



AMERICAN IMMIGRATION LAW FOUNDATION

Practice Advisory Representing Individuals Who Are in Removal Proceedings As a Result of Special Call-in Registration

September 26, 2003
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This practice advisory discusses issues, arguments, and strategies for representing respondents who were placed in removal proceedings after appearing for special call-in registration and providing information to the Department of Homeland Security (“DHS”). This advisory assumes that counsel has knowledge of the registration program and refers to respondents in the male gender because the program only applied to men.

Many individuals who have been placed in removal proceedings as a consequence of registering pursuant to the special call-in program are subject to removal for overstaying nonimmigrant status, being out of status or entering the US without inspection and are not immediately statutorily eligible for relief from removal. This advisory focuses on ways of either terminating proceedings or raising legitimate issues until relief becomes available, including requesting continuances or administrative closure where appropriate and challenging DHS’ evidence of alienage and removability.

Part I of this advisory discusses strategy issues and reviews burden of proof issues when responding the allegations of alienage and removability in the Notice to Appear (“NTA”). Part II sets forth arguments that could lead to termination of proceedings and also discusses when DHS is precluded from reopening or reissuing a new NTA if proceedings are terminated. Part III addresses challenges to evidence proffered by DHS that was either obtained or created during the special call-in registration interview. Part IV applies to respondents who are prima facie eligible for adjustment of status and, therefore, may be able to show that proceedings should be continued or administratively closed under *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client’s case.

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I. THRESHOLD ISSUES

Should I contest the allegations and charges in the Notice to Appear?

In deciding how to respond to charges in the NTA, consider whether the allegation is true, whether DHS has evidence of the allegation; and also whether such evidence is admissible. In most cases, whether or not the allegation is true, counsel does not know whether DHS has admissible evidence to substantiate the allegation. Thus, it may be advantageous to deny the allegations and removability. By denying the allegations, DHS is forced to meet its burden of proving alienage (and removability where respondent is charged with a ground of deportation under INA § 237). DHS is sometimes unprepared to prove its case or does so improperly and it is important to capitalize on these mistakes whenever possible.

What if DHS adds/substitutes charges and/or factual allegations on the Notice to Appear?

DHS may add or substitute charges of inadmissibility and/or deportability and/or factual allegations at any time during the proceedings. Additional charges are required to be lodged, and/or substitutions made, in writing and served on respondent or respondent's counsel of record. 8 C.F.R. §§ 1003.30, 1240.10(e).

The regulations provide that the immigration judge shall advise respondent that he “may be given a reasonable continuance to respond to the additional factual allegations and charges.” *Id.* Thus, by regulation, when the NTA is substantively amended, the immigration judge should automatically grant a request to continue proceedings.

Who bears the burden of proving alienage?

DHS bears the burden of proving alienage in all cases. *United States ex. rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) (“the burden of proving alienage rests upon the Government”).

If respondent is charged without being admitted or paroled, DHS must “first establish the alienage of respondent.” 8 C.F.R. § 1240.9(c).

If respondent is charged with deportability, alienage must be proven “by clear, unequivocal, and convincing evidence . . .” *Woodby v. INS*, 385 U.S. 276, 286 (1966).

An immigration court only has subject matter jurisdiction if the respondent in the proceedings is not a citizen or national of the United States. Thus, if, and only if, alienage is proven, will deportability/inadmissibility become an issue.

Who bears the burden of establishing removability and by what standard?

After alienage is proven, if respondent is charged with *deportability* under INA § 237, the government bears the burden of proving deportability by clear and convincing evidence. INA § 240(c)(3); 8 C.F.R. § 1240.8(a).

If respondent is charged with *being in the US without being admitted or paroled* under INA § 212, he bears the burden of proving that either (1) he is “clearly and beyond doubt” entitled to admission and is not inadmissible as charged; or (2) by “clear and convincing evidence,” that he is lawfully present in the US pursuant to a prior admission. INA § 240(c)(2); 8 C.F.R. § 1240.8(c). A respondent who was *paroled into the US* and whose parole has expired or been revoked, must prove that he is “clearly and beyond doubt” entitled to admission and is not inadmissible as charged. 8 C.F.R. § 1240.8(a)

When can DHS call respondent to testify?

DHS may call a respondent to testify only *after* the government has presented sufficient evidence of alienage. *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971) (“*Upon presenting evidence that the respondent is an alien*, the Service may call upon him to testify and may use his testimony to find that deportability is established.” (emphasis added)). As it contains only the government’s allegations, the NTA, which is often the first exhibit admitted by the immigration judge, is *not* adequate evidence of alienage.

What if voluntary departure is the only relief immediately available to respondent?

Many individuals who are granted voluntary departure but do not depart the United States are barred from relief from removal, including adjustment of status, for ten years. Because the penalties for failing to depart are harsh, individuals who are eligible for voluntary departure should consider the potential repercussions of a grant of voluntary departure before deciding to apply for this relief. In many cases, a person who is granted voluntary departure may end up in a worse position than someone who is ordered removed. Therefore, even if the immigration judge urges respondent to apply for voluntary departure, voluntary departure may be the preferable option where the respondent unequivocally intends to leave the country and can afford to do so at his own expense.

The consequences of failing to depart pursuant to a grant of voluntary departure are discussed in more detail in AILF’s July 2003 Practice Advisory entitled, *Failure to Depart After a Grant of Voluntary Departure: The Consequences and Arguments to Avoid Them*.
http://www.ailf.org/lac/lac_pa_072203.asp

II. ARGUMENTS THAT COULD LEAD TO TERMINATION OF PROCEEDINGS²

A. An Unauthorized Official Issued the Notice to Appear

The NTA must be issued by an authorized official to be valid.³ If an authorized official did not issue the NTA, the removal proceeding should be terminated because the charging document, which is the basis for the proceeding, is procedurally deficient. Accordingly, the immigration

² Also on these general topics: *Selected Strategies in Removal Cases*, available at: <http://www.nationalimmigrationproject.org/sept11/resources.htm>.

³ For a list of authorized officers, *see* 8 C.F.R. § 239.1(a); 8 C.F.R. § 1239.1(a). Additional officers may be delegated the authority to issue NTA’s at the discretion of the Department of Homeland Security. 8 C.F.R. § 239.1(a)(38); 8 C.F.R. § 2.1.

court would lack jurisdiction over respondent. Counsel would argue that the NTA was improvidently issued and, therefore, termination is warranted. *But see* 8 C.F.R. §§ 239.2(a)&(c), 1239.2(a)&(c) (stating that DHS may move for dismissal based on an improvidently issued NTA and such dismissal shall be without prejudice to DHS or respondent). That the regulation is silent as to respondent's ability to move for dismissal does not preclude respondent from making such a motion nor does it preclude the immigration judge from exercising *sua sponte* authority to dismiss.

If proceedings were terminated, DHS could presumably cure the defect by issuing a new NTA. However, moving to dismiss the proceedings based on a procedurally defective NTA may be particularly beneficial if respondent will soon become statutorily eligible for relief from removal.

B. Special Call-In Registration Interview Conducted in the Absence of Counsel

Some special call-in registrants retained attorneys who were prevented from attending the interview with them. In this situation, respondent should assert that violation of the right to counsel requires termination of the proceeding or, as an alternative, that the evidence obtained in violation of this right cannot be admitted.

The regulation at 8 C.F.R. § 292.5(b) provides:

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. Emphasis added.

This regulation should apply to special call-in registrations.⁴ If respondent was denied the benefit of counsel at his special registration interview, DHS violated the regulation. In *Matter of Garcia-Flores*, 17 I&N Dec. 325, 329 (BIA 1980), the BIA discussed when a regulatory violation amounts to a due process violation that would warrant invalidating the action or proceeding. First, the regulation allegedly violated must provide a procedural or substantive

⁴ A special call-in registration interview is an examination. The registration program requires nonimmigrant aliens to appear before, register with, and provide information to DHS. *See* 8 C.F.R. § 264.1; 67 Fed. Reg. 67766-68 (Nov. 6, 2002); 67 Fed. Reg. 70526-28 (Nov. 22, 2002); 67 Fed. Reg. 77642-44 (Dec. 18, 2002); 68 Fed. Reg. 2363-66 (Jan. 16, 2003). The interview is conducted under oath and DHS creates a written record of the interview. The DHS officer assesses whether the individual complied with the conditions of nonimmigrant visa status and admission and requires him to provide any additional information requested. 8 C.F.R. § 264.1(f).

A special registration examination is also "provided for in this chapter." 8 C.F.R. § 292.5(b) falls within Part 292, which is entitled "Representation and Appearances," and is contained in Chapter I of Volume 8 of the Code of Federal Regulations. 8 C.F.R. § 264.1, which sets forth the special registration procedure, falls within Part 264, which is entitled "Registration and Fingerprinting of Aliens in the United States," and is also contained in Chapter I. Moreover, both Parts 292 and 264 are in the same *subchapter* of Chapter I, Subchapter B: Immigration Regulations.

benefit to the respondent. If it does, the violation must prejudice an interest protected by the regulation. The Board further stated that:

Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed. Similarly, where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency, it can be deemed prejudicial. [citations omitted]. As a general rule, however, prejudice will have to be specifically demonstrated.” *Id.*

In addition, most circuit courts that have addressed the issue require a showing of prejudice to prevail on a due process claim based on a regulatory violation. However, courts generally acknowledge that prejudice may be presumed where constitutional or statutory rights are implicated.⁵

In the Second Circuit, if the regulation was promulgated to protect a fundamental constitutional or statutory right, the action (or inaction) constitutes a *per se* due process violation. If the regulation affords a procedural or substantive right not covered by the INA or the Constitution, termination is also appropriate if the violation causes prejudice to the right sought to be protected by the regulation.⁶

The regulation at issue, 8 C.F.R. § 292.5(b), provides a procedural and substantive benefit, the right to counsel, during examinations before DHS. The right emanates from the Due Process Clause of the Fifth Amendment, which requires an opportunity to be represented by counsel.⁷ Although the INA specifically provides the right to counsel in removal proceedings (INA §§ 292, 240(b)(4)(A)), the Administrative Procedure Act provides the right to counsel in administrative matters before agencies.⁸ Thus, because § 292.5(b) protects a fundamental constitutional and statutory right, prejudice should be presumed or, under Second Circuit

⁵ See *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979) (setting forth test adopted by the BIA in *Matter of Garcia-Flores*); *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002) (adopting BIA’s approach in *Garcia-Flores*, finding no constitutional right implicated where same officer arrested and examined respondent in violation of § 287.3); *Delgado-Corea v. INS*, 804 F.2d 261, 263 (4th Cir. 1986) (holding that, under *Garcia-Flores*, a showing of prejudice is required but acknowledging that it may be presumed where a constitutional right is implicated); *Arzanipour v. INS*, 866 F.2d 743, 746 (5th Cir. 1989) (holding that a showing of substantial prejudice is required unless “the regulation is required by the constitution or a statute.”). *But see Bui v. INS*, 76 F.3d 268, 270-271 (9th Cir. 1996) (holding that agency failure to follow regulation requiring respondent to designate country of deportation violated right conferred by statute and remanding for designation where BIA speculated that violation constituted harmless error).

⁶ *Montilla v. INS*, 926 F.2d 162, 166-170 (2d Cir. 1991) (where IJ violated regulation requiring respondent to state on the record whether he desired counsel and violation affected right to counsel, the court did not require a showing of prejudice); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir.), *cert. denied*, 513 US 1014 (1994) (limiting *Montilla* to “fundamental” constitutional or statutory rights); *Montero v. INS*, 124 F.3d 381, 387 (2d Cir. 1997) (finding INS did not violate 8 C.F.R. § 287.3(a), but, nevertheless recognizing in dicta that termination, without a showing of prejudice would be remedy, if regulation implicated a fundamental right).

⁷ *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1989); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985). The ability to be represented by counsel necessitates an adequate opportunity to contact counsel. *Castro O’Ryan v. INS*, 847 F.2d 1307, 1312-13 (9th Cir. 1987); *Baires v. INS*, 856 F.2d 89, 90-91 (9th Cir. 1988). Although these cases involve the right to counsel in deportation proceedings, they should be applicable.

⁸ 5 U.S.C. § 555(b) states, in relevant part:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

precedent, is not required. If a showing of prejudice were required, counsel would need to show that respondent was prejudiced by the absence of counsel during the interview.

C. Respondent's Arrest and Detention Violated 8 C.F.R. § 287.3

In accordance with INA § 287(a)(2), certain DHS officers could arrest special call-in registrants without a warrant.⁹ The regulations at 8 C.F.R. § 287.3 provide the implementing procedures for such arrests. Significantly, 8 C.F.R. § 287.3(d) provides DHS with 48 hours from the time of arrest to make a formal custody determination and issue the NTA and warrant of arrest, absent an emergency or extraordinary circumstances. 8 C.F.R. § 287.3(a) requires the arresting officer be someone other than the interviewing officer unless arranging for another officer to conduct the interview causes unnecessary delay. In addition, respondent must be told of the reasons for arrest, notified of the right to counsel, provided with information regarding free legal services, and be advised that any statements may be used against him in proceedings. 8 C.F.R. § 287.3(c).

If, for example, DHS detained respondent and then unnecessarily delayed interviewing him, failed to make a custody determination or issue an NTA within 48 hours, or failed to advise respondent that his statement may be used against him in proceedings, DHS violated 8 C.F.R. § 287.3. Such violations implicate protected constitutional and statutory rights and violate due process. As discussed in detail above in section II.B, when a regulatory violation amounts to a due process violation, termination of the proceedings may be an appropriate remedy to cure the violation.¹⁰ DHS would presumably issue a new NTA, however, respondent may be closer to becoming eligible for relief from removal.

D. DHS Fails to Prove Alienage or Removability

If DHS does not establish alienage and deportability by “clear and unequivocal facts,” counsel must decide whether it is strategically better to request that the IJ terminate proceedings or whether to wait and raise the issue on appeal to the BIA. If the immigration judge seems inclined to order termination, then it may be advisable to consider moving to terminate proceedings after DHS concludes its presentation of evidence.

Provided appropriate objections to DHS's evidence (or lack of evidence) have been made on the record, counsel could also request termination or remand on appeal to the BIA. If the BIA

⁹ INA § 287(a)(2) authorizes a DHS officer to make a warrantless arrest of a noncitizen whom the officer has reason to believe is in the U.S. in violation of immigration law if the person is likely to escape before a warrant can be obtained for his arrest. This section further requires that the individual “be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.”

The law governing the arrest, detention and bond procedures for noncitizens without criminal convictions is further addressed in AILF's January 13, 2003 Practice Advisory entitled, *Arrest, Detention, and Bond Proceedings for Noncitizens Without Criminal Convictions* (http://www.ailf.org/lac/lac_pa_011303.asp).

¹⁰ At least one immigration judge has held that the appropriate remedy is termination of the proceedings without prejudice. In that case, respondent was detained for two days before questioned by INS and detained for 16 days before an NTA was issued. See also *Vitarelli v. Seaton*, 359 U.S. 535, 545, (1959) (Government proceedings that fall "short of the requirements of the applicable departmental regulations... [are] illegal and of no effect".). Emphasis added.

agrees that DHS has not established its case, it could either terminate or remand the case back to the immigration judge.

If the case is terminated because DHS failed to establish alienage or removability, can DHS move to reopen proceedings based on new evidence?

Yes, DHS can move to reopen proceedings before the immigration court and the BIA *provided that* the evidence is “material and was not available and could not have been discovered or presented at the former hearing.” See 8 C.F.R. § 1003.23(b) (immigration court) and 8 C.F.R. § 1003.2(c) (BIA).¹¹ If the evidence accompanying DHS’ motion to reopen was available or should reasonably have been available, DHS cannot remedy its failure to present such evidence through a motion to reopen. *Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984) provides support for this argument.

In *Ramon-Sepulveda*, INS attempted to submit the Record of Deportable Alien (form I-213) and respondent’s testimony to prove alienage. Respondent invoked his Fifth Amendment right to refuse to testify against himself and, after opposing counsel challenged the admissibility of the I-213, INS withdrew it. INS then concluded its evidentiary presentation and the immigration judge terminated proceedings for failure to prove alienage. Seven months later, INS submitted respondent’s birth certificate and sought to reopen proceedings. The immigration judge granted reopening and respondent appealed the grant to the BIA. On appeal, the BIA concluded that the birth certificate was “not necessarily discoverable prior to the hearing.” The Ninth Circuit found that the BIA had abused its discretion and reversed. The Court found that there was no indication that the birth certificate could not have been discovered before the hearing and, therefore, reopening violated the plain language of the regulation. 743 F.2d at 1310.

What arguments are available to counter the issuance of a new NTA where DHS is precluded from reopening?

Under the principle of *res judicata*, a valid, final judgment in an earlier removal proceeding precludes the DHS from later seeking to remove the same respondent based on the same claim or issue that was litigated, or could have been litigated, in the earlier proceeding.

In *Ramon-Sepulveda v. INS*, 824 F. 2d 749 (9th Cir. 1987), Ninth Circuit held that an immigration judge’s earlier decision to terminate proceedings based on INS’ failure to prove alienage precluded the INS from initiating subsequent proceedings based on new evidence. Similarly, in *Medina v. INS*, 993 F.2d 499 (5th Cir.), *rehearing denied*, 1 F.3d 312 (1993), the Fifth Circuit held that the doctrine of *res judicata* barred INS from relitigating the question of respondent’s citizenship where the INS conceded that respondent was a citizen and waived appeal in an earlier proceeding. That the immigration judge applied the wrong standard in determining respondent’s citizenship in the earlier proceeding did not alter the Court’s

¹¹ DHS may file one motion to reopen proceedings before the BIA within ninety days of the BIA’s final decision. Note, however, that time and numerical limitations do *not* apply to motions to reopen before an immigration judge if the motion is filed by DHS and seeks to reopen a removal proceeding. *Id.*

conclusion that “a final uncontested grant of citizenship cannot be revisited at the INS’s pleasure.” 1 F.3d at 315.

III. ARGUMENTS CHALLENGING EVIDENCE FROM RESPONDENT’S SPECIAL CALL-IN REGISTRATION INTERVIEW

In proceedings resulting from a person’s appearance at a special call-in registration interview, DHS may try to submit evidence obtained or created during the interview to establish alienage or removability. Such evidence includes the Record of Sworn Statement in Administrative Proceedings (I-877) and Record of Deportable Alien (I-213) as well as other documentary evidence provided by the individual.

A. Challenging the Manner and Circumstances under which DHS Prepared the Evidence

Counsel may be able to preclude or diminish the evidentiary value of evidence prepared by DHS during the special call-in registration interview, particularly the Record of Sworn Statement in Administrative Proceedings.

In *Balasubramanrim v. INS*, 143 F.3d 157 (3d Cir. 1998), the Third Circuit held that an airport statement alone did not provide a valid ground upon which the BIA could base its finding that respondent, an asylum applicant, was not credible. The Court stated:

First, the hand written record of the airport interview in this case may not be reliable. We do not know how the interview was conducted or how the document was prepared. We do not know whether the questions and answers were recorded verbatim, summarized, or paraphrased. We cannot tell from the document the extent to which [respondent] had difficulty comprehending the questions, whether questions had to be repeated, or when and how sign language was used. Nor does the document reveal whether [respondent’s] responses actually correspond to those recorded or whether the examiner recorded some distilled or summary version based on his best estimation of the response.

. . . Similarly, when the arriving alien is not proficient in English and no translator is provided, the airport interview may not elicit all the events which are central to an asylum claim.

Although *Balasubramanrim* involved a statement made to INS officials upon respondent’s arrival to the US, the Court’s concerns about the written record of the airport interview may be applicable to challenges regarding the reliability of evidence prepared by DHS, particularly where respondent is not proficient in English.

B. Statements Resulting from Coercion, Duress, or Inducement.

Due process requires that statements used to support deportability be made voluntarily.¹² If respondent's statements at his special registration interview were the result of coercion, duress, or inducement, respondent may argue that his statements and, by extension, documents provided by respondent during the special call-in registration interview, should not be admitted.

Examples of coercion, stress, or inducement claims include leading respondent to believe that he had no rights, that he could not communicate with counsel, that he could be detained without explanation, physical abuse, hours of interrogation, denial of sleep, food or drink, threats of criminal and civil penalties or deportation for failure to comply, promises, or interference with any attempt to exercise his rights.¹³

Such claims must be supported by testimony.¹⁴ In addition, they may be supported by evidence of the lack of information and/or incorrect and contradictory information provided to the public, the denial of the right to counsel, or the lack of interpreters. Claims may also be supported by evidence of respondent's reasonable belief that he, as a member of the Arab, Muslim or South Asian community, was subject to special scrutiny and harsh treatment.¹⁵

C. Evidence Resulting from "Egregious" Violations

The Supreme Court has held that the exclusionary rule does *not* apply in immigration proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). *See also Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979). However, the Court considered that exclusion of evidence *might be* appropriate in cases where evidence is obtained by "egregious violation of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Lopez-Mendoza*, 468 U.S. at 1050-51. Thus, if the evidence

¹² *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (holding that where admissions underlying finding of deportability were involuntarily made, due process warrants their exclusion from the record); *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960) ("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.").

¹³ *See, generally, Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980) (due process requires excluding admissions from the record where respondent was led to believe that deportation was inevitable, that he had no rights whatsoever, that he could not communicate with his attorney, and that he could be detained without explanation of why he was in custody); *Bong Youn Choy v. Barber*, 279 F.2d at 645-47 (vacating deportation order based on coerced statement by sleep-deprived respondent where INS threatened perjury charges and deportation).

¹⁴ *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988) (where admissibility of I-213 challenged, claim must be supported by testimony, affidavit alone is not sufficient).

¹⁵ In this regard, counsel should document evidence of the disproportionate number of detainees from Arab, Muslim and South Asian communities following September 11th and the intense secrecy, arbitrariness, unnecessarily harsh conditions of detention, including excessive lengths of detention and physical and verbal abuse. Furthermore, it may be helpful to provide evidence that, of over 82,000 persons registering under the call-in program, none was charged with terrorism related crimes. *See* the Report from the Office of Inspector General issued in June 2003, entitled *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (<http://www.usdoj.gov/oig/special/03-06/index.htm>).

was obtained by an “egregious violation” such as, for example, physical abuse of respondent, exclusion of the evidence may be warranted under *Lopez-Mendoza*.

In addition, where the behavior of DHS officials was violent, abusive or negligent during the special call-in registration process, counsel should consider bringing suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 and/or the tort theory set forth in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

IV. CONTINUING OR ADMINISTRATIVELY CLOSING CASES BASED ON PRIMA FACIE ELIGIBILITY FOR ADJUSTMENT OF STATUS

In the absence of a uniform EOIR policy, whether immigration judges will permit respondents to continue, or administratively close, removal proceedings based on prima facie eligibility for adjustment of status will be decided on a case-by-case basis. Under the BIA’s decision in *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), there is a strong argument that such proceedings should be continued (or administratively closed) as long as a non-frivolous visa petition has been filed.

In *Velarde*, the BIA held that a motion to reopen based on prima facie eligibility for adjustment of status through marriage to a US citizen should be granted, even if the underlying visa petition has not been approved, provided that the motion:

- (1) is timely filed (within 90 days of the decision);
- (2) is not numerically barred by the regulations (must be the first and only motion to reopen filed);
- (3) is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996) (because respondent overstayed a voluntary departure period) or, on any other procedural grounds;
- (4) presents clear and convincing evidence indicating a strong likelihood that the respondent’s marriage is bonafide; and
- (5) is not opposed by the Service or its opposition is based solely on *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992) (because the visa petition has not been approved).

In finding that reopening under these circumstances is warranted, the BIA reasoned that its holding is consistent with the Congress’ legislative intent in amending the marriage fraud provisions to allow respondents who marry in proceedings the opportunity to pursue adjustment of status. *Velarde*, 23 I&N Dec at 257. The BIA remanded *Velarde*’s case for further proceedings consistent with its opinion and entry of a new decision. Once reopened, presumably the immigration judge would have to either continue or administratively close *Velarde*’s case until he becomes statutorily eligible for adjustment.

The *Velarde* holding should be applicable to respondents with other types of family-based and employment-based visa petitions and/or adjustment applications pending. *Velarde* involved a respondent who married a US citizen *while in proceedings*. However, many respondents will have established the qualifying relationship and filed a visa petition/adjustment application based *before* proceedings commenced. Furthermore, extending *Velarde* to respondents covered by

INA § 245(i) would be consistent with Congress' repetitive re-enactment of that provision,¹⁶ established canons of statutory construction¹⁷ and preserving family unity.¹⁸

If respondent may reopen proceedings to pursue adjustment *after* a final order of removal under *Velarde*, then requiring issuance and reopening of a final order to pursue adjustment would simply waste the judicial resources of the EOIR and the parties. Thus, the immigration judge should assess, in the first instance, whether respondent satisfies the *Velarde* test for reopening and continue or close proceedings accordingly.

Velarde motions to reopen based on relationships other than marriage to a US citizen should meet requirements (1) – (3) above. These requirements are presumably inapplicable to *Velarde* motions continue or administratively close proceedings before immigration judges. All motions should present clear and convincing evidence that the appropriate qualifying relationship is bonafide. Although presently unknown whether DHS will oppose such motions, it would seem that they should not oppose if respondent has meet all other requirements.

Representations in motions may be used to establish alienage and deportability. Once alienage and deportability have been established, a subsequently filed application for adjustment of status is not part of the record on alienage and deportability. 8 C.F.R. § 1240.11(e).¹⁹ Thus, where alienage or deportability is disputed, a *Velarde* motion should not be filed until the immigration judge has decided these issues.

¹⁶ Section 245(i) was first enacted on August 26, 1994 by § 506(b) of the Department of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act, 1995, Pub. L. 103-317, and was scheduled to sunset on September 30, 1997. That date was extended by a series of continuing resolutions. The provision was modified and re-enacted on November 26, 1997 by § 111 of the Departments of Commerce, State and Justice Appropriations Act for 1998, Pub. L. 105-119, 11 Stat. 2440 and again on December 21, 2000 by § 1502 of the Legal Immigration and Family Equity Act, Pub. L. 106-554. The preamble to the regulations originally implementing § 245(i) stated that “[t]he [new] rule allows prospective lawful permanent residents to avoid the difficulties and expense of travel to a United States consulate or embassy abroad.” See 59 Fed. Reg. 51091 at 51092 (Oct. 7, 1994).

¹⁷ *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) (a specific statute will not be controlled by a more general one); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (“[W]e assume that Congress is aware of existing law when it passes legislation.” (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990))).

¹⁸ *Hameetman v. City of Chicago*, 776 F.2d 636, 642 (7th Cir. 1985) (stating that when the state “forces a man to live apart from his family [it] deprives him of a form of liberty protected by the due process clause . . .”); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (“[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”). These cases involved US citizens, therefore, the Due Process Clause of the Fourteenth Amendment was at issue. The Due Process Clause of the Fifth Amendment applies to non-citizens.

¹⁹ 8 C.F.R. § 1240.11(e) provides: “[a]ny application under this section [including applications under INA § 245] shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his or her alienage or deportability.” Representations made in a *Velarde* motion should be considered part of the “application” for adjustment of status.