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

File No:	A [redacted]	)
In the Matter of:		)
	MONDRAGON PATINO, Jonathan,	) **IN REMOVAL PROCEEDINGS**
Respondent		)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or the Act) (2017)—*present in the United States without admission or parole*

MOTION: Motion to Terminate

ON BEHALF OF RESPONDENT:
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ACLU Foundation of Southern California
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ON BEHALF OF THE GOVERNMENT:
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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Jurisdiction vested and removal proceedings commenced on September 7, 2017, when the Department of Homeland Security (Government) filed a Form I-862, Notice to Appear, with the Court. *See* Exh. 1; 8 C.F.R. § 1003.14(a) (2017). Therein, the Government alleged that Respondent is a native and citizen of Mexico who entered the United States without admission or parole. Exh. 1. On May 5, 2018, Respondent moved to terminate proceedings, arguing that the Government violated its own regulations and Respondent's constitutional rights when he was detained and arrested on August 17, 2017, by an immigration officer in a roving Customs and Border Protection (CBP) vehicle. *See* Exh. 4 (Mot. to Terminate) (Apr. 5, 2018). The Government opposes termination, contending that Respondent's detention and arrest were lawful. *See* Exh. 7 (Opp'n to Mot. to Terminate) (May 17, 2018). In support of its argument and to prove alienage, the Government submitted a Form I-213, Record of Deportable/Inadmissible Alien. Exh. 7A. In response, Respondent moved to suppress the Form I-213 in light of the alleged regulatory and constitutional violations. Supp. to Mot. to Terminate (Dec. 20, 2018) [hereinafter Mot. 3]. Respondent further filed evidence in support of his motion to terminate, including the declaration of Saba Basria, who reviewed over a thousand Forms I-213 regarding individuals who, like Respondent, were stopped by a CBP vehicle in the San Diego and El Centro sectors. Evidence in Supp. of Mot. to Terminate (Apr. 24, 2019) [hereinafter Mot. 4].

On May 8, 2019, the Court held a contested removal hearing. At the hearing, the Government introduced into evidence documents from Respondent's bond hearing to establish alienage; namely, the birth certificate of Respondent's U.S. citizen son. Bond Proceeding Submission (May 8, 2019). Respondent objected to its submission, and the Court provided both parties with an opportunity to brief the issue. Respondent subsequently provided a supplemental brief to his motion to terminate. Supp. to Mot. to Terminate (May 13, 2019) [hereinafter Mot. 5]. The Government did not respond. Upon review of the evidence and arguments submitted by the parties, the Court finds that the evidence submitted by the Government to establish alienage must be suppressed. As such, the Government failed to meet its burden, and the Court therefore terminates proceedings.

II. LAW AND ANALYSIS

When a respondent is charged as inadmissible, the Government bears the burden of first establishing alienage. 8 C.F.R. § 1240.8(c); *see also Murphy v. INS*, 54 F.3d 605, 608 (9th Cir. 1995) (finding that the respondent only bears the burden of establishing time, place, and manner of entry after the Government has established alienage by clear and convincing evidence). Here, the Government alleges Respondent is a citizen and national of Mexico and that he is inadmissible for being present in the United States without being admitted or paroled. Exh. 1. Respondent, however, argues that the Government has not met its burden of proving his alienage, and therefore removability, because the evidence on which it relies is inadmissible. Exh. 4; Mot. 5. Specifically, Respondent argues for suppression of the Form I-213 because it was obtained in violation of both 8 C.F.R. § 287.8(b)(2) and Respondent's Fourth Amendment rights. Exh. 4 at 10; *see also Sanchez v. Sessions*, 904 F.3d 643, 655 (9th Cir. 2018) (delineating the requirements for suppression in immigration proceedings for constitutional and regulatory violations). Respondent further contends that the birth certificate obtained from his bond proceedings should be excluded because its admission would violate the intent of 8 C.F.R. § 1003.19, which provides that bond proceedings should be "separate and apart" from removal proceedings. *See* Mot. 5 at 1–3. Finally, Respondent argues that his proceedings should be terminated regardless because the Government egregiously violated his Fourth Amendment rights when he was detained and arrested on August 17, 2017. *See id.*; *see also Sanchez*, 904 F.3d at 655 (providing that termination of removal proceedings without prejudice is appropriate when an agency egregiously violates a respondent's Fourth Amendment rights). For the following reasons, the Court finds that the documents submitted by the Government to establish alienage were obtained in violation of 8 C.F.R. § 287.8(b)(2) and must be suppressed. Because the Government has provided no other evidence to establish alienage, the Court terminates proceedings.[1]

[1] The Court need not address whether the Government's regulatory violation was egregious in order to terminate proceedings, because the Government has not introduced any independently-obtained evidence to meet its burden. *Compare Sanchez*, 904 F.3d at 654 (holding that termination without prejudice may be an appropriate remedy for an egregious regulatory violation even if there is other evidence in the record not obtained as a result of the regulatory violation), *with Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012) ("If the [Government] meets its burden, the Immigration Judge should issue an order of removal; if it cannot, the Immigration Judge should terminate proceedings.").

A. Suppression

Although "the exclusionary rule generally does not apply in removal proceedings," two exceptions exist: (1) when an agency of the government violates a regulation promulgated for the benefit of respondents and that such violation prejudices a respondent's protected interests; and (2) when an agency egregiously violates a respondent's Fourth Amendment rights. *See Sanchez*, 904 F.3d at 649. Once the respondent establishes a prima facie case of illegality under either of these exceptions, the burden shifts to the Government to justify the manner in which it obtained that evidence. *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975). At issue here is whether the CBP officer who detained and arrested Respondent violated 8 C.F.R. § 287.8(b)(2), which provides that "[i]f the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning."[2]

Evidence may be excluded for a regulatory violation if three requirements are satisfied: "(1) the agency violated one of its regulations; (2) the subject regulation serves a 'purpose of benefit to the alien;' and (3) the violation 'prejudiced interests of the alien which were protected by the regulation." *Id.* at 650 (internal citation omitted). In *Sanchez*, the U.S. Court of Appeals for the Ninth Circuit found that the regulation in question, 8 C.F.R. § 287.8(b)(2), was promulgated for the benefit of noncitizens such as Respondent, and that prejudice is presumed because the regulation reflects the Fourth Amendment's requirement that brief detentions be supported by reasonable suspicion. *See Sanchez*, 904 F.3d at 651–52. Thus, the Court's inquiry focuses on the first element: whether the agency violated 8 C.F.R. § 287.8(b)(2). *See id.* at 650. Upon review of the record, arguments of counsel, and applicable law, the Court finds that Respondent has made a prima facie showing that the CBP officer who detained him on August 17, 2017, violated 8 C.F.R. § 287.8(b)(2), and the Government has not rebutted this prima facie claim.

1. Section 287.8(b)(2)

Section 287.8(b)(2) requires that officers possess reasonable suspicion on the basis of "specific articulable facts" that a person is unlawfully present in the United States before detaining the person. Respondent contends that the CBP officer who stopped him while he was driving did not have such reasonable suspicion, and impermissibly detained him based on his Latino appearance. Exh. 4 at 2; *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (holding that a brief stop conducted by a roving CBP vehicle constitutes a limited seizure for Fourth Amendment purposes and thus requires reasonable suspicion). The Ninth Circuit has consistently held that reasonable suspicion of alienage cannot be based solely on a respondent's racial background or national origin. *See Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994).[3]

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[2] Because Respondent established that the CBP officer who detained him violated 8 C.F.R. § 287.8(b)(2), the Court need not address Respondent's constitutional argument.

[3] Although a regulatory violation (as opposed to a constitutional violation) is at issue, 8 C.F.R. § 287.8(b)(2) is intended to reflect constitutional protections rooted in the Fourth Amendment. *See Sanchez*, 940 F.3d at 651. Thus, the Court looks to Fourth Amendment case law for the reasonable suspicion calculus insofar as it relates to investigatory stops. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Brignoni-Ponce*, 422 U.S. at 881.

Respondent's description of the events leading up to the investigatory stop is as follows. Around 4:30 p.m. on August 17, 2017, Respondent was driving home on Interstate Highway 15 (I-15) in north San Diego County. Exh. 4 at 2; *id.*, Tab 1 (Decl. of Respondent). Before his exit, he saw a CBP vehicle enter the freeway. *Id.*, Tab 1 ¶ 3–4. While Respondent was driving in the second lane from the right, the CBP officer pulled up next to him in the right-most lane, driving parallel to Respondent for about a mile. *Id.* ¶ 5–6. Respondent intended to change lanes to exit, but the CBP officer either sped up or slowed down along with Respondent, thus hindering his ability to merge into the right-most lane and exit. *Id.* ¶ 6. In response, Respondent increased his speed, signaled his blinker to change lanes, and entered the right lane in front the CBP vehicle. *Id.* Respondent took the next exit, and the CBP vehicle followed him and turned on its lights, signaling Respondent to pull over. *Id.* ¶ 7. Respondent complied and pulled his vehicle to the side of the road. *Id.*

In sum, Respondent's account of the events makes out a prima case that the officer stopped him in violation of 8 C.F.R. § 287.8(b)(2). *See Matter of Burgos*, 15 I&N Dec. at 279. Indeed, there appears to be no apparent reason why the CBP officer intentionally drove parallel to Respondent and subsequently pulled him over after he exited a well-trafficked highway. According to Respondent's account, he did not seemingly violate any traffic laws or otherwise demonstrate suspicious behavior. Thus, the Court finds that Respondent established a prima facie case that the CBP officer did not possess adequate reasonable suspicion when he stopped Respondent. *See Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (holding that facts presented in affidavits supporting a motion must be accepted as true unless inherently unbelievable).

The Government attempts to rebut Respondent's prima facie showing by pointing to the Form I-213.[4] Exhs. 7, 7A. The Form I-213 provides a narrative of Respondent's stop and arrest, as well as the CBP officer's reasoning for detaining Respondent. Exh. 7A. The Government relies on several facts provided by the CBP officer to demonstrate he possessed reasonable suspicion: (1) I-15 is frequently used by illegal aliens and smugglers who are attempting to make their way north in the United States; (2) when the CBP officer merged into traffic, he observed Respondent driving a gold Nissan Altima pass him in the second lane and then immediately step on his brakes; (3) when the CBP officer proceeded to pull up to Respondent because of his abrupt deceleration, Respondent never looked at him and had his hand near his face; (4) after running Respondent's license plate, the CBP officer discovered the vehicle had "several" owners within the last six months and no international crossings within the last eighteen months; and (5) when the CBP officer moved behind Respondent's vehicle, Respondent "abruptly" moved over into another lane to exit the highway. *See* Exh. 7 at 2–3; Exh. 7A at 2–3. The CBP officer also noted that from his experience, factors three and four are "common tactics" of illegal aliens. Exh. 7A at 2–3.

2. Reasonable Suspicion

In evaluating reasonable suspicion, the Court must consider the totality of the circumstances to determine whether the officer was "aware of specific, articulable facts which,

[4] The Government declined to produce the CBP officer as a witness for the contested hearing, arguing that his statements in the Form I-213 provided a sufficient basis for reasonable suspicion.

when considered with objective and reasonable inferences, form a basis for *particularized* suspicion." *See United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (internal citations omitted) (emphasis in the original). Further, "to establish reasonable suspicion, an officer cannot rely solely on generalizations that, if accepted, would cast suspicion on large segments of the law-abiding population." *United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006). Finally, in the context of border patrol stops, the totality of the circumstances may include characteristics of the area, proximity to the border, usual patterns of traffic and the time of day, previous alien or drug smuggling in the area, behavior of the driver, appearance of the vehicle, and officer experience. *See Brignoni-Ponce*, 422 U.S. at 884–85.

The Court first notes that relatively minor aspects of the CBP officer's account of the events leading up to the stop vary from Respondent's version.[5] Even accepting the CBP officer's description of the encounter, however, the Court finds that he failed to "articulate objective facts providing a reasonable suspicion the [Respondent] was an alien illegally in this country." *See Orhorhaghe*, 38 F.3d 488, 497 (9th Cir. 1994) (internal citation omitted). To begin, the Court acknowledges that the CBP officer "is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." *See Brignoni-Ponce*, 422 U.S. at 885. Further, the CBP officer here articulated specific facts, memorialized in the Form I-213, for his suspicion that Respondent was unlawfully present within the United States. *See* Exh. 7A. Nevertheless, the factors the CBP officer relied on were highly subjective and of "questionable value." *See Montero-Camargo*, 208 F.3d at 1134; *Nicacio v. INS*, 797 F.2d 700, 705 (9th Cir. 1986), *overruled in part on other grounds in Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 1045 (9th Cir. 1999) ("While an officer may evaluate the facts supporting suspicion in light of his experience, experience may not be used to give the officers unbridled discretion in making a stop."). The Court addresses each factor in turn, and then collectively.

First, Respondent's deceleration when the CBP officer's "marked DHS vehicle" merged onto I-15 is the type of factor that would "cast suspicion on large segments of the law-abiding population." *See Manzo-Jurado*, 457 F.3d at 935; *United States v. Raygoza-Garcia*, 902 F.3d 994, 1000–01 (9th Cir. 2018) (finding that "slowing down on a busy highway about 70 miles from the border after seeing law enforcement is not suspicious on its own"). Next, Respondent's location on an interstate highway in north San Diego County does little to suggest he was unlawfully present or otherwise engaged in unlawful activity. *See Brignoni-Ponce*, 422 U.S. at 882 ("Roads near the border carry. . . a large volume of legitimate traffic. . . . We are confident that substantially all of the traffic in [cities including San Diego] is lawful and that relatively few . . . residents have any connection with the illegal entry . . . of aliens."); *Manzo-Jurado*, 457 F.3d at 936 ("[A] location or route frequented by illegal immigrants, but also by many legal residents, is not significantly probative to an assessment of reasonable suspicion."); *cf. United States v. Urias*, 648 F.2d 621, 622–23 (9th Cir. 1981) (finding an officer had reasonable suspicion to stop the petitioner after he turned onto a dirt road near a state fish hatchery when "in the [officer's] experience about 75% of vehicles that turned there . . . were carrying illegal aliens attempting to avoid [a nearby] checkpoint").

[5] The two accounts diverge substantially regarding the events that occurred *after* the CBP officer stopped Respondent. It is not necessary, however, for the Court to make any findings as to what transpired after the initial stop. Although Respondent also argues that he was subject to an unlawful arrest, this issue need not be reached given the Court's finding that the CBP officer violated 8 C.F.R. § 287.8(b)(2) during his investigatory stop.

Likewise, Respondent's alleged failure to make eye contact with the CBP officer provides minimal support for reasonable suspicion. The officer indicated that this was evasive behavior commonly employed by illegal aliens. Exh. 7A at 2; *see also Montero-Camargo*, 208 F.3d at 1136 (acknowledging that evasive behavior may be a "pertinent factor in determining reasonable suspicion") (internal quotations and citation omitted). Both looking and not looking at a CBP officer, however, has been cited as a basis for reasonable suspicion. *See* Mot. 4, Tab 1 ¶ 5 (citing Forms I-213 where CBP agents found reasonable suspicion for both making eye contact and not making eye contact); *Montero-Camargo*, 208 F.3d at 1134 (noting that while eye contact—or lack thereof—may be considered as a factor establishing reasonable suspicion, it can also be treated with "skepticism" and can be of "questionable value"); *see also Gonzalez-Rivera. Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1446 (9th Cir. 1994) ("a driver's failure to look at the Border Patrol cannot weigh in the balance of whether there existed reasonable suspicion for a stop"). Moreover, without more specific information or an explanation, it is difficult for the Court to ascertain why the changed ownership of a vehicle is a "common tactic" used by illegal aliens and alien smugglers. *See* Exh. 7A at 3. Nor is it clear why the vehicle's lack of international crossings caused the officer concern. *See id.* Indeed, it seems like such a factor would suggest that Respondent was both lawfully present and not involved alien smuggling—much like the majority of drivers in that area on I-15. *See Brignoni-Ponce*, 422 U.S. at 882. Finally, Respondent's alleged "abrupt" exit onto Highway 76 similarly does not weigh heavily on reasonable suspicion. *See Montero-Camargo*, 208 F.3d at 1138 ("The use of a highway exit is both frequent and legal[.]").

In sum, the Court finds that the enumerated factors, even when considered in their totality, fail to provide a particularized and "objective justification" for the stop. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989). Each factor cited by the CBP officer provides little probative value to the reasonable suspicion calculus. Respondent was driving on a well-trafficked interstate highway north of San Diego, on a weekday in the late afternoon. Case law confirms that his initial deceleration and subsequent exit from the highway is common behavior of both citizens and noncitizens alike. The same applies to Respondent's alleged failure to look at the CBP officer while he was driving—common sense compels the conclusion that keeping one's eyes on the road is not only customary, but in normal circumstances valued. Thus, the Court finds the CBP officer's investigatory stop was impermissible. *Cf. Montero-Camargo*, 208 F.3d at 1139 (finding that two cars with Mexican license plates driving in tandem that made U-turns and stopped briefly at a locale historically used for illegal activities was sufficient to constitute reasonable suspicion). Therefore, the Court concludes that the Government has not met its burden to justify the manner in which the immigration officer obtained evidence of Respondent's alienage. *See Matter of Burgos*, 15 I&N Dec. at 279.

Consequently, Respondent is entitled to suppression of the alienage evidence obtained in violation of 8 C.F.R. § 287.8(b)(2). *See Sanchez*, 904 F.3d at 651. Both documents that the Government submitted to establish alienage, the Form I-213 and U.S. birth certificate of Respondent's son, are the fruit of Respondent's unlawful detention. The immigration officer prepared the Form I-213 after he detained and arrested Respondent. *See* Exh. 7A. And when Respondent later appeared for a bond proceeding as a result of that arrest, he submitted his U.S. citizen son's birth certificate. *See* Bond Proceeding Submission. But for Respondent's unlawful stop, neither of these documents would have been obtained by the Government. Thus, both documents must be suppressed. *See Sanchez*, 904 F.3d at 655; *cf. id.* at 653 n.12 (noting that the

petitioner's Family Unity Benefits and Employment Authorization applications were admissible to establish alienage because they predated the unlawful stop).

B. Termination

Because there is nothing else in the record to demonstrate Respondent's alienage, the Government has not met its burden.[6] Therefore, Respondent is not removable pursuant to the charge contained in the NTA, and the Court must terminate proceedings. *See Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 468 (AG 2018) ("Immigration judges . . . possess the authority to terminate removal proceedings where the charges of removability against a respondent have not been sustained.") (citing 8 C.F.R. § 1240.12(c)).

Accordingly, the following orders shall be entered:

ORDERS

IT IS HEREBY ORDERED that the Form I-213 and Bond Proceeding Submission be **SUPPRESSED**.

IT IS FURTHER ORDERED that the charge under INA § 212(a)(6)(A)(i) is **NOT SUSTAINED**.

IT IS FURTHER ORDERED that these proceedings be **TERMINATED** without prejudice.

DATE: June 10, 2019

Sebastian T. Patti
Immigration Judge

Appeal Rights: Both Parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty (30) calendar days of service of this decision. 8 C.F.R. § 1003.38.

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
( ) MAIL ( ) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer
(M) ALIEN'S ATT/REP (I) DHS
DATE: 6/10/19 BY: COURT STAFF
Attachments: ( ) EOIR-33 ( ) EOIR-28
( ) Legal Services List ( ) Other

[6] The Government has submitted no other independently-obtained evidence to establish Respondent's alienage, as Respondent had no criminal or immigration history before his August 17, 2017 arrest. *See* Exh. 4, Tab 1 ¶ 17 (Decl. of Respondent); Exh. 7A at 3 ("[Respondent's information] revealed no previous criminal or immigration history.").