relevant in this case.

We ultimately reached the same conclusion in our unpublished decision in Matter of Rodriguez-Echeverria. The alien in that case had given the statements she sought to suppress before the Notice to Appear was filed and therefore before the initiation of formal removal proceedings. Moreover, she was given the required advisals upon being served with the Notice to Appear. Consequently, we concluded that her statements were not obtained in violation of 8 C.F.R. § 287.3.

In Samayoa-Martinez v. Holder, 558 F.3d at 902, the Ninth Circuit also concluded that the 1997 revisions to 8 C.F.R. § 287.3 superseded our holding in Matter of Garcia-Flores, 17 I&N Dec. 325, that an immigration officer violates 8 C.F.R. § 287.3 when he fails to give an alien the advisals after the alien is arrested.

We also note that mere referral to secondary inspection does not constitute an arrest. For example, the Ninth Circuit has stated that “[d]etention and questioning during routine searches at the border are considered reasonable within the meaning of the Fourth Amendment.” United States v. Zaragoza, 295 F.3d 1025, 1027 (9th Cir. 2002) (citing United States v. Espericueta-Reyes, 631 F.2d 616, 622 (9th Cir.1980), and United States v. Montoya de Hernandez, 473 U.S. 531, 539-40 (1985)).


In light of our conclusion, we need not address the respondent’s argument that the Immigration Judge erred in denying his request for a grant of humanitarian asylum. We also need not decide whether the Immigration Judge properly denied asylum in the exercise of discretion.

We note that the Immigration Judge improperly stated that the facts did not “compel” a finding of past or future persecution. Whether the facts of record compel a particular outcome is an issue for the courts of appeals to decide in their review of Board decisions. See, e.g., Prasad v. INS, 47 F.3d 336, 338-39 (9th Cir. 1995) (explaining the standard of appellate review of Board decisions as set forth by the Supreme Court in INS v. Elias-Zacarias, 502 U.S. at 479, 481, 483-84).
Laura Nancy CASTRO,
Yuliana Trinidad CASTRO,
Trinidad Muraira de CASTRO,
Rodrigo SAMPAYO,
Jessica GARCIA,
Ana ALANIS,
Luis MONTEMAYOR,
Ana Luisa GUERRERO,
Ervey Lorenzo SANTOS
Alicia RUIZ,
Maria REYES,
Jenifer Itzel GONZALEZ,

PLAINTIFFS, In Their Own Name and On Behalf of All Others Similarly Situated,

v.

Michael T. FREEMAN, Port Director,
U.S. Customs and Border Protection, and
Hillary CLINTON, U.S. Secretary of State,
Janet NAPOLITANO, Secretary, Department of Homeland Security,

DEFENDANTS.

FOURTH AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Laura Nancy Castro ("Laura"), Yuliana Trinidad Castro ("Yuliana"), in their own names and on behalf of their mother, Trinidad Muraira de Castro ("Trinidad"), Rodrigo Sampayo ("Sampayo"), Jessica Garcia, ("Garcia"), her mother, Ana Alanis ("Alanis), Luis Montemayor, ("Montemayor"), Ana Luis Guerrero, ("Guerrero"), Ervey Lorenzo Santos, ("Santos"), Alicia
Ruiz ("Ruiz"), Maria Reyes ("Reyes"), and Jenifer Itzel Gonzalez, ("Gonzalez"), through undersigned counsel, file their Fourth Amended Class Action Complaint for Declaratory and Injunctive relief.

I. INTRODUCTION

Justice Joseph Story long ago wrote: “Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country while the parents are resident there under the protection of the government and owing a temporary allegiance thereto are subjects by birth.” Inglis v. Trustees of Sailor’s Snug Harbor, 28 U.S. 99, 164 (1830). Thirty-eight years later, Congress adopted the Fourteenth Amendment to the Constitution, which, pursuant to the Citizenship Clause, automatically confers U.S. citizenship on persons born within the United States. The Citizenship Clause reads: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

This case is about protecting the right to birthright citizenship, to ensure that no person born within the United States is unlawfully deprived of the privileges, benefits and protections that accompany this sacred Constitutional right. Through the instant class action complaint, Plaintiffs challenge the Department of State’s ("DOS") inappropriate application of the standard of proof in adjudicating U.S. citizenship claims and the agency’s failure to afford U.S. citizenship claimants any meaningful opportunity to challenge its decisions to deny a U.S. passport application or revoke an existing passport. Plaintiffs further challenge the Department of Homeland Security’s ("DHS") unlawful tactics at ports of entry in encounters whereby DHS officers subject U.S. citizenship claimants, and, in some cases, their parents, to coercion, threats,
duress, prolonged interrogations, or similar harsh tactics based on DHS’ disbelief that the individual, or individual’s child, was born in the United States.

II. JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 (Federal Question) and 1651 (Writs), as a civil action arising under the Constitution and laws of the United States; 5 U.S.C. § 701 et seq., as an action to compel agency action unlawfully withheld or unreasonably delayed; and 28 U.S.C. § 1361, as an action to compel officers or employees of the United States to perform a duty owed to Plaintiffs. Declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201-02.

2. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (e)(1), (2), (4) because Defendants are head officers of U.S agencies and a Port Director of a subdivision of a U.S. agency; Defendants have a residence in this district; because “a substantial part of the events or omissions giving rise to the claim[s] occurred” in the jurisdiction of this district; because most of the Plaintiffs reside in this district; and because no real property is involved.

III. THE PARTIES

A. PLAINTIFFS

3. Laura and Yuliana Castro are citizens of the United States. They reside in Cameron County, Texas.

4. Sampayo, Garcia, Montemayor, Guerrero, Santos, Ruiz, Gonzalez, and Reyes have bona fide claims to being natives and citizens of the United States based on birth within the country, and specifically within the State of Texas. Sampayo, Garcia, Montemayor, Guerrero, Santos, Ruiz, and Gonzalez were born in Cameron County, Texas. Reyes was born in Creedmore,
Texas, and has a residence in Brownsville, Texas.

5. Trinidad Castro and Ana Alanis are Mexican nationals. Trinidad Castro is the mother of Laura and Yuliana Castro. Ana Alanis is the mother of Jessica Garcia. Trinidad Castro and Ana Alanis reside in Matamoros, Mexico.

B. DEFENDANTS

6. Michael T. Freeman is an employee of U.S. Customs and Border Enforcement (“CBP”), a subdivision of the Department of Homeland Security. His title is Port Director. He is responsible for CBP operations at the ports of entry in Brownsville, Texas.

7. Hillary Clinton is the duly appointed and confirmed Secretary of State of the United States.

8. Janet Napolitano is the duly appointed and confirmed Secretary of the Department of Homeland Security.

9. All Defendants are sued in their official capacities.

IV. LEGAL BACKGROUND AND GENERAL ALLEGATIONS

A. U.S. PASSPORT AUTHORITY

10. Only the Secretary of State or her designee is authorized to grant, issue and verify U.S. passports. 22 U.S.C. § 211a.

11. The regulations governing the granting, issuing and verifying passports are located at 22 C.F.R. Part 51.

12. The regulations at 22 C.F.R. Part 51, Subparts C, D and E, govern the adjudication of passport applications.

13. The Secretary of State may revoke a passport in accordance with 8 U.S.C. § 1504 (passport...
illegally, fraudulent or erroneously obtained); 42 U.S.C. § 652(k) (non-payment of child
support); 22 U.S.C. § 2714 (certain drug traffickers); 22 U.S.C. § 2671(d)(3) (default on
repatriation loan); and 22 U.S.C. § 212a (persons convicted of sex tourism). The regulations at
22 C.F.R. Parts E and F govern the revocation of passports.

B. ARBITRARY APPLICATION OF THE PREPONDERANCE OF THE
EVIDENCE TEST FOR ESTABLISHING U.S. CITIZENSHIP

1. The Preponderance of the Evidence Standard

14. A U.S. citizenship claimant bears the burden of establishing that he or she is a national of
the United States. 22 C.F.R. § 51.40.

15. The standard of proof under 22 C.F.R. § 51.40 is preponderance of the evidence, i.e., that
it is “more likely than not” that the person is a U.S. citizen: (not whether the evidence
“sufficiently establishes” U.S. citizenship, or citizenship has been shown to DOS’ “satisfaction”
or whether the agency is of the “opinion” that the person is not U.S. citizens). See Patel v. Rice,
burden of establishing, by a preponderance of the evidence, that he is a United States national.”
(citing Reyes v. Neelly, 264 F. 2d 673, 674-75 (5th Cir. 1959)); 7 Foreign Affairs Manual 1381
(passport applicant must prove citizenship by preponderance of the evidence); and 8 C.F.R. §
341.2(c) (burden of proof for issuance of a certificate of citizenship is preponderance of the
evidence).

2. Pre-September 7, 2003: Application of the Preponderance of the Evidence Standard

16. Although previously improper under Mexican law, Mexican nationals who had children
born in the United States frequently registered their births in Mexico, particularly if they intended to raise the child in Mexico. More recently, Mexican law changed to now allow the children of Mexican nationals born abroad to have Mexican citizenship. Although less common since the change in law, the practice of dual registration persists.

17. In the past, such dual registration rarely if ever caused problems, provided the child was first registered in the United States, and/or had a baptismal certificate showing birth in the United States that predated the Mexican birth certificate.

18. In determining citizenship, the former Immigration and Nationality Service (“INS”) (now part of the Department of Homeland Security) and the Executive Office for Immigration Review (part of the Department of Justice) previously sought out and relied upon the oldest “public” document, including both birth and baptismal certificates, as the most reliable evidence of the place and date of birth.

19. This practice was reflected in pre-printed language in INS requests for evidence where birth facts were at issue. See, e.g., In re Pagan, 22 I&N Dec. 547, 548 (BIA 1999); In re Bueno-Almonte, 21 I&N Dec. 1099, 1030 (BIA 1997).

20. In fact, baptismal certificates were previously considered by the Board of Immigration Appeals (“BIA”) to carry almost the same degree of evidentiary weight as birth certificates. See In re Matter of S.S. Florida, 3 I&N Dec. 111, 116 (BIA 1948).

3. **Post-September 7, 2003: Application of the Preponderance of the Evidence Standard**

21. The preponderance of the evidence standard is applied arbitrarily. Although the U.S. claimant continues to bear the burden of establishing citizenship by a preponderance of the
evidence, the law surrounding this burden has not changed, and, at some point after September 7, 2003, DOS stopped relying on the *oldest* “public” document in adjudicating citizenship claims, unless the oldest public document shows Mexican nationality. Otherwise, they consider that even a much later filed Mexican birth certificate effectively “cancels” a timely filed U.S. birth certificate, showing midwife birth. DOS also considers that a delayed Texas birth certificate constitutes evidence both of birth in Texas, and evidence that the bearer was *not* born in Texas.¹

22. Now, in cases of dual birth registration cases, and regardless of when the Mexican registration occurred, DOS ignores affidavits and other evidence explaining the existence of the Mexican registration. If the Mexican birth registration occurred prior to the U.S. birth registration, DOS generally takes it as conclusive of birth in Mexico, even ignoring evidence created before the Mexican registration, such as baptismal certificates. However, the converse is not true: in most such cases, if the U.S. registration occurred first, DOS still requires more than one corroborating “public” document, in the absence of which, the passport application is almost always denied.

23. Now, in cases where DOS questions a claim of U.S. citizenship, they make arbitrary requests for documents, such as, for example, in the case of an applicant who was born in 1934, where DOS requested evidence of his mother’s prenatal care, and a 1935 census record. They also now request personal information which bears no reasonable relationship to the citizenship claim, such as the addresses, both in the U.S. and abroad, of every place where the applicant has

¹ See, e.g. Plaintiffs’ Exhibit EE, [161:3-4], where a passport application was denied, even though the applicant has a court ordered delayed birth certificate, and there is no Mexican birth certificate. There was no adverse evidence, unless the delayed birth certificate is construed as adverse evidence. By contrast, another application was denied, where the applicant alleged birth by a suspicious midwife, on the sole grounds that there was no Mexican birth certificate, [162:5].
resided and every school s/he ever attended, and the names, addresses, and phone numbers of every employer and former employer.

4. DOS “Decisions”

24. In some cases, DOS articulates its finding as an “opinion.”

25. In others, DOS states that the applicable standard has not been met to their “satisfaction.”

26. In many cases, DOS simply asserts that the burden has not been met, without analyzing the evidence, or explaining why the evidence fails to meet that standard.

27. At times, DOS even denies passport applications where there is no evidence of foreign birth, documentary or testimonial, based apparently on their claim that a delayed birth certificate, or one showing delivery by a “suspicious” midwife, constitutes evidence of foreign birth.

C. LACK OF DUE PROCESS PROTECTIONS IN THE DENIAL AND REVOCATION OF U.S. PASSPORTS

1. Lack of Due Process Hearing When Passport Denied or Revoked Based on Non-nationality

28. Where citizenship is questioned, the procedures by which applications for United States passports are adjudicated, or previously issued passports are revoked, do not afford Due Process. DOS often makes arbitrary and capricious requests for evidence, and personal information. There is no requirement that a denial or revocation reflect meaningful consideration of all the evidence, or fair application of the “preponderance of the evidence” standard, and there are no administrative procedures affording Due Process protections by which the person can contest the denial of an application for a U.S. passport, or revocation of a previously issued passport.

---

2 See, e.g., the denial of the passport application on behalf of the minor I.H. by a form letter stating that it is the “opinion” of DOS that she “[n]ever had claim to U.S. citizenship,” [101:3].
29. Specifically, the regulations at 22 C.F.R. § 51.70(a) provides:

(a) A person whose passport has been denied or revoked under 22 CFR 51.60(b)(1) through (10), 51.60(c), 51.60(d), 51.61(b), 51.62(a)(1) where the basis for the adverse action would entitle the applicant to a hearing under this section, or § 51.62(a)(2) may request a hearing to the Department to review the basis for the denial or revocation within 60 days of receipt of the notice of the denial or revocation.

(b) The provisions of §§ 51.70 through 51.74 do not apply to any action of the Department taken on an individual basis in denying, restricting, revoking, or invalidating a passport or in any other way adversely affecting the ability of a person to receive or use a passport for reasons excluded from § 51.70(a) including:

1. Non-nationality;
2. Refusal under the provisions of 51.60(a);
3. Refusal to grant a discretionary exception under emergency or humanitarian relief provisions of § 51.61(c);
4. Refusal to grant a discretionary exception from geographical limitations of general applicability.

Emphasis added.

30. Thus, “non-nationality” is one of the few grounds for denial or revocation of a U.S. passport which does not entitle one to a hearing.

2. Lack of Adequate Procedures When Passport Denied or Revoked Based on Fraud Relating to Place of Birth

31. Under 22 C.F.R. § 51.62(b), DOS may revoke a U.S. passport on the grounds that DOS has “determined” that the holder is not a U.S. national, although neither the standard of proof, nor on whom the burden rests, is specified therein. In such cases, the prior passport holder is not entitled to any due process protections. 22 C.F.R. § 51.70(b)(1).

32. Even where the regulations provide for a “hearing,” (e.g., where a passport is revoked for “fraud,” under 22 C.F.R. § 51.62(a)(2)), current procedures afford no Due Process safeguards. See, Doc. [151]. 22 C.F.R. § 51.71 through § 51.74.
33. The hearing officer is not an Administrative Law Judge, but an employee of the Department of State. There are no publicized hearing procedures, and DOS refuses to allow pre-hearing conferences to be recorded. There is no body of applicable law, or redacted decisions from other cases. There is no procedure by which legal questions, (e.g., the standard and burden of proof), can be raised and resolved, or proposed evidence can be challenged, prior to the hearing. If the applicant is within the United States, all hearings are conducted in Washington, D.C., completely at the expense of the citizenship claimant. There is no assurance that witnesses residing abroad can be paroled in to testify, and if they chose to testify by tele-video, they must pay all costs. There is no assurance that adverse witnesses will be required to testify in person, or even be subjected to cross-examination. See, Doc. [151]. If the applicant is outside the United States, the hearing may be conducted at a U.S. embassy or consulate abroad. The lack of any Due Process safeguards reduces such a hearing, where available, to an extremely expensive sham.

D. UNLAWFUL PROCEDURES AND TACTICS BY BORDER OFFICIALS


35. On June 1, 2009, the Western Hemisphere Travel Initiative (“WHTI”), Pub. L. No. 110–53, title VII, § 724 (Aug. 3, 2007) was fully implemented. With only limited exceptions, WHTI made it illegal for U.S. citizens to “depart from or enter the United States” without a valid U.S. passport. 8 U.S.C. § 1185(b); 22 C.F.R. § 53.1(a).)

36. Under 22 C.F.R. § 53.2(h) and (i), the Department of State may waive the requirement
that a U.S. citizen must have a passport in order to enter the U.S., in the case of an “unforeseen emergency,” or for “humanitarian or national interest reasons.”

37. Under 22 C.F.R. § 53.3, CBP is required to report any citizen who seeks to enter without a U.S. passport to DOS, “so that the Department of State may apply the waiver provisions of § 53.2(h) and § 53.2(i) to such citizen, if appropriate.”

38. Instead, CBP adopted and publicized a policy that passport applicants could travel to and from Mexico, by presenting to CBP their Texas birth certificates, identification documents, and receipts for passport applications, when they seek re-entry. The policy does not inform such persons that, notwithstanding that they present the required documents, they may be detained on their return, subjected to very harsh treatment, and denied re-entry, without access to a hearing.

39. When encountered at a port of entry, and notwithstanding Hernandez v. Cremer, 913 F.2d 230 (5th Cir. 1990), CBP considers that even applicants for entry who have facially valid documents showing U.S. citizenship, including a U.S. passport, have no Constitutional rights unless and until criminal charges are contemplated.

40. If CBP officers are not convinced of a claim to U.S. citizenship, such officers often confiscate the person’s documents, “convince” them to withdraw their applications for entry, by use of threats, prolonged interrogation, and other harsh tactics, and force them to leave the United States, where they are left with no apparent means of asserting their citizenship claims.

41. CBP officers have used measures prohibited by 42 U.S.C. § 2000dd-0 in attempting to coerce U.S. citizen claimants and/or their parents to “confess” that they were falsely registered as born in the U.S., without regard to the veracity of such confessions, if obtained.

42. Defendants fail to properly train CBP and DOS officers on the fact that under Fifth
Circuit precedent, persons seeking entry as U.S. citizens with facially valid documents showing U.S. citizenship have constitutional rights, or on the permissible limits of interrogation of U.S. citizenship claimants, and/or their parents.

43. On information and belief, it is alleged that agents of Defendants have acted similarly in scores of cases. Plaintiffs’ experiences reflect and are the product of policies, patterns and practices adopted and overseen by Defendants.

V. FACTS

A. THE CASTRO FAMILY

44. Laura Nancy Castro and Yuliana Trinidad Castro are natives and citizens of the United States, born in Brownsville, Texas in 1980 and 1984, respectively. Their births were attended by midwife Trinidad Saldivar, who, shortly thereafter, timely registered them in Brownsville, Texas. Their mother, Trinidad Muraira de Castro, is a Mexican citizen, who at all relevant times had documents with which to lawfully enter the United States. Docs [110,112].

45. Shortly after the births of Laura and Yuliana, their mother, Trinidad, returned with them to her home in Matamoros, Mexico, where she has resided at all pertinent times. Id.

46. When Laura was about four years old, Trinidad registered her birth in Mexico, as born in Matamoros, so that she could attend school there. The same day, and for the same reason, Trinidad also registered the birth of Yuliana, (who was then four and a half months old), in Matamoros, Mexico, also showing birth in Matamoros. Id.

---

3 Trinidad Saldivar, the midwife who delivered Laura and Yuliana, is on Defendants’ list of suspicious midwives. CBP Officer Cabrera represented to Trinidad Castro that Ms. Saldivar had spent five years in prison for filing false birth certificates, but a PACER search of her name turned up no entries. Ms. Saldivar has received anonymous threats of unspecified harm if she fails to “admit” that she falsely registered births in the United States.

48. On August 24, 2009, at about 9:40 a.m., Laura, Yuliana, and Trinidad Castro, with Yuliana’s infant daughter, C.A.G., applied for admission/entry at the Old Bridge in Brownsville, Texas. Laura presented her U.S. passport. Yuliana presented her birth certificate, Texas ID, the receipt for her application for a U.S. passport, and the Texas birth certificate of C.A.G. Trinidad presented her laser visa. The agent on duty, CBP Officer Eliseo Cabrera, noted that Yuliana’s birth certificate reflected a midwife birth, and took them to secondary inspection, where he detained, interrogated, threatened, and otherwise treated all four Plaintiffs inhumanely for about ten hours. Id.

49. At the time of the events in question, all four were in a delicate medical state. Trinidad suffers from high blood pressure. Laura was in the early months of pregnancy, and was experiencing symptoms demonstrating that it was a high-risk pregnancy. Yuliana was recovering from complications of childbirth. C.A.G., who was only a few weeks old, was deprived of the care and environmental conditions any newborn requires, and cried uncontrollably. Id.

50. Based on threats, fear, hunger, exhaustion, and her inability to continue listening to the cries of her infant granddaughter, C.A.G., complicated by her own the delicate medical condition, and awareness of the medical vulnerability of the others, Trinidad succumbed to the efforts of Officer Cabrera to extract a false “confession” from her, to the effect that Yuliana and Laura had in fact been born in Mexico, and signed a document that he had prepared. Id.
51. The Castros’ family was so concerned by their detention that they sent an attorney to the port of entry, but he was not allowed to represent, or even communicate with Plaintiffs. The family also called the police, who came to the bridge, and made a report. \textit{Id.}

52. After forcing Trinidad Castro to sign a false “confession,” Defendants confiscated the documents of Laura, Yuliana, and Trinidad, and returned them to Mexico, without giving them any opportunity to contest his actions. Laura and Yuliana were treated as having “withdrawn” their applications for entry. Trinidad was found to be inadmissible for fraud, under 8 U.S.C. § 1182(a)(6) (C)(i), and subjected to “expedited removal.” \textit{Id}.\footnote{By treating them as having “withdrawn” applications for admission, rather than putting them in proceedings, or issuing orders of expedited removal, Defendants Napolitano and Freeman deprived Laura and Yuliana Castro of all statutory means of asserting U.S. citizenship. Similarly, by forcing Trinidad Castro to sign a “confession” of fraud, Defendants Napolitano and Freeman deprived her of the ability to have a hearing before the Immigration Judge with respect to the bona fides of her visa, and her request for admission, under 8 U.S.C. § 1229a, or to contest the cancellation of her laser visa. \textit{See}, 8 U.S.C. § 1 252(e)(1). Therefore, Trinidad Castro challenges the means by which the false confession was extracted, and seeks a declaration that it is, indeed, false, and that she committed no fraud.}

53. Other than by requesting additional documentation in support of their passport applications, at no time prior to August 24, 2009, did any Defendant attempt to inform anyone in the Castro family that there were questions as to whether Laura and Yuliana had in fact been born in Texas. Prior to that date, all three: Laura, Yuliana, and their mother, Trinidad Castro, had crossed into the U.S. frequently, without problems or complications.

54. When the instant action was filed, Laura, Yuliana and Trinidad Castro were at the Old Brownsville Bridge. At the time of filing, they were therefore within the United States, in Brownsville, Texas, within the jurisdiction of this Court.

55. On April 5, 2010, Laura’s U.S. passport was revoked, allegedly for fraud, under 22
C.F.R. § 51.62(a)(2) [125]. She requested a hearing, and expended substantial energy and funds into preparing to go to Washington, D.C., [151], but the hearing was canceled at the last minute, based on the evidence developed before this Court, and her passport was returned to her, [96].

56. Based on the same evidence, Yuliana also received a U.S. passport. Id. Removal proceedings against Yuliana were terminated, but notwithstanding DOS’ decision to give Yuliana a passport, Defendant DHS reserved the right to re-institute proceedings against her, and the Immigration Judge held that the citizenship of persons such as the Castro sisters can only be determined following an order of expedited removal, which would, in most cases, involve lengthy administrative detention, with no possibility of parole, [99].

57. For weeks after receiving her passport, Laura continued to have problems when she crossed the border with her passport. This causes her to be fearful and suffer emotional distress each time she crosses. Both Laura and Yuliana fear that they could experience similar problems in the future, and only be able to assert their U.S. citizenship by being physically detained. This adversely affects both of them emotionally and physically.

58. The finding that Trinidad Muraira de Castro committed fraud, derived from the false “confession” that Laura and Yuliana were actually born in Mexico, permanently bars her from the United States. 8 U.S.C. § 1182(a)(6)(C)(i). Since she is not the spouse, son, or daughter or a U.S. citizen or lawful permanent resident, she is ineligible for a waiver under 8 U.S.C. § 1182(i). She has close relatives born in Texas, and will be deprived of the opportunity to participate fully in the lives of her U.S. citizen children and grandchildren, or to immigrate to the United States.

59. By order dated April 26, 2011, [158], this Court dismissed claims raised by Laura and
Yuliana under 8 U.S.C. § 1503, concluding that they were mooted by their possession of U.S. passports. However, Laura and Yuliana remain Plaintiffs in this action as representatives of the proposed class of individuals who were subject to mistreatment by agents of Defendant Napolitano, and with their mother, in seeking a declaratory judgment that she did not commit fraud in registering them as born in Texas. See § IV (Class Allegations), infra.

60. By that same order, the Court dismissed the habeas claim raised by Trinidad Castro based on the fact a visa petition had not been filed on her behalf. However, like her daughters, Trinidad Castro remains a Plaintiff in the instant amended action as a representative of the proposed class of individuals who were subject to mistreatment by agents of Defendant Napolitano. See § IV (Class Allegations), and in seeking a declaratory judgment that she did not commit fraud in registering them as born in Texas, infra.

B. RODRIGO SAMPAYO

61. Rodrigo Sampayo is a United States native and citizen, born in Brownsville, Texas in 1949. His birth was attended by midwife Belen Lopez, who registered his birth in Brownsville a few months later. His mother, Rebecca Ortiz, was a Mexican citizen. His father, Ramon Sampayo, was a Spanish national. Both are now deceased. Mr. Sampayo’s birth was also registered in Mexico City, as having been born there, when he was about five years old. [64].

62. At some point after his birth, Mr. Sampayo’s parents took him to Mexico City, Mexico, where he grew up. Until recently, the only birth certificate of which he was aware was the one stating that he had been born in Mexico City, Mexico. As a result, for most of his life, Mr. Sampayo used his Mexican birth certificate, and even had a border crossing card, issued by INS.

5 Midwife Belen Lopez is not on the USCIS or other known list of suspicious midwives.
It was only after both parents were deceased that Mr. Sampayo learned that he had been born in Texas. His parents never sought monetary, immigration, or other benefits from the fact that Mr. Sampayo was born in Texas. *Id.* To the contrary, the fact that they never informed him of the existence of his birth in Texas is strong circumstantial evidence that they had no intention of using his U.S. citizenship to obtain any benefit, and thus no motive to have falsely registered him as born in Texas.

63. In early 2009, Plaintiff Sampayo applied for a U.S. passport. He received a letter, dated June 24, 2009, asserting that his midwife was on a “suspicious” list, and requesting additional documentation of his birth. Since both parents are deceased, he was unable to provide some of the information about them that was requested by DOS, but he responded as fully as was reasonably possible. *Id.*

64. On September 17, 2009, Mr. Sampayo applied for entry at Brownsville, Texas. He presented his birth certificate, Texas driver’s license, and the receipt for his U.S. passport. The agent on duty, CBP Officer Eliseo Cabrera, noted that his birth certificate reflected a midwife birth, and was filed several months, (but less than one year), after his birth. *Id.*

65. Officer Cabrera then took Mr. Sampayo to secondary inspection, where for approximately six hours he detained and interrogated him, threatening that if he did not “admit” foreign birth, he would be detained. During the interrogation, Mr. Sampayo’s attorney, Jaime Diez, arrived with a signed G-28, and sought to represent him. Defendants Napolitano and Freeman refused Mr.

---

6 Due to counsel’s error, Mr. Sampayo’s statement in support of his passport application indicated that he had heard as a child that he had been born in Brownsville. This was incorrect. He only learned this when he discovered his Texas birth certificate.

7 Under 22 C.F.R. § 51.42(a), a U.S. birth certificate filed within one year of birth is deemed primary evidence of U.S. birth.
Diez all access to Mr. Sampayo, and refused to even inform Mr. Sampayo that his attorney was outside, attempting to represent him. *Id.*

66. After about six hours, Mr. Sampayo concluded that he had no option but to sign whatever papers Mr. Cabrera presented to him. Mr. Cabrera wrote up the incident, making a knowing false assertion that Mr. Sampayo had “freely” admitted foreign birth. *Id.*

67. After forcing Mr. Sampayo to sign the papers he had prepared, Mr. Cabrera confiscated his documents, and returned him to Mexico. Mr. Sampayo was given no chance to contest said actions, but was treated as having “withdrawn” an application for admission. 8 *Id.*

68. Other than by requesting additional documentation in support of his passport application, at no time prior to September 17, 2009, did any Defendant make any attempt to inform Mr. Sampayo that there were questions as to whether he had in fact been born in Texas, or that his midwife was on a “suspicious” list. After having found his Texas birth certificate, he had crossed into the U.S. frequently, without problems or complications. *Id.*

69. On March 1, 2010, Defendant Clinton denied Mr. Sampayo’s passport application, parroting Officer Cabrera’s claim that Mr. Sampayo had “admitted freely” birth in Mexico. [64:3]. The text of the letter reads, [64:3]:

> This agency sent you a letter identifying one or more deficiencies in your passport application and requesting additional information to establish your entitlement to a U.S. passport. A copy of that letter is enclosed. Since we received an incomplete response from you, your passport application is hereby denied due to the deficiency or deficiencies that letter identified. In addition, our records indicate that in 1986, an individual with your given name and other matching biographical data was issued a Border Crossing Card that grants non-U.S. citizens permission to travel to the United States. Further, on September 17, 2009, you gave to U.S.

8 By forcing him to “withdraw” his application to enter, rather than ordering his expedited removal, Defendants Napolitano and Freeman deprived Mr. Sampayo of the statutory means of asserting U.S. citizenship by contesting the removal order. *See, 8 U.S.C. § 1252(e)(2).*
Customs and Border Protection a sworn statement in which you admitted freely that you were born in "Mexico, Mexico DF [Distrito Federal]" and that you are a citizen of Mexico.

70. By letter dated May 7, 2010, Defendants refused to reconsider the denial, again citing Mr. Sampayo’s alleged confession. [69:13].

71. At the moment the instant action was filed, Mr. Sampayo was at the Gateway Bridge in Brownsville, Texas. At the time of filing, he was therefore within the United States, in Brownsville, Texas, within the jurisdiction of this Court, but unable to enter the United States. He has been deprived of all evidence of his U.S. citizenship. Mr. Sampayo has ties on both sides of the Rio Grande. His business requires that he travel back and forth between Mexico and the U.S., and he has suffered greatly because of his inability to do so. Id.

72. By order dated April 26, 2011, this Court dismissed Mr. Sampayo’s prior habeas corpus claim, and severed his claim under 8 U.S.C. § 1503 into an individual action, CA B-11-082. However, Mr. Sampayo remains a Plaintiff in this amended action as a representative of the proposed class of individuals who have had their passport applications erroneously denied without a due process hearing and the proposed class of individuals who have been subject to mistreatment by agents of Defendant Napolitano. See § IV (Class Allegations), infra.

C. JESSICA GARCIA AND ANA ALANIS

73. Jessica Garcia was born in Brownsville, Texas in 1987. Her birth was also attended by midwife Trinidad Saldivar, who registered it in Brownsville two and a half weeks later. Shortly after her birth, her mother took Jessica to her home in Matamoros, Mexico. When Jessica was about seven weeks old, her mother registered her birth in Matamoros, as having been born there, in order to obtain vaccinations for her in Mexico. [48,49].
74. In May, 2009, Ms. Garcia applied for a U.S. passport. Because she was born with the aid of a midwife, DOS made arbitrary requests for evidence and personal information. Said application was not adjudicated until at least June 24, 2010, [141:3]. She has never received a denial letter, although she continues to receive mail at the address given on the application.

75. On October 31, 2009, at about 9:30 a.m., Ms. Garcia sought entry at the new bridge, in Brownsville, Texas. Officer Cabrera was working primary. She showed him her Texas ID, Texas birth certificate, and the receipt for her passport application. He asked if she also had a Mexican birth certificate. She was unaware of the existence of such a document, and replied that she did not. Officer Cabrera then sent her in to secondary inspection.[48,49].

76. Ms. Garcia waited a while, and when nothing happened, asked another CBP officer what was going on, because she was due at work in Brownsville at 10:00 a.m. That officer locked her in a small room, to await Officer Cabrera, who arrived about 30 minutes later. He eventually produced her Mexican birth certificate, which had been filed a month after her Texas birth certificate. He claimed that the Texas birth certificate was fraudulent, and began to hurl threats and insults at her, and make false representations, in a vain attempt to force Ms. Garcia to sign the papers he had prepared apparently to “withdraw” her application for admission. Id.

77. Eventually, Ms. Garcia’s mother, Ana Alanis, also came to the port of entry. She explained why Jessica Garcia had two birth certificates, and insisted that she had been born in Brownsville. Nonetheless, she was also treated with threats, insults, and false statements by Officer Cabrera, in a vain attempt to get her to falsely “confess” that Jessica had been born in Matamoros. Id.

---

9 Defendants incorrectly state therein that the denial letter was attached as an exhibit.
78. When neither woman would “confess” to the untruth sought by Officer Cabrera, he was forced (apparently by his Supervisor), to issue an NTA. He confiscated all the documents Jessica and her mother had with them, and sent them back to Mexico. Id. Among the documents confiscated was the request of the Department of State seeking additional evidence of her birth in the United States, and papers relating to her outstanding student loan.

79. The NTA against Ms. Garcia was never filed with the EOIR, so no hearing was ever scheduled. Nor was she afforded a hearing by which to challenge the confiscation of her documents. This left Ms. Garcia completely in the air.

80. As a result, Jessica Garcia lost her employment, and the income on which she and her family depended. In order to settle her motion for preliminary injunction, Defendants agreed to allow her to enter as a U.S. citizen until her citizenship claim is finally determined. However, she continues to be sent into secondary inspection, interrogated, and often delayed for extended periods when she enters. Among other hardships, she lost her employment, health insurance, and defaulted on other financial obligations, including a payment schedule for a traffic ticket in Brownsville, Texas. Her health has suffered, and she gained a lot of weight. Her relationships with her husband and children have also deteriorated. Her old job is no longer available, and she has had difficulty finding new employment.

81. DOS claims that, on June 24, 2010, they denied Ms. Garcia’s passport application. By order dated April 26, 2011, this Court severed her claim under 8 U.S.C. § 1503 into an individual action, CA B-011-083. However, Ms. Garcia remains a Plaintiff in this amended action as a representative of the proposed class of individuals who have had their passport applications erroneously denied without a due process hearing and the proposed class of
individuals who have been subject to mistreatment by agents of Defendant Napolitano. See § IV (Class Allegations), infra

82. Like her daughter, Ms. Alanis remains a Plaintiff in the instant amended action as a representative of the proposed class of individuals who were subject to mistreatment by agents of Defendant Napolitano. See § IV (Class Allegations), infra.

D. LUIS MONTEMAYOR

83. Luis Montemayor was born in Mercy Hospital, in Brownsville, Texas, in September, 1967, during the height of Hurricane Beulah, which caused extreme flooding and devastation in the Rio Grande Valley, Texas. His birth certificate was signed the day of his birth, but apparently as a result of the hurricane, the hospital neglected to file it, and the oversight was not discovered and corrected for over ten years, [164].

84. Mr. Montemayor is the youngest of eight children, all of whom were born in Mercy Hospital in Brownsville. Like his siblings, his birth was also registered in Mexico, about a month after his birth. And like most of his siblings, his Mexican birth certificate asserted birth in Mexico, even though they, too, were actually born in Mercy Hospital, in Brownsville, Texas.

85. In 2007, Mr. Montemayor obtained a United States passport, and in 2009, a U.S. passport card. He departed and entered the U.S. numerous times without incident.

86. However, in January, 2011, he received a letter from the Department of State, stating that his passport and passport card had been revoked. The letter (incorrectly) alleged that he had been contacted, and given an opportunity to provide additional evidence of his birth in Texas. The letter further stated that, since revocation was based on “non-citizenship,” he was not entitled to a hearing.
87. The revocation letter also threatened Mr. Montemayor with criminal prosecution, if he continued to use his passport or passport card.

88. In relevant part, the letter states:

In support of your application for U.S. passport 433348288, you submitted a birth record showing that you were born on September 21, 1967 in Brownsville, Texas. This birth certificate was registered on March 3, 1978, more than ten years after your birth. Thereafter, U.S. Passport Number 433348288 was issued to you on October 29, 2007. In support of your application for U.S. passport card C02269400 you submitted U.S. passport 433348288. Thereafter, U.S. passport card C02269400 was issued to you on September 23, 2009.

An investigation revealed a Mexican birth registration in your name, indicating that you were born on September 21, 1967, in Matamoros, Tamaulipas, Mexico, less than one month after your birth. The Department contacted you and you indicated that you did not have any additional evidence supporting your claim of birth in the U.S. Based on this new evidence and the totality of the circumstances, we have determined that the revocation of your passport is warranted.

89. Mr. Montemayor disputes having ever having received any such communication from the Department of State, or asserting that he was unable to provide additional evidence of his birth in Texas. He submits that he only learned that his citizenship was in question when he received the letter revoking his passport and passport card.

90. Mr. Montemayor joins this action as a named Plaintiff in the passport revocation class. See § IV (Class Allegations), infra.

E. ANA LUISA GUERRERO

91. Ana Luisa Guerrero was born in Brownsville, Texas, in July, 1977. Her birth in Texas was an accident, since her parents were shopping in Brownsville when her mother’s water broke. Her birth was assisted by Victoria Grimaldo, who was recommended by the girlfriend, (Mariana), of her paternal grandfather. Her birth was registered in Brownsville approximately one month
later. Mariana and her daughter were present for the actual birth. [160].

92. Two days after her birth, Ms. Guerrero’s mother registered her in Mexico, as having been born there. She changed the date of birth to June, 1977, to enable Ms. Guerrero to start school in Mexico a year earlier than she would be able to do if her date of birth were shown as July, 1977. In December, 1977, Ms. Guerrero was baptized in Mexico, also showing birth in Mexico.

93. In 2006, Ms. Guerrero petitioned a Mexican Court to correct her Mexican birth certificate, to reflect her actual date and place of birth. The petition was granted in January, 2007. A few days later, she applied for, and promptly received, a U.S. passport.

94. In 2008, Ms. Guerrero filed an I-130 petition, seeking to immigrate her Mexican national husband. The couple was interviewed by DHS in Harlingen, Texas. However, notwithstanding that she had a facially valid U.S. passport, in January, 2009, DHS demanded additional documents to substantiate her birth in Texas. Ms. Guerrero complied with their request. In December, 2009, Ms. Guerrero and her parents were interviewed by DHS. They steadfastly maintained that she had been born in Texas. Nonetheless, by letter dated a few days later, DOS informed Ms. Guerrero that her U.S. passport had been revoked. She was given no opportunity to challenge the revocation, either before or after it occurred.

95. In relevant part, the revocation letter states:

The Department was recently informed of an investigation regarding the circumstances of your birth. The investigation uncovered a Mexican birth record in the name Ana Luisa Guerrero Ornelas that lists your date and place of birth as June 20, 1977, in Matamoros, Mexico. This birth record was filed on July 6, 1977. You provided a sworn statement to U.S. Citizenship and Immigration Services in which you stated that you were aware of this Mexican birth record since you were ten years old. However, the birth record was not amended until February 2, 2007 - three days before your application for a U.S. passport. The amended Mexican birth record changed your date and place of birth to July 4, 1977, Brownsville, Texas. Based on this new evidence and the totality of the
circumstances, we have determined that the revocation of your passport is warranted.

96. Shortly thereafter, Ms. Guerrero received a Notice of Intent to Deny the I-130 filed on behalf of her husband. She responded with additional evidence, and the I-130 petition remains pending.

97. Ms. Guerrero also has an individual action pending. CA B-11-cv-16. By Order dated May 9, 2011, this Court dismissed her habeas causes of action, leaving only her claim under 8 U.S.C. § 1503. She is therefore joining this action as a named Plaintiff in the passport revocation class. See § IV (Class Allegations), infra.

F. ALICIA RUIZ

98. Alicia Ruiz was born in 1933, in Mercedes, Texas, where her family had been living for some time, and where her older brother had been born and baptized. As was common at that time, her birth was not timely registered. At the age of nine months, she was baptized in Mercedes, Texas. Her baptismal certificate shows birth in “Relampago Ranch,” Texas. Ms. Ruiz’ parents moved to Mexico, and when she was ten, registered her birth in Mexico, as having been born there. When she married in Mexico, in 1951, she was required to present a birth certificate, but the only one she possessed showed birth in Mexico, so her marriage certificate also shows birth in Mexico. However, the birth certificates of two of her three children reflect that she was born in Texas. [57].

99. Ms. Ruiz has applied three times for a U.S. passport. Each time, her application has been rejected. The most recent denial, in 2009, from which there is no administrative appeal, notes only that she was registered in Mexico before her delayed Texas birth certificate was filed.
The denial recites as follows, [57:36]:

A check with the Mexican vital records office revealed that there was a birth certificate recorded for you on 9/22/1943 Reynosa, Tamaulipas, Mexico. This record was filed before the Texas birth certificate. As a result of this finding, a US passport cannot be issued to you at this time.

100. This denial simply ignores all other evidence, including her contemporaneous baptismal certificate, and denies her Due Process.

101. By order dated April 26, 2011, this Court severed Ms. Ruiz’ claim under 8 U.S.C. § 1503 into an individual action, CA B-11-084. However, Ms. Ruiz remains a Plaintiff in this amended action as a representative of the proposed class of individuals who have had their passport applications erroneously denied without a due process hearing. See § IV (Class Allegations), infra

G. MARIA REYES

102. Maria Reyes was born in Creedmore, Travis County, Texas, in 1931. Her brother, Hermenegildo Reyes, was born in Lockhart, Texas, in 1928. In October, 1931, the family was repatriated to Mexico. The repatriation document states that her parents, Abraham Reyes and Carmen Lucio de Reyes, were accompanied by Hermenedegido Reyes, age 3, and Maria Reyes, age five months, and that they were coming from “Greehmore, Texas.” On April 21, 1932, Maria Reyes was baptized in Lampazos, N.L., Mexico. Her baptismal certificate reflects birth in “Cremord, Tex.” The following day, her parents registered her birth in Lampazos, N.L., showing the same date of birth, but reflecting her place of birth as Anahuac, N.L., Mexico. [163].

103. In 1975, Ms. Reyes obtained a delayed Texas birth certificate, using her baptismal certificate, and repatriation record. In 2006, she attempted to obtain a U.S. passport. The
application was denied, based solely on the fact that the Mexican birth record predated the delayed Texas birth certificate.

104. In 2007, Ms. Reyes applied for a copy of her Texas birth certificate. The request was denied, since the U.S. Consulate had advised the State of Texas of the Mexican birth certificate. She requested a hearing in Austin, Texas, where the ALJ found that she had, indeed, been in born in Texas, and a new birth certificate was issued, [163:18-30].

105. In 2008, Ms. Reyes again applied for a U.S. passport, using her newly issued Texas birth certificate. On May 9, 2008, that application was also denied, [163:3]:

A check with the Mexican vital records office revealed that there was a birth certificate recorded for you on 04/22/1932. This record was filed before the Texas birth certificate. As a result of this finding, a U.S. passport cannot be issued to you at this time.

106. This denial, from which no administrative appeal exists, ignores all the other relevant evidence, and denies her Due Process.

107. By order dated April 26, 2011, this Court severed Ms. Reyes’ claim under 8 U.S.C. § 1503 into an individual action, CA B-11-085. However, Ms. Reyes remains a Plaintiff in this amended action as a representative of the proposed class of individuals who have had their passport applications erroneously denied without a due process hearing. See § IV (Class Allegations), infra.

H. JENIFER ITZEL GONZALEZ

108. Jenifer Itzel Gonzalez was born in 1992 in Port Isabel, Texas, with the aid of midwife Marta A. Martinez, who is “suspected,” but neither was convicted of, nor confessed to, filing false birth certificates. Her birth was registered in Cameron County two days later. Her mother
was a schoolteacher in Mexico, and returned with Ms. Gonzalez to Matamoros, where her birth was registered about a week after it was registered in Texas. The Mexican reflected birth in Matamoros, so that she could obtain medical services there. When she was about six months old, Ms. Gonzalez was baptized, also in Matamoros. The baptismal certificate also shows birth in Port Isabel, Texas. [65]

109. Ms. Gonzalez applied for a U.S. passport on June 8, 2007, in Brownsville, Texas. Twice Defendants made arbitrary requests for more documents and information, and twice she responded. Her application was denied on March 25, 2010. The denial stated, in pertinent part, [65:3]:

An individual applying for a U.S. passport has the burden of proving by a preponderance of the evidence through documentary evidence his or her U.S. citizenship or nationality (22 C.F.R. 51.40, 51.41). Because your birth record was filed by a birth attendant who the Department has reason to believe is not reliable, you were asked to provide supplementary documentation to support your claim of birth in the United States. ...

The additional documentation you provided to support your claim of birth in the United States is not sufficient to establish by a preponderance of the evidence that you were born in the United States. There exists a foreign birth record indicating that your birth occurred in Mexico AND you have not submitted sufficient early public records to support your birth in the United States. Therefore, we are unable to determine that you are entitled to a passport and your application is denied.

110. This denial ignores the other relevant evidence. It does not explain why a contemporaneously filed Texas birth certificate, and baptismal certificate, showing birth in Texas, weighed against a later filed Mexican birth certificate, for which a credible explanation was provided, do not constitute a “preponderance” of the evidence. This demonstrates that Defendants’ suspicion that the midwife who delivered her had in other cases fraudulently registered children in Texas was deemed to be “evidence” that Ms. Gonzalez was not born here.
Otherwise, a finding that she had not met the “preponderance of the evidence” standard would not have been possible.

111. By order dated April 26, 2011, this Court severed Ms. Gonzalez’ claim under 8 U.S.C. § 1503 into an individual action, CA B-11-086. However, she remains a Plaintiff in this amended action as a representative of the proposed class of individuals who have had their passport applications erroneously denied, without lawful application of the preponderance of the evidence standard, or a post-denial, due process hearing. See § IV (Class Allegations), infra.

I. ERVEY LORENZO SANTOS

112. Ervey Lorenzo Santos was born in Brownsville, Texas, on August 1974. His mother was attended by Vicenta A Vitte, a midwife. His birth was timely registered in Texas six days later. When he was born, his parents were residing in Poblado Anahuac in Matamoros, Mexico. [161]

113. Approximately three months after his birth, Mr. Santos was baptized in the City of Anahuac, part of the dioceses of Matamoros, Mexico. His baptismal certificate reflects birth in Brownsville.

114. In August of 1980, at the age of six, Mr. Santos’ father registered him in Matamoros, Mexico showing his birth in the City of Anahuac, Tamaulipas, Mexico. The registration also indicated that he was born in July 1974. This was done so that Mr. Santos could attend school in Mexico, starting one year earlier than would otherwise be the case.

115. To the best of his recollection and belief, Mr. Santos first applied for a U.S. Passport in Brownsville, Texas, in about 1995, when he was approximately twenty-one years old. He remembers that a government official told him that he would not receive a passport because he was born with a midwife. Mr. Santos did not receive his U.S. Passport.
116. On or about March 20, 2001, Mr. Santos again applied for a U.S. Passport in Mississippi, where he was living at that time. He recalls being told it would take approximately 2 months to receive his U.S. Passport. He did not receive it within 2 months. He later moved, without having received his passport.

117. On or about December 7, 2007, Mr. Santos applied for the third time for a U.S. Passport in Brownsville, Texas. Shortly after, DOS contacted Mr. Santos to ask why he needed another U.S. Passport if he already had one. Mr. Santos wrote back to DOS informing them that he did not receive any prior passport.

118. On May 1, 2008, DOS issued Mr. Santos a U.S. Passport.

119. On or about November 30, 2007, Mr. Santos went with his parents to the U.S. Consulate in Ciudad Juarez, Mexico for an interview regarding their pending applications to immigrate to the United States. At this interview, DOS intensively questioned his mother for approximately two hours about the place where her son was born. Throughout the interrogation, his mother repeatedly told the consular officer that Mr. Santos was born in Texas. However, after his mother was interviewed, the consular officer called his father and interviewed him for approximately two hours. Through the use of threats, lies and intimidation, his father was pressured into falsely “admitting” that his son was not born in the United States. Among other things, the consular officer told his father that if he did not admit that his son was not born in the U.S. that they would send his son to jail. Mr. Santos’ father signed a document which he could not read because it was in English. The consular officer did not provide him with a copy of the document.

120. Shortly after his father signed this document, Mr. Santos was called in and told that his
father had admitted he was not born in the United States. The consular officer confiscated his social security card and cut in half his Texas Drivers’ License.

121. The consular officer also instructed Mr. Santos to sign a document written in English, which he could not read. Again, the consular officer did not provide him with a copy of it.

122. After this incident, Mr. Santos’ parents, both of whom suffer from high blood pressure, became very ill.

123. On or about June 14, 2009, Mr. Santos wrote a letter to immigration informing them that because of the incident in Cuidad Juarez, where they were threatened and intimidated, his parents had decided for health reasons that at this time they did not want to continue with the process of immigrating to the United States. On or about June 17, 2009, DHS sent Mr. Santos a letter informing him that his parents’ case was closed.

124. On or about March 10, 2011, Mr. Santos received a certified letter from the Department of State, informing him that his U.S. Passport was being revoked, and ordering him to surrender his U.S. Passports. The letter stated, in relevant part (emphasis added), [161:19-20]:

An investigation conducted by the Department revealed that the birth certificate presented by you for both applications was false and that you submitted false identity documents in support of your application for U.S. Passport. Your father, Lorenzo Santos Lopez, admitted in a signed statement that you were in fact born in Tamaulipas, Mexico, and that his father in law had purchased the false U.S. birth certificate for you for the sum of $150.00. Additionally, you admitted in a signed statement that you have known of the true circumstance of your birth since 1993. A Mexican birth certificate was located during the investigation that confirms that you were born on July 18, 1974 in Tamaulipas, Mexico. Because you made a false statement of material fact on the passport applications, your passports are revoked pursuant to Section 51.62(a)(2) of Title 22 of the U.S. Code of Federal Regulations.

... You have a right to a hearing under Sections 51.70 through 51.74 of Title 22 of the U.S. Code of Federal Regulations, a copy of which is enclosed. This hearing would address the evidence presented upon which the passports were issued.
Should you desire such a hearing, you must notify this office in writing within 60 days of receipt of this notice. A request for a hearing does not serve to stay the revocation action taken by the Department of State.

125. On or about April 25, 2011, as mandated by DOS, Mr. Santos surrendered his U.S. Passports.

126. For financial and other reasons, including the facts that the hearing offered would address only the “evidence presented upon which the passports were issued,” could be conducted only in Washington D.C., at Mr. Santos’ expense, and would offer no Due Process protections, [151], and given DOS’ recognition that not requesting such a hearing does not constitute a failure to exhaust administrative remedies, [151:8], Mr. Santos did not request such a hearing.

IV. CLASS ALLEGATIONS

127. Plaintiffs hereby incorporate by reference the allegations of paragraphs 1 through 126.

128. Plaintiffs seek to represent the following related classes:

First Proposed Class:

Passports Revoked Based on Allegations Related to Non-Nationality
(Represented by Plaintiffs Montemayor, Guerrero and Santos)

Individuals who:
• have received or will receive U.S. passports;
• whose passports, on or after September 7, 2003, have been or will be revoked by Defendant Clinton based, in whole or in part, on 22 C.F.R. § 51.62(b) (non-national) or 22 C.F.R. § 51.62(a)(2) (obtained illegally, or obtained by fraud or error), where Defendant Clinton’s underlying assertion is that the bearer is not a citizen of the United States; and
• whose claims of U.S. citizenship have not been finally adjudicated by a federal court.

Second Proposed Class:

Passport Applications Denied Based on Failure to Prove U.S. Nationality
(Represented by Plaintiffs Sampayo, Garcia, Ruiz, Reyes, Gonzales)
Individuals who:

- on or after September 7, 2003, applied for, or who will in the future apply for, a United States passport;
- whose passport application has been or will be denied by Defendant Clinton based, in whole or in part, on 22 C.F.R. § 51.62(b) (non-national) or 22 C.F.R. § 51.62(a)(2) (obtained illegally, or obtained by fraud or error), where Defendant Clinton’s underlying assertion is that the applicant is not a citizen of the United States; and
- whose claim of U.S. citizenship has not been finally adjudicated by a federal court.

**Third Proposed Class:**

*Mistreatment at the Border Related to Citizenship*

(Represented by Plaintiffs Laura and Yuliana Castro, Garcia, Sampayo)

Individuals who:

- on or after September 7, 2003, presented or will present at a U.S. ports of entry facially valid documentation of their U.S. citizenship (including a U.S. passport, U.S. birth certificate showing birth in the United States or one of its territories; voter registration card; certificate of citizenship; or naturalization certificate);
- who were refused entry or, in the future will be refused entry, into the United States by agents of Defendants Napolitano and/or Clinton;
- who were subjected to, or will be subjected to, coercion, threats, duress, or similar harsh tactics by agents of Defendants Napolitano and/or Clinton; and
- whose claim of U.S. citizenship has not been finally adjudicated in federal court.

**Fourth Proposed Class:**

*Mistreatment at the Border Relating to Accusation of Having Falsely Registered a Child As Born in the United States*

(Represented by Plaintiffs Trinidad Castro and Ana Alanis)

Individuals who:

- who have or will have a child with facially valid documents showing birth in the United States, (including a U.S. passport, U.S. birth certificate showing birth in the United States or one of its territories; voter registration card; certificate of citizenship; or naturalization certificate), but whose claim of U.S. citizenship has been called into question by agents of the Department of Homeland Security or the Department of State, and
- who, on or after September 7, 2003, on U.S. soil, were or will be detained and
questioned by agents of Defendants Napolitano and/or Clinton for more than two hours, during which they were or will be accused of having falsely registered their child as born in the United States.

129. As used in these class definitions, September 7, 2003, represents six years before the date of the initial filing of the instant action (September 7, 2009) as contemplated by the applicable statute of limitations, 28 U.S.C. § 2401.

130. On information and belief, Plaintiffs allege that, as so defined, the classes number in the hundreds, not counting future members.

131. The classes are so numerous that joinder of all members would be impracticable. Joinder is particularly impracticable since the classes include future members.

132. The claims of the representative parties are typical of the claims of the classes.

133. The representative parties, and their counsel, can and will fairly and adequately protect the interests of the classes. Class counsel are experienced in class action litigation and in litigation of the type of claims raised here.

134. There are questions of law and fact that are common to the classes which predominate over any individual questions. Further, Defendants have acted, or refused to act, on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief, with respect to the class as a whole.

V. THE CAUSES OF ACTION

FIRST CAUSE OF ACTION

Violation of the Preponderance of Evidence Standard

Violation of Fifth Amendment (Due Process Clause), Fourteenth Amendment (Citizenship Clause); 5 U.S.C. §§ 702, 706 (APA Claims);
28 U.S.C. § 2201 (Declaratory and Corresponding Injunctive Relief); 28 U.S.C. § 1361 (Mandamus Act)

(Plaintiffs Sampayo, Garcia, Montemayor, Guerrero, Ruiz, Reyes, and Gonzalez, on their own behalf and behalf of all others similarly situated, Against Defendant Clinton)

135. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 134.

136. As alleged above, Defendant Secretary of State improperly applies the “preponderance of evidence” standard, both in adjudicating U.S. passport applications and in determining whether to revoke previously issued U.S. passports. Such action deprives Plaintiffs of the full enjoyment of the rights and privileges of U.S. citizenship to which they are entitled by virtue of birth within the United States.

137. Defendant Clinton’s actions violate Plaintiffs’ rights under the Fifth and Fourteenth Amendments, the Administrative Procedures Act, the Mandamus Act, and entitle Plaintiffs to relief under the Declaratory Judgment Act.

SECOND CAUSE OF ACTION

Lack of Due Process in Adjudicating Passport Applications

Violation of Fifth Amendment (Due Process Clause); and Fourteenth Amendment (Citizenship Clause); 8 U.S.C. § 1101(a)(22); 22 U.S.C. § 211a; and 5 U.S.C. §§ 702, 706 (APA Claims for violations of Executive Orders 11295 and 13323)

(Plaintiffs Sampayo, Garcia, Ruiz, Reyes, and Gonzalez, on their own behalf and behalf of all others similarly situated, Against Defendant Clinton)

138. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 137.

139. The regulations implementing 22 U.S.C. § 211a do not provide for Due Process protections in the adjudication of applications for United States passports.

140. Under federal law, a person whose U.S. passport application has been denied based on
non-nationality is not entitled to request a hearing in which he or she could obtain review of the 
basis for the denial.

141. Such actions violate the Fifth and Fourteenth Amendments, 8 U.S.C. § 1101(a)(22), 22 
U.S.C. § 211a, and the Administrative Procedures Act and are inconsistent with Executive 
Orders 11295 and 13323.

THIRD CAUSE OF ACTION

Lack of Due Process in Revoking U.S. Passport Based on Non-Nationality

Violation of Fifth Amendment (Due Process Clause); and Fourteenth Amendment (Citizenship 
Clause); 8 U.S.C. § 1101(a)(22); 22 U.S.C. § 211a; and 5 U.S.C. §§ 702, 706 (APA Claims for 
violations of Executive Orders 11295 and 13323)

(Plaintiffs Montemayor and Guerrero, on their own behalf and behalf of all others similarly 
situated, Against Defendant Clinton)

142. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 141.

143. Under federal law, a person whose U.S. passport has been revoked based on 
non-nationality is not entitled to request a hearing in which he or she could obtain review of the 
basis for the denial.

144. Such actions violate the Fifth and Fourteenth Amendments, 8 U.S.C. § 1101(a)(22), 22 
U.S.C. § 211a, and the Administrative Procedures Act and are inconsistent with Executive 
Orders 11295 and 13323.

FOURTH CAUSE OF ACTION

Inadequate Hearing for Passports Denied or Revoked Under 22 C.F.R. § 51.62(a)(2)

Violation of Fifth Amendment (Due Process Clause)

(Plaintiff Santos, on his own behalf and behalf of all others similarly situated, 
Against Defendant Clinton)
145. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 144.

146. Plaintiffs complain about the hearing afforded to them when Defendants deny U.S. passports or revoke previously issued U.S. passports where the underlying assertion is that the bearer claims to have been, but was not, born in the United States.

147. The hearing does not afford adequate notice and a meaningful opportunity to contest Defendants’ determinations because, among other things, the hearing officer is not an impartial adjudicator, there is no right to discovery, there are no publicized procedures, no body of applicable law, no right to subpoena critical witnesses, and no contemporaneous record of the hearing for appellate review.

148. Such actions violate Plaintiffs’ right under the Fifth Amendment.

**FIFTH CAUSE OF ACTION**

**Unequal Treatment of Persons Whose Passport Applications Have Been Denied Based on Non-Nationality**

*Violation of Equal Protection under the Fifth Amendment*

(Plaintiffs Sampayo, Garcia, Ruiz, Reyes, and Gonzalez, on their own behalf and behalf of all others similarly situated, Against Defendant Clinton)

149. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 148.

150. Plaintiffs complain that Defendant wrongfully denies a hearing to applicants for U.S. passports whose applications are denied based on non-nationality. In contrast, a hearing is afforded to persons whose U.S. passports applications are denied based on grounds not-related to non-nationality, specifically under 22 C.F.R. §§ 51.60(b)(1)-(10), 51.60(c), 51.60(d), 51.61(b), 51.62(a)(1), or 51.62(a)(2).

151. Such action violates Equal Protection as applied through the Due Process Clause of the
Fifth Amendment.

SIXTH CAUSE OF ACTION

Unequal Treatment of Persons Whose Passports Have Been Revoked
Based on Non-Nationality
Violation of Equal Protection under the Fifth Amendment

(Plaintiffs Montemayor and Guerrero, on their own behalf and behalf of all others similarly situated, Against Defendant Clinton)

152. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 151.

153. Plaintiffs complain that Defendant wrongfully denies a hearing to persons whose U.S. passports are revoked based on non-nationality. In contrast, a hearing is afforded to persons whose U.S. passports applications are revoked based on grounds not-related to non-nationality, specifically under 22 C.F.R. §§ 51.60(b)(1)-(10), 51.60(c), 51.60(d), 51.61(b), 51.62(a)(1), or 51.62(a)(2).

154. Such action violates Equal Protection as applied through the Due Process Clause of the Fifth Amendment.

SEVENTH CAUSE OF ACTION

Border Mistreatment of U.S. Citizenship Claimants

Violation of Fifth Amendment (Due Process Clause), Fourteenth Amendment (Citizenship Clause); United Nations Convention Against Torture, 42 U.S.C. § 2000dd-0
Executive Orders 11295 and 13323, and Failure to Adhere to Precedent

(Plaintiffs Laura, and Yuliana Castro, Sampayo, and Garcia, on their own behalf and behalf of all others similarly situated, Against Defendants Clinton, Freeman and Napolitano)

155. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 154.

156. Plaintiffs complain of a pattern and practice of employing unlawful tactics at ports of
entry when questioning U.S. citizen claimants about their citizenship claims. Defendants’ interrogation tactics are cruel, inhumane and degrading because, among other things, persons are denied access to counsel, and subjected to lengthy periods of detention and interrogation, and deprivation of food, water and access to bathroom facilities.

157. Such actions violate the Citizenship Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 3, S. Treaty Doc. No. 100-20, p.20, 1465 U.N.T.S. 85 and 42 U.S.C. § 2000dd-0.

EIGHTH CAUSE OF ACTION

Border Mistreatment of Parents of U.S. Citizen Claimants


(Plaintiffs Trinidad Castro and Ana Alanis, Laura and Nancy Castro, and Jessica Garcia, on their own behalf and behalf of all others similarly situated, Against Defendants Clinton, Freeman and Napolitano)

158. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 157.

159. Plaintiffs complain of a pattern and practice by Defendants of employing unlawful tactics at ports of entry when interrogating parents of U.S. citizen claims about their child’s birth. Defendants’ interrogation tactics are cruel, inhumane and degrading because, among other things, persons are denied access to counsel, and subjected to lengthy periods of detention and interrogation, and deprivation of food, water and access to bathroom facilities.

160. Defendants’ treatment at ports of entry of the parents of U.S. citizen claimants violates the Due Process Clause of the Fifth Amendment, the Convention Against Torture and Other

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs’ respectfully request that this Court:

1) Assume jurisdiction over the instant action;

2) Certify this case as a class action, as proposed above; and

3) Declare that the actions, practices and determinations challenged herein violate federal law, including but not limited to, the Constitution, Immigration and Nationality Act, and the Administrative Procedures Act, and issue an appropriate order for injunctive and declaratory relief to remedy these violations and prevent future violations.

Plaintiffs further request that this Court:

4) Declare that the actions, practices and determinations challenged herein violate federal law, including but not limited to, the Constitution, Immigration and Nationality Act, and the Administrative Procedures Act, and issue an appropriate order for injunctive and declaratory relief to remedy these violations and prevent future violations.

5) Declare 22 C.F.R. § 51.70(b)(1) unlawful in that it does not afford due process protections where U.S. passport applications are denied or previously issued passports are revoked for “non-nationality”;

6) Declare that the standard for adjudicating applications for United States passports is whether the applicant has shown U.S. citizenship by a preponderance of the evidence;

7) Declare that when the Department of State proposes to revoke a U.S. passport for non-nationality, under 22 C.F.R. § 51.62(b), or under 22 C.F.R. § 51.62(a)(2), where the
underlying claim is that the bearer is not a national or citizen of the United States, the bearer is entitled to be advised of and given an opportunity to rebut the adverse evidence upon which the proposed revocation is based, and that such a passport may be revoked only upon a showing by the Department of State, that the preponderance of the evidence shows that the bearer is not a national or citizen of the United States.

8) Declare that applicants for United States passports are entitled to fair and transparent application of the preponderance of the evidence standard, in accordance with Fifth Circuit precedent, including, if a passport application is denied, or a previously issued passport is revoked, a discussion of the evidence presented, and the reasons it does not meet the preponderance test;

9) Declare that the discretion granted by 22 C.F.R. § 51.45 is circumscribed by Plaintiffs’ liberty and privacy interests, as protected by Due Process, and does not give the Department of State either unbridled discretion to request documents, or personal information that does not bear a reasonable relationship to the applicant’s citizenship claim, or the discretion to deny a passport application if requested information or documents are not produced, where the evidence demonstrates, by a preponderance of the evidence, that the passport applicant is, in fact a U.S. national;

10) Declare that the phrase “documentary evidence” as used in 22 C.F.R. § 51.41 includes affidavits, declarations under penalty of perjury, and any other evidence presented tending to show that the person is a national of the United States;

11) Declare that in adjudicating an application for a U.S. passport, the fact that a birth certificate was not promptly filed in the U.S., or reflects delivery by a midwife or under other
non-traditional circumstances, can be considered in deciding whether to request additional evidence of the person’s birth in the U.S., but that such facts do not constitute *evidence* that the individual was not born in the U.S. for purposes of applying the preponderance of the evidence test.

12) Declare that applicants for entry into the United States who hold facially valid documents reflecting United States citizenship are entitled to fair procedures in determining whether they will be allowed to enter, or placed in proceedings under 8 U.S.C. § 1229, including but not limited to the right to be represented by counsel, and to be free from interrogation tactics which violate the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 3, S. Treaty Doc. No. 100-20, p.20, 1465 U.N.T.S. 85 and 42 U.S.C. § 2000dd-0.

13) Declare that the parents of individuals who claim United States citizenship and whose claim to U.S. citizenship is questioned by Defendants are also entitled to be represented by counsel during any questioning by Defendants, and to be free from interrogation tactics which violate the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 3, S. Treaty Doc. No. 100-20, p.20, 1465 U.N.T.S. 85 and 42 U.S.C. § 2000dd-0.

14) Declare that neither Ana Alanis nor Trinidad Castro committed fraud by causing their daughters, Plaintiffs Jessica Garcia, Laura Castro and Yuliana Castro, to be registered as having been born in Brownsville, Texas,

15) Issue an injunction, mandating that DOS:

- Re-adjudicate the passport applications and adjudicated future passport applications, of members of the First and Second Classes as defined above, applying the preponderance of
evidence standard in a manner consistent with Fifth Circuit precedent; and

- Provide adequate training and supervision to all adjudicators and supervisors with respect to the proper application of the preponderance of evidence standard, consistent with Fifth Circuit precedent;

16) Enjoin the Department of State from not providing due process protections to contest denials of passport applications based on “non-nationality,” including but not limited to a local hearing conducted within a reasonable time after the date of the denial;

17) Enjoin the Department of State from revoking a U.S. passport for non-nationality, under 22 C.F.R. § 51.62(b), or under 22 C.F.R. § 51.62(a)(2), where the underlying claim is that the bearer is not a national or citizen of the United States, without first advising the bearer of, and giving him or her an opportunity at a locally conducted hearing to rebut, the adverse evidence upon which the proposed revocation is based, and from revoking such a passport, absent a showing by the Department of State, that the preponderance of the evidence shows that the bearer is not a national of the United States.

18) Enjoin the Department of State from denying a passport application, or revoking a previously issued passport, without issuing a written decision which includes a discussion of the evidence presented, and how application of the preponderance of the evidence test results in the action taken;

19) Issue an injunction limiting the interrogation tactics DHS and DOS officers at ports of entry may utilize in cases of where the officer questions the U.S. citizen claimant, or their parents, about birth within the United States. Specifically, Plaintiffs request an injunction which:

- establishes their right to counsel in such encounters;
• sets a limit of no more than two hours that they may be detained and interrogated;

• prohibits using threats, including but not limited to threatened detention, or criminal prosecution, as a means of obtaining a “confession” of alienage or fraudulent registration, or withdrawal of an application for entry as a United States citizen;

• prohibits the use of lies as a means of obtaining such a “confession” or withdrawal of an application for entry as a United States citizen;

• guarantees humane conditions during such encounters; and

• mandates that persons with facially valid documents showing United States citizenship not be subjected to expedited removal and, if put in removal proceedings under 8 U.S.C. § 1229, and if hearings as to their right to enter or to possess any documents which were seized cannot be conducted within 72 hours, and absent clear indications that the person is a flight risk, and/or a threat to the community or national security, s/he will be given a multiple entry document, as “nationality unknown,” and have all confiscated documents returned;

• mandates that the parents of applicants for entry with facially valid documents showing birth in the United States not be subjected to expedited removal or other sanctions on the grounds that they allegedly committed fraud in registering their children as born in the U.S., and that any evidence developed during or as a result of such an encounter not be used against them for any purpose, unless and until such time as the citizenship of the applicant has been finally determined; and

• requires DHS and DOS to provide adequate training and supervision with respect to the treatment of U.S. citizenship claimants, and their parents, at the ports of entry;
20) Enjoin Defendants from using against them for any purpose, any statements, admissions, or other information obtained during or as a result of the encounters at the port of entry between Ana Alanis, Jessica Garcia, Trinidad, Laura, and Yuliana Castro, and CBP Officer Eliseo Cabrera,

21) Issue an award of attorneys’ fees, and such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,

s/ Lisa S. Brodyaga

__________________________________________________________
Lisa S. Brodyaga, Attorney in Charge  Jaime M. Diez
REFUGIO DEL RIO GRANDE  JONES & CRANE
17891 Landrum Park Road  P.O. Box 3070
San Benito, TX 78586  Brownsville, TX 78523
(956) 421-3226  (956) 544-3565
(956) 421-3423 (fax)  (956) 550-0006 (fax)
Federal ID: 1178  Federal ID: 23118
Texas Bar No. 03052800  Texas Bar No. 00783966

Trina Realmuto  Javier Maldonado
NATIONAL IMMIGRATION PROJECT  LAW OFFICE OF JAVIER N. MALDONADO, PC
of the NATIONAL LAWYERS GUILD  110 Broadway St., Ste. 510
14 Beacon Street, Suite 602  San Antonio, TX 78205
Boston, MA 02108  (210) 277-1603
(617) 227-9727 ext. 8  (210) 587-4001 (fax)
(617) 227-5495 (fax)  Federal ID: 20113
California State Bar No. 201088  Texas Bar No. 00794216

*Attorneys for Plaintiffs/Petitioners and Proposed Class Members*

CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing was electronically served on all counsel of record on May 27, 2011.

s/ Lisa S. Brodyaga
§ 292.5 Service upon and action by attorney or representative of record.

(a) Representative capacity. Whenever a person is required by any of the provisions of this chapter to give or be given notice; to serve or be served with any paper other than a warrant of arrest or a subpoena; to make a motion; to file or submit an application or other document; or to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented.

(b) Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

Credits


Notes of Decisions (35)

Current through November 8, 2012; 77 FR 67170

End of Document

§ 287.3 Disposition of cases of aliens arrested without warrant.

Currentness

(a) Examination. An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Act will be examined by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien.

(b) Determination of proceedings. If the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry in accordance with 8 CFR parts 235, 239, or 240, order the alien removed as provided for in section 235(b)(1) of the Act and § 235.3(b) of this chapter, or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case.

(c) 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 provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized under § 292.2 of this chapter or 8 CFR 1292.2 that are located in the district where the hearing will be held. The examining officer shall note on Form 1–862 that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

(d) Custody procedures. Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.

Credits


Notes of Decisions (40)

Current through November 1, 2012; 77 FR 66147