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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of	)	
	)	
	)	
Mr. XXX	)	**BRIEF IN SUPPORT OF**
	)	**RESPONDENT'S APPEAL**
A 111-111-111	)	
A 222-222-222	)	
	)	
Respondent	)	

I. FACTUAL AND PROCEDURAL HISTORY

Mr. XXX is a native and citizen of Guatemala who entered the U.S. in approximately 1989 and applied for asylum in 1989 or 1990. IJ Dec. at 1, 4. Mr. XXX was subsequently granted a number of Employment Authorization Documents (EAD) while his application for asylum was pending. *See* Exh. 3.

On approximately September 5, 2009, Mr. XXX was taken into custody by the Department of Homeland Security ("DHS") and identified as Mr. YYY, A# 222-222-222, a native and citizen of Mexico who had been placed in expedited removal proceedings and ordered removed from Otay Mesa, California on November 5, 2004. *See* Exh. 2(A). Mr.

XXX was issued a Notice to Appear ("NTA") charging "YYY" with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationaltiy Act ("INA") as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as deisignated by the Attorney General. Exh. 1; IJ Dec. at 1.

On numerous occasions during the course of removal proceedings, Mr. XXX stated to the Immigration Judge ("IJ") that he had never used the name YYY, that he entered the U.S. in 1989, applied for asylum soon after, and that he had never been deported from the U.S.[1] In support of these statements, Mr. XXX submitted a number of documents, including a Guatemalan birth certificate, a California driver's license, a Social Security card, and numerous EAD's. Exh. 2. In response to this assertion, the IJ amended the name on the Notice to Appear to read "XXX; Aka YYY" but continued to list the A# number of YYY (222-222-222), rather than Mr. XXX's A# as listed on his EAD (072-511-306). IJ Dec. at 1.

During the course of removal proceedings, Mr. XXX expressed his desire to apply for suspension of deportation under section 203 of the Nicaraguan Adjustment and Central American Relief Act ("NACARA"). On January 7, 2010, the DHS admitted that Mr. XXX had previously received employment authorization through USCIS as a result of filing an asylum application, which would suggest eligibility for NACARA under 8 C.F.R. § 240.58. However, the IJ found that Mr. XXX's alleged deportation under the "pseudonym" of YYY stopped the time necessary in order to establish a *prima facie*

[1] Respondent appeared *pro se* before the IJ and no transcript has been made of the removal proceedings. While Respondent's counsel has attempted to reconstruct the events for the purpose of this brief, certain statements are based on Mr. XXX's recollection and cannot be directly cited to the record. For this reason,

eligibility for relief under NACARA. IJ Dec. at 5. Based on this finding, the IJ ordered Mr. XXX removed to Guatemala on January 22, 2010. IJ Dec. at 1-2.

On January 29, 2010, Mr. XXX, by and through counsel, filed a Motion to Reopen and Reconsider along with a request for an emergency stay of removal. *See* Resp. Motion; IJ Dec. at 2. On March 18, 2010, the IJ denied Mr. XXX's Motions to Reopen and Reconsider and denied the Motion for a Stay of Removal as moot since his removal had been effectuated on February 2, 2010. IJ Dec. at 5. Mr. XXX timely filed this appeal.

II. ISSUES PRESENTED

A. WHETHER THE IJ ERRED IN DENYING RESPONDENT'S MOTION TO RECONSIDER.

B. WHETHER THE IJ ERRED IN DENYING RESPONDENT'S MOTION TO REOPEN.

III. LEGAL ARGUMENT

A. WHETHER THE IJ ERRED IN DENYING RESPONDENT'S MOTION TO RECONSIDER.

In his Motion to Reconsider, Mr. XXX argued that the IJ erred in finding that he had been deported in 2004 under the name YYY.[2] If Mr. XXX and Mr. YYY are the same person, then the IJ was correct in her finding that Mr. XXX is ineligible to apply for relief under NACARA since Mr. XXX does not have the necessary years of continuous

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counsel would ***strongly*** support the preparation and distribution of a transcript of the removal proceedings and the opportunity for supplemental briefing based on the transcript.

[2] The IJ's decision states that, in his Motion to Reconsider, Mr. XXX improperly shifts the burden of proof to the DHS since "the burden belonged to the respondent to prove by a preponderance of the evidence that he was eligible for NACARA relief, and rebut the evidence contained in the record of his prior removal under an alias." IJ Dec. at 4. However, Mr. XXX contends that the submission of his driver's license, Social Security card, and EAD's with signatures different from that of Mr. YYY effectively rebutted the unsupported DHS assertions that the fingerprints of the two men are a definitive match. Therefore, the burden was on the DHS to overcome Mr. XXX's evidence, which it failed to do.

physical presence. However, if Mr. XXX and Mr. YYY are not the same person, then Mr. XXX has a *prima facie* claim to relief under NACARA.

For the following reasons, Mr. XXX argues that the IJ erred in finding that he was deported in 2004 under the name YYY, and that he is therefore eligible to apply for relief under NACARA.

1. The DHS' decision to place Mr. XXX in removal proceedings establishes that he was not previously removed as Mr. YYY.

Section 241(a)(5) of the INA covers the reinstatement of removal orders against aliens who have illegally reentered the U.S. This section states:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and ***the alien shall be removed under the prior order*** at any time after the reentry.

(emphasis added). Similarly, the corresponding regulation states:

> An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal ***shall be removed from the United States by reinstating the prior order***. ***The alien has no right to a hearing before an immigration judge in such circumstances.***

8 C.F.R. § 241.8(a). In other words, both the statute and the regulation *mandate* that an alien who has been previously removed shall be subject to reinstatement of the previous order.

Here, if the DHS believed that Mr. XXX had previously received an order of removal, it was bound by the statute and the regulations to reinstate this order. However, the DHS did not do so. Instead, the DHS: 1) issued Mr. XXX a Notice to Appeal ("NTA") charging him as a native and citizen of Guatemala; and 2) argued that his previous removal to Mexico rendered him ineligible to apply for relief under NACARA.

However, these two actions are inapposite – either Mr. XXX was previously removed as YYY such that his order of removal should be reinstated OR he was not previously removed such that an NTA may be issued and he is eligible to apply for relief under NACARA. The DHS cannot have it both ways. If the DHS believed that Mr. XXX had been removed, then it was legally bound to reinstate the removal order. Therefore, its decision to place Mr. XXX in removal proceedings constitutes a concession as a matter of law that Mr. XXX was not previously removed and is therefore eligible to apply for NACARA.

2. The DHS has failed to submit sufficient evidence showing that the fingerprints of Mr. XXX match those of Mr. YYY.

The primary evidence relied upon by the DHS to establish in removal proceedings that Mr. XXX had been previously removed as Mr. YYY was an alleged match in the IDENT system, which is based on fingerprints. *See* Exh. 2(A), (B), (C). In either case, Mr. XXX argues that the DHS has failed to submit sufficient evidence showing that the fingerprints of Mr. XXX match those of Mr. YYY.

In the I-213, the DHS claims that Mr. XXX matches the fingerprints and picture in the IDENT system of Mr. YYY. Exh. 2(A). To enroll an alien in IDENT, an immigration employee places the alien's right and left index fingers on the IDENT fingerprint scanner, takes the alien's photograph with the IDENT camera, and enters certain biographical information into the computer. *See* "IDENT/IAFIS: The Batres Case and the Status of the Integration Project," http://www.justice.gov/oig/special/0403/final.pdf, fn. 3. However, in late 2003, the Department of Justice Office of the Inspector General reported that 20 to 30 percent of IDENT fingerprint quality indicator scores had began falling into the unacceptable range. *Id.* at 35. Furthermore, ICE itself has admitted that, "because of

the diverse environments in which this data is collected, accuracy, completeness, and quality may vary considerably." *See* "Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)" http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf, pg. 5.

These doubts regarding the reliability and accuracy of IDENT procedures are more than rhetorical questions. Here, for instance, the fingerprint of Mr. YYY that appears on the Verification of Removal I-296 is squared off at the corners and has a thin strip from a fingerprint on the right-hand side of the box. Exh. 2(E). Thus, it appears that this fingerprint was reproduced from an electronic version that appears in the IDENT system. However, page 254 of the Inspector's Field Manual for U.S. Customs and Border Patrol requires that the fingerprint on an I-296 be an original fingerprint rather than an electronic reproduction. *See* U.S. Customs and Border Patrol Inspector's Field Manual, *http://drop.io/zdlbidi,* pg. 24. Therefore, the immigration officials that handled the removal of Mr. YYY violated the established IDENT procedures such that the evidence suggesting that Mr. XXX was removed in 2004 is not reliable.

Furthermore, when an IDENT match is made, the IDENT system reports a "fingerprint score" that rates the strength of the fingerprint match. *See* "IDENT/IAFIS: The Batres Case and the Status of the Integration Project," http://www.justice.gov/oig/special/0403/final.pdf, pg. 20. Therefore, the reliability of a particular match can be bolstered or challenged based on the fingerprint score that appears on the screen at the time the alleged match is made. Here, the DHS could have submitted the fingerprint score to establish that the probability of a match between the fingerprints of Mr. XXX and Mr. YYY was high, but did not do so. Rather, the documents submitted by

the DHS are merely computer printouts that list biographical information, fingerprints, and pictures of both Mr. XXX and YYY. The documents do not state that the fingerprints of Mr. XXX match those of YYY, nor is there an expert affidavit or any impartial scientific evidence in the record to support this assertion. In other words, apart from the assertion by the author of the I-213, there is no independent evidence to establish the existence of an IDENT match or any match whatsoever between the fingerprints of Mr. XXX and Mr. YYY.

The discrepancies between the files of Mr. XXX and YYY are also confirmed by the DHS' own evidence. On the EARM "Case Summary and Encounter Details," the Subject ID number for Mr. YYY is listed several places as "333333333." Exh. 2(C). However, the Subject ID on the I-213 prepared for Mr. XXX is listed as "444444444." Exh. 2(A). ***The DHS fails to explain why Mr. XXX and YYY would have been assigned different Subject ID numbers if they are indeed the same person.*** Since the DHS' own evidence shows that Mr. XXX and YYY were treated as two separate people by its own system, the IJ erred in finding that Mr. XXX was deported in 2004.

In asserting that Mr. XXX was deported in 2004 as Mr. YYY, the DHS has failed to submit more than unsupported hearsay and various database printouts that display no more than pictures and fingerprints of various individuals. *See* Exh. 2(A), (B), (C). Since Mr. XXX was first apprehended in September 2009, he has consistently and credibly maintained that he is not Mr. YYY, that he is from Guatemala, and that he has never been deported. *See* Exh. 2(A). Therefore, the DHS has been on notice for at least ten months that the issue of identity must be proven, yet it has failed to submit any independent verification that Mr. XXX is the same person who was removed in 2004. In light of the

fact that questions exist about the reliability of the IDENT system, the border patrol failed to comply with its own manual in the removal of Mr. YYY, the documents provided by the DHS list separate "Subject ID" numbers for Mr. XXX and YYY, and the DHS did not produce the "fingerprint score" of the IDENT database match, the DHS has failed to submit sufficient evidence showing that the fingerprints of Mr. XXX match those of Mr. YYY.

3. The evidence submitted by Mr. XXX conclusively establishes that he is not YYY.

At the IJ's request, Mr. XXX submitted a variety of documents to establish his identity, including a Guatemalan birth certificate with translation, a California driver's license, a Social Security card, and several Employment Authorization Documents. Exh. 3. At least four of these documents contain examples of Mr. XXX's signature. *Id.* ***Significantly, the signature of YYY that appears on the Verification of Removal I-296 does not match or resemble Mr. XXX's signature.*** This fact is more than sufficient to find that the DHS has not established that Mr. XXX was deported in 2004 by clear and convincing evidence.

In denying the Motion to Reconsider, the IJ acknowledged the distinction in signatures but dismissed this evidence, stating, "it reasons to believe that an individual providing a false identity would likewise falsely sign, rather than provide a signature with his own true name." IJ Dec. at 5. However, the IJ misinterprets the argument – Mr. XXX does not rely on the *actual* name written on the I-296 but rather the fact that ***the name is written in completely distinct handwriting from that of Mr. XXX***. While it is reasonable that a person who gave a fake name would also attempt to sign the fake name on a form, this would not explain the difference in handwriting. In order for Mr. XXX and YYY to

be the same person, as in the IJ's theory, Mr. XXX would have had to be caught at the border and sign a false name in a completely different style of handwriting so as to avoid the possibility that this signature would be compared to another signature at some remote point in the future. To assume that someone who had no prior immigration history and was being detained by Border Patrol for the first time would have the foresight necessary to disguise his handwriting in hopes of avoid being subsequently matched with his true signature is a far-fetched explanation for these discrepancies. Therefore, the IJ's explanation is insufficient to overcome the doubts that are raised by the differences between the signatures of Mr. XXX and YYY.

4. The IJ's remaining explanations for denying the Motion to Reconsider are unpersuasive.

In denying the Motion to Reconsider, the IJ conceded that discrepancies existed between the names, nationalities, and birth dates of Mr. XXX and those of YYY. IJ Dec. at 5. The IJ dismissed these discrepancies by stating that they "do not contradict a finding that the respondent entered the United States previously under a false alias." *Id.* Yet the IJ cited to no proof independent of the I-213 to show that Mr. XXX had ever used the "alias" of YYY. Rather, the I-213 reflects that an ICE officer typed in the name "YYY" until Mr. XXX protested that he was not YYY, at which time the ICE official merely added the handwritten notation "=AKA Adolfo XXX=TN." Exh. 2(A). Similarly, the IJ listed the case name as "XXX, Aka YYY." IJ Dec. at 1. In other words, it was the DHS and the IJ who arbitrarily assigned the "alias" of "YYY" to Mr. XXX. The only evidence supporting the IJ's contention that Mr. XXX and YYY are the same person is the discredited and unsupported assertion from the IDENT system, which fails to establish that Mr. XXX used the "alias" of YYY.

The IJ also cited to the narrative portion of the I-213 stating that the *"[s]ubject ver[i]fied [sic] photo in IDENT as himself*." IJ Dec. at 4 (emphasis in IJ Dec.). The IJ went on to characterize this statement as proof that the "the respondent *identified himself* as the individual previously removed." *Id.* (emphasis in IJ Dec.). However, this is an improper inference. While the I-213 states that Mr. XXX *verified the photo in IDENT as himself*, this does not mean automatically mean that he *identified himself as the individual previously removed*. The distinction is significant because the I-213 fails to indicate which IDENT photo Mr. XXX was shown – the IDENT photo of Mr. XXX himself allegedly taken in 2009 or the IDENT photo allegedly taken of YYY in 2004. If Mr. XXX were shown a picture of himself in that was taken in 2009 and appeared in IDENT, it is only logical that he would identify it as himself. However, the I-213 fails to specify *which photo* Mr. XXX identified as himself; therefore, the IJ draws an improper and unsupported inference from this statement.

The IJ similarly contends that, in comparing the photo as contained in the Notice to Alien Ordered Removed I-296, "the Court found that the respondent was the individual depicted under the name of "YYY." IJ Dec. at 4. However, in the copy of the I-296 provided to Mr. XXX, ***the image that appears is almost completely blackened and does not provide enough detail to make a positive identification.*** Therefore, the IJ's reliance on her ability to compare the I-296 to Mr. XXX's appearance in court in order to establish identity by clear and convincing evidence is misplaced and should not be relied upon.

In sum, there are numerous troubling reasons to doubt that Mr. XXX was deported in 2004 under the name YYY. First, the DHS has failed to explain why it did not merely reinstate removal proceedings as required by law if Mr. XXX had been previously

removed. Second, the DHS failed to submit sufficient evidence showing that the fingerprints of Mr. XXX match those of Mr. YYY in light of the fact that questions exist about the reliability of the IDENT system, the border patrol failed to comply with its own manual in the removal of Mr. YYY, the documents provided by the DHS list separate "Subject ID" numbers for Mr. XXX and YYY, and the DHS did not produce the "fingerprint score" of the IDENT database match. Third, Mr. XXX submitted a variety of documents to establish his identity, including a Guatemalan birth certificate with translation, a California driver's license, a Social Security card, and several Employment Authorization Documents – at least four of which contain signatures that are in a completely different handwriting than the signature that appears on the 2004 removal order for YYY. Finally, the IJ's remaining explanations for finding that Mr. XXX was deported as YYY are unpersuasive since they misstate and misconstrue the evidence. For these reasons, Mr. XXX argues that he was not deported as YYY in 2004 and that he remains eligible to apply for NACARA.

B. WHETHER THE IJ ERRED IN DENYING RESPONDENT'S MOTION TO REOPEN.

The IJ cited two reasons for denying Mr. XXX's Motion to Reopen: that the evidence was previously available and could have been presented during the former proceedings and that the evidence was not material and would have "failed to alter the finding that that the respondent had assumed the alias of 'YYY.'" IJ Dec. at 4. Both of these bases for denying the Motion to Reopen are erroneous.

The new evidence submitted by Mr. XXX in his Motion to Reopen consisted of a series of e-mails between Mr. XXX's counsel and James L. Reaves, the Chief of Intakes,

Evaluations & Problem Resolution for the USCIS Ombudsman. Resp. Motion Exh. 4. The IJ herself stated that this evidence was "sought by counsel on January 27, 2010, five days after this Court entered a final order of removal." IJ Dec. at 3. Prior to the Motion to Reopen, Mr. XXX appeared *pro se* during the course of removal proceedings. The IJ's statement therefore assumes that, before counsel entered on his case, Mr. XXX – an indigent, detained, Spanish-speaker appearing *pro se* – could have e-mailed a high-level official at the USCIS Ombudsman office and received a response as to whether any of his records appeared in the USCIS system. This is the only way that Mr. XXX could have previously presented the evidence to the IJ. It is not realistic to believe that Mr. XXX could have done so; therefore, for all practical purposes, the evidence was not "previously available" pursuant to 8 C.F.R. § 1003.23(b)(3).

Second, the IJ claimed that the new evidence was not material and would not have rebutted the IJ's finding that Mr. XXX was deported as Martin YYY in 2004. However, such a finding would constitute legal error on the part of the IJ since the confirmation of a USCIS file for Mr. XXX undermines the validity and the credibility of the DHS' assertions throughout the removal proceedings and calls into question the reliability of the evidence presented by the DHS. For the first five months of removal proceedings, the DHS confidently claimed that a "search in CIS & CLAIMS, show no records found under that name." Exh. 2(A). However, on January 7, 2010, the DHS admitted that – contrary to its previous assertions – Mr. XXX had been receiving employment authorizations through USCIS. IJ Dec. at 4. If certain statements on the I-213 are proven inaccurate, the credibility of other statements on the document must be called into question – including the assertions of an IDENT match between Mr. XXX and YYY.

The IJ explained that the DHS' previous failure to locate a USCIS record can be attributed to the fact that the DHS investigated the name "XXX1" while the previous EAD reflected that the USCIS record existed under the name "XXX2." IJ Dec. at 5. However, this explanation fails to explain why Mr. Reaves, who was given the name "XXX1" to investigate, would have found a USCIS record while the DHS, given the exact same name, would not. Resp. Motion, Exh. 4. Furthermore, Mr. Reaves' unequivocal statement that the USCIS system contains a record of Mr. XXX and that the DHS "could have given you this information if they chose too [sic]" raises serious questions as to the veracity of the DHS' statements denying the existence of a USCIS file. Since the core issue in this case is whether the DHS' claims as to the IDENT match between Mr. XXX and Mr. YYY are reliable, the debunking of a DHS statement made on the same I-213 is undoubtedly material as to Mr. XXX's eligibility for relief.

IV. CONCLUSION

Because the IJ erred in finding that the evidence submitted by the DHS was sufficient to rebut Mr. XXX's claim to eligibility for relief, this Board should grant Mr. XXX's motion to reconsider and remand with instructions to allow him to apply for NACARA. In the alternative, because the IJ erred in finding that the evidence provided was not previously available and was not material, this Board should grant Mr. XXX's motion to reopen.

Respectfully submitted this 20th day of July, 2010,

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Certificate of Service

I hereby certify that a copy of the foregoing was served on ICE District Counsel at 1705 E. Hanna Rd., AZ 85231 by placing it in the box marked "ICE Litigation" outside of the EOIR window on the date indicated below:

Date:_____ **Signature:**_____