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

File No: [redacted]	)	
	)	
In the Matter of:	)	
	)	
SOLANO-CONTRERAS, Edgar	)	**IN REMOVAL PROCEEDINGS**
	)	
	)	
Respondent	)	

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

MOTIONS: Motion to Suppress; Motion to Terminate

ON BEHALF OF RESPONDENT:
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ON BEHALF OF DHS:
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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Jurisdiction vested and removal proceedings commenced on January 19, 2018, when the Department of Homeland Security ("DHS") filed a Form I-862, Notice to Appear ("NTA"), with the court. *See* Exh. 1, NTA; 8 C.F.R. § 1003.14(a). The NTA alleged the following:

1. You are not a citizen or national of the United States;
2. You are a native and citizen of Mexico;
3. You arrived in the United States at or near Calexico, California on or about March 1, 2007; and
4. You were not then admitted or paroled after inspection by an Immigration Officer.

Exh. 1. On July 17, 2018, Respondent submitted a Motion to Terminate Removal Proceedings, arguing that DHS violated its own regulations and Respondent's constitutional rights when he was detained without reasonable suspicion at the Greyhound bus station in Indio, California. Exh. 2, Resp't's Mot. to Terminate (July 17, 2018). On December 11, 2018, the court issued an order holding Respondent's Motion to Terminate in abeyance and ordering both parties to present further testimonial evidence as necessary at the next hearing. *See id.*, IJ Order (Dec. 11, 2018).

On February 18, 2020, Respondent filed an amended Motion to Terminate Proceedings, or in the Alternative, Suppress Evidence, in light of the U.S. Court of Appeals for the Ninth Circuit's ("Ninth Circuit") opinion in *Sanchez v. Sessions*, 904 F.3d 643, 646 (9th Cir. 2018). Exh. 3, Resp't's Amend. Mot. to Terminate (Feb. 18, 2018). On February 19, 2020, the court issued an order taking Respondent's amended motion under advisement and ordering DHS to respond by February 28, 2020. Exh. 4, IJ Order (Feb. 19, 2018). DHS did not respond. On March 4, 2020, the court granted DHS's oral motion to continue over Respondent's objection and ordered DHS to respond by April 3, 2020. Exh. 5, IJ Order (March 4, 2020). On March 25, 2020, DHS opposed termination, contending that Respondent did not establish a *prima facie* case of an egregious violation. *See* Exh. 6, Opp'n to Mot. to Terminate at 3 (March 25, 2020). In support of its argument and to prove alienage, DHS submitted a Form I-213, Record of Deportable/Inadmissible Alien, Respondent's Mexican passport, and Respondent's Mexican birth certificate. *Id.*, Tabs A–C. On April 20, 2020, Respondent replied, moving to suppress DHS's submissions in light of the alleged regulatory and constitutional violations. *See* Exh. 7, Resp't's Reply (April 20, 2020).

On October 27, 2020, the court held a contested removal hearing, in which Respondent, his counsel, and DHS appeared telephonically. On that same day, Respondent testified in support of his Motion to Terminate. *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) (holding that a respondent must testify regarding an alleged violation because "the mere offering of an affidavit is not sufficient to sustain his burden"). Upon review of the evidence and arguments submitted by the parties, the court finds that the evidence submitted by DHS to establish alienage must be suppressed and proceedings terminated.[1]

For the following reasons, the court **grants** Respondent's Motions to Suppress and Terminate.

II. LAW AND ANALYSIS

A. Credibility

Respondent's testimony on October 27, 2020, was plausible, consistent, and detailed in accordance with the standards set forth by the REAL ID Act. *See* INA § 240(c)(4)(C). Accordingly, the court credits his testimonial evidence.

B. Suppression

1. Section 287.8(b)(2) and Reasonable Suspicion

Although "the exclusionary rule generally does not apply in removal proceedings," two important exceptions to this general rule exist: (1) when an agency of the government violates a regulation promulgated for the benefit of respondents and that violation prejudices the 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

[1] This case was transferred to the undersigned Immigration Judge's docket. In accordance with 8 C.F.R. § 1240.1(b), the undersigned Immigration Judge has familiarized himself with the entire record.

prima facie case of illegality under either of these exceptions, the burden shifts to DHS to justify the manner in which it obtained its evidence. *See Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975).

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." *See Sanchez*, 904 F.3d at 650 (internal citation omitted). In *Sanchez*, 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 id.* 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 U.S. Customs and Border Protection ("CBP") officers who detained him on January 11, 2018 violated 8 C.F.R. § 287.8(b)(2), and DHS has not rebutted this *prima facie* claim.

8 C.F.R. § 287.8(b)(2) provides that:

> If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.

The underlying record is "devoid of any such specific articulable facts." *See id.* Instead, the record reveals that around 10:25 p.m. on January 11, 2018, Respondent stood in line to board a Greyhound bus from Indio, California, to Los Angeles, California. Exh. 3, Tab A at ¶ 4–5 (Resp't's Decl.). Earlier that day, he took a Greyhound bus from his home in Los Angeles. *Id.*, ¶ 3. He needed to travel to Indio for his job as a handyman and property manager, but his car was being repaired so he had to take the bus. *Id.*, ¶ 2–3. As he stood in line, two officers in plain clothes approached him and asked for his name and where he lives. *Id.*, ¶ 5. Respondent told them his name was Edgar Solano and that he lives in Los Angeles. *Id.* The officers told him to step aside and show identification, but Respondent declined to show his identification because he did not want to miss the last bus to Los Angeles. *Id.* One of the officers then grabbed Respondent, informed the bus driver that he could drive away, and took Respondent to an unmarked pickup truck to put him in handcuffs. *Id.*, ¶ 6.

At this point, the encounter is undeniably a detention—from the moment the CBP officer grabbed Respondent and the bus left the station, he did not feel free to leave or end the encounter. *See, e.g.*, *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The officers questioned Respondent about his country of origin while they detained him, and then took him to an immigration detention facility. *Id.*, ¶ 8; *cf. United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). Based on these facts, the court concludes that Respondent has made a *prima facie* showing that the immigration officers who detained him violated 8 C.F.R. § 287.8(b)(2). *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);

see also Sanchez, 904 F.3d at 650–51 (finding *prima facie* showing of 8 C.F.R. § 287.8(b)(2) violation when there were no "specific and articulable facts that would support the Coast Guard officers' decision to detain Sanchez on the basis of reasonable suspicion that he was unlawfully present in this country or otherwise engaged in illegal activity").

DHS attempts to rebut Respondent's *prima facie* showing of a 8 C.F.R. § 287.8(b)(2) violation by pointing to the Form I-213, but, like in *Sanchez*, the Form I-213 is "remarkably terse in its recitation of events surrounding [the respondent's] detention." *Sanchez*, 904 F.3d at 650. The Form I-213 simply states that the officers "encountered a subject, later identified as [Respondent] . . . After a brief interview, [Respondent] admitted to being a citizen of Mexico. [Respondent] was placed under arrest." Exh. 6, Tab A at 3. It is notably silent as to how Respondent in particular was identified. *See id.* Moreover, the Form I-213 indicates that "[t]he Indio Greyhound Bus Station has been previously identified as a common transfer location for illegal aliens." *Id.* at 2. However, the location of the Indio Bus Station is not sufficient for the officers to establish particularized individual suspicion as to Respondent himself because it is a public space that is enjoyed by members of the law-abiding society. *See United States v. Manzo-Jurado*, 457 F.3d 928, 936 (9th Cir. 2006) (stating that "a location or route frequented by illegal immigrants, but also by many legal residents, is not significantly probative to an assessment of reasonable suspicion").

DHS also contends that Respondent's questioning and detention was based on specific articulable facts given that Respondent failed to cooperate and provide his identification to the officers. Respondent, however, was merely trying to board the bus as it was the last bus to Los Angeles that night. Therefore, his desire to board the bus and attempt to show the officers his round-trip bus ticket does not provide any evidence of lack of cooperation with officers. Exh. 2, Tab B at 20–21. Furthermore, although identification from another country may give rise to reasonable suspicion that a person is an alien, it does not necessarily follow that the lack of identification gives rise to reasonable suspicion. Here, Respondent was calmly in line and did not have his license on his person because he left it in his car, which was being repaired; nor was he required by law to have his license as he was not driving a car that day. *Cf. United States v. Valdes-Vega*, 738 F.3d 1074, 1079 (9th Cir. 2013) (holding that officers had reasonable suspicion when they stopped a truck with Mexican license plates driving erratically).[2] Nevertheless, Respondent indicates in his declaration that he informed the officers that he did not have his license with him *after* they detained and handcuffed him. Exh. 3, Tab A at ¶ 8. Thus, DHS cannot rely on Respondent's lack of identification as a factor in establishing reasonable suspicion. The court therefore concludes that DHS has not met its burden to justify the manner in which the immigration officers obtained evidence of Respondent's alienage. *See Burgos*, 15 I&N Dec. at 279.

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[2] When the officers approached Respondent, he was merely in line to board a bus back home and there was no indication that he was engaging in criminal activity. Therefore, Respondent's encounter with CBP officers can also be analogized to the criminal context, in which officers may not order a person to provide identification if not reasonably suspected of criminal conduct. *See United States v. Landeros*, 913 F.3d 862, 870 (9th Cir. 2019) (holding than "an officer may not lawfully order a person to identify herself absent particularized suspicion that she has engaged, is engaging, or is about to engage in criminal activity"); *cf. Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 187–88 (2004).

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. The documents that DHS submitted to establish alienage, the Form I-213, Respondent's passport, and Respondent's birth certificate, are the fruit of Respondent's unlawful detention. The immigration officer prepared the Form I-213 after he detained and arrested Respondent. *See* Exh. 6, Tab A. And when Respondent later appeared for a bond proceeding as a result of that arrest, he submitted his birth certificate and then his passport as a condition for the Intensive Supervision of Appearance Program ("ISAP"). *See* Exh. 6, Tabs B, C. But for Respondent's unlawful stop, none of these documents would have been obtained by DHS. Thus, the 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); *see also Perez Cruz v. Barr*, 926 F.3d 1128, 1146 (9th Cir. 2019) (holding that a birth certificate obtained following an unlawful detention should have been suppressed).

2. DHS's Submission of *Desert Sun* Article as Impeachment

On October 27, 2020, during DHS's cross-examination of Respondent, DHS submitted a news article from the *Palm Springs Desert Sun*, entitled, "Border Patrol detained undocumented immigrant based on appearance, name at Indio Greyhound station, ACLU alleges" as impeachment evidence. *See* DHS's Submission of Impeachment, Tab D at 1. The article states that "Solano is from Oaxaca, Mexico and has lived in the U.S. for 12 years." *Id.* DHS introduced this article after Respondent denied that he spoke to the author of the article, Rebecca Plevin. However, even if this article can be used to impeach Respondent, it is insufficient evidence of his alienage because DHS introduced it to impeach his credibility, not to establish his alienage. *See Urooj v. Holder*, 734 F.3d 1075, 1078–79 (9th Cir. 2013) (holding that where the respondent invoked his Fifth Amendment privilege and the court admitted the record of sworn statement as impeachment rather than substantive evidence, it failed to meet its burden to prove removability). As such, the court finds that DHS failed to offer independently-obtained evidence of Respondent's alienage.[3]

C. Termination

"A Fourth Amendment violation is egregious if 'evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should have known is in violation of the Constitution.'" *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008) (citations omitted). "'Hispanic-looking appearance and presence in an area where illegal aliens frequently travel are not enough' to justify a seizure by immigration officials." *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994); *see also Brignoni-Ponce*, 422 U.S. at 885–86.

[3] On the same note, the court will not consider Respondent's answers to DHS's questions regarding his alienage because he properly invoked his Fifth Amendment privilege. *See Hoffman v. United States*, 341 U.S. 479 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."); *see also Matter of R-*, 4 I&N Dec. 720, 721 (BIA 1952) (holding that a witness cannot be compelled to state why the answer might tend to incriminate him).

On this record then, the court finds that the CBP officers egregiously violated Respondent's constitutional rights. Before the officers detained Respondent, they merely knew his name, his place of residence, and appearance. However, these are not appropriate factors in establishing the requisite reasonable suspicion. *See Orhorhaghe*, 38 F.3d at 497 (holding that a foreign-sounding name is insufficient to justify a seizure); *see also Brignoni-Ponce*, 422 U.S. at 885–86 (holding that apparent Mexican ancestry did not furnish reasonable grounds to believe that the three occupants were aliens). The fact that the officers targeted Respondent based on his race is further supported by Respondent's testimony that people of mixed races were in line for the last bus to Los Angeles. Accordingly, a reasonable CBP officer should have known that he or she was violating the Fourth Amendment by seizing Respondent based on his Latino appearance alone, and Respondent's seizure and arrest was an egregious violation of his Fourth Amendment rights. *See Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448 (9th Cir. 1994) (finding an egregious constitutional violation and suppressing evidence where Border Patrol officers stopped petitioner based solely on his Hispanic appearance and all other reasons had low probative value).

Because the court finds that the CBP officers' conduct was egregious, termination of Respondent's case without prejudice is warranted. *See Sanchez*, 904 F.3d at 653 (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).[4]

Accordingly, the following orders shall be entered:

[4] DHS also argued that Respondent's original declaration constitutes independent evidence of alienage. *See* Exh. 2, Tab A at ¶ 8 ("They asked me where I was from and I said I was from Mexico. They asked me if I had papers authorizing me to be in this country, and I said I do not."). However, even if Respondent's original declaration constitutes independent evidence, termination of his case is still warranted because of the CBP officers' egregious violation. *See Sanchez*, 904 F.3d at 653.

ORDERS

IT IS HEREBY ORDERED that the Form I-213, Respondent's passport, and Respondent's birth certificate, 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: 11/30/2020.

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.