

Trina Realmuto
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8 (tel)
(617) 227-5495 (fax)
trina@nipnlg.org

Attorney for Respondent

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
OFFICES OF CUSTOMS AND BORDER PROTECTION
DERBY LINE, VERMONT

In the Matter of:)
)
)
_____,)
)
Respondent.)
_____)

File No.: A XXX-XXX-XXX

**BRIEF IN SUPPORT OF MOTION TO RECONSIDER/REOPEN
AND RESCIND [REDACTED] EXPEDITED REMOVAL ORDER**

I. INTRODUCTION

Respondent, *****, hereby moves for reconsideration/reopening and rescission of the decision of the U.S. Customs and Border Protection Office at _____, _____, dated _____, ordering her removed pursuant to 8 U.S.C. § 1225(b)(1).

II. STATEMENT OF JURISDICTION

This office has jurisdiction over the instant motion under 8 C.F.R. § 103.5, entitled Reopening or Reconsideration, which, in relevant part provides:

(a) Motions to reopen or reconsider in other than special agricultural worker and legalization cases—

(1) When filed by affected party—

(i) General. . . . Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

(ii) Jurisdiction. The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. . . .

This motion is timely filed within 30 days of the _____ expedited removal order for which reconsideration and reopening is sought. Venue is proper with the _____ Port of Entry as that office made the decision to issue the expedited removal order.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Ms. XXX entered the United States from XXX as a lawful permanent resident on February X, 19X, at the age of eight. **Exhibit A**, Notice and Order of Expedited Removal (Form I-860). She is presently X years –old and has spent nearly X decades living in the United States. She has X U.S. citizen siblings, X U.S. citizen children, and X U.S. citizen grandchildren. **Exhibit B**, *United States of America v. XXXX*, Case No. XXX, Docket No. X (order dismissing prosecution under 8 U.S.C. § 1326(a)). One of her X serves in the U.S. Marine Corps. **Exhibit C**, Motion to Dismiss the Indictment Pursuant to 8 U.S.C. § 1326(d).

In [REDACTED], the Department of Homeland Security, U.S. Immigration and Customs Enforcement issued and served a Notice to Appear, placing Ms. XXXX in removal proceedings. **Exhibit C**. The Notice to Appear alleged deportability as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii), as defined in 8 U.S.C. § 1101(a)(43)(G), for 2008 and 2009 convictions for larceny in the third degree under Conn. Gen. Stat. § 53a-124. **Exhibit D**, Notice to Appear. Following an immigration judge decision finding her deportable for this charge, the Board of Immigration Appeals (BIA) dismissed Ms. XXXX’s appeal on [REDACTED]. **Exhibit E**, BIA decision.

On [REDACTED], CBP apprehended Ms. XXXX at the port of entry at Derby Line, Vermont. **Exhibit F**, Record of Deportable Alien (Form I-213). A database check in “TECS” revealed to CBP Officer Jason Prue that Ms. XXXX previously had been ordered removed as an aggravated felon. **Exhibit F**. Despite this notice, CBP conducted an “admissibility interview” with Ms. XXXX about her re-entry. *Id.* “Upon completing of the admissibility interview [Ms.] [Ms.] XXXX was advised of her Miranda rights. At 1800 hours [Ms.] XXXX decided not to answer questions and she requested a lawyer.” *Id.*

At 7:30 p.m., CBP contacted Assistant U.S. Attorney (AUSA) Cowles regarding criminally prosecuting Ms. XXXX. Exhibit F. At 7:50 p.m., AUSA Cowles “advised of case acceptance” for prosecution under 8 U.S.C. § 1326 for illegal reentry after a prior removal order. *Id.* CBP transported Ms. XXXX to federal custody that same night. *Id.*

The Office of the Federal Defender for the District of Vermont defended Ms. XXXX against the § 1326(a) charge. On [REDACTED], the Office moved to dismiss the charge, claiming that Ms. XXXX “was improperly deemed to be an aggravated felon based on her third-degree larceny convictions from Connecticut and was removed on this basis.” Exhibit C. That motion provides a detailed analysis explaining that said convictions are not aggravated felonies, that the assistance rendered by prior immigration counsel was ineffective, and that, but for prior counsel’s ineffective assistance, Ms. XXXX would have been able to apply for relief from removal. It is incorporated herein by reference. Ms. XXXX is eligible both for cancellation of removal and relief under former § 212(c) of the Immigration and Nationality Act.

On [REDACTED], the U.S. District Court for the District of Vermont granted Ms. XXXX’s motion to dismiss the § 1326(a) charge, finding the prior removal order fundamentally unfair and that “but for her counsel’s ineffective assistance, she would have been granted cancellation of removal.” Exhibit B.

Notwithstanding the judicial finding that the prior order issued by the BIA was fundamentally unfair and its dismissal of a criminal charge predicated on that order, Supervisory CBP Officer David George determined that Ms. XXXX was removable under 8 U.S.C. § 1225(b)(1) and, in violation of the regulations requiring a supervisor’s concurrence of this determination, Officer George approved his own determination, signing the name of Assistant Port Director Charles J. Guyette to the order. Exhibit A. Significantly, Officer George did not

tick the designated box for indicating that supervisory concurrence was obtained telephonically or by other means. *Id.* In addition, Officer George nor any other officer properly considered the effect of the District Court's decision.

Ms. XXXX was removed to XX that same day, presumably turned over to XX immigration authorities as she is presently detained.

IV. ARGUMENT

A. **The Expedited Removal Order Must Be Rescinded Because CBP Violated Regulations That Affect Fundamental Rights Deriving From the Constitution or Statute and Constitutional Rights to Counsel and Protection Against Self-Incrimination.**

Almost fifty years ago, the Supreme Court reiterated a principle of law stating that a government agency must comply with its administrative regulations, and when it fails to do so, its action cannot stand. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). *See also Bridges v. Wixon*, 326 U.S. 135, 152-153 (1945) (the Supreme Court invalidated a deportation that was ordered on the basis of statements taken without complying with the immigration service's rules requiring signatures and oaths, finding that the rules were designed "to afford . . . due process of law" by "providing safeguards against essentially unfair procedures").

The Second Circuit has adopted the Supreme Court's holding in *Accardi* (now-called the *Accardi* doctrine), and has made clear that it will not tolerate an agency's violation of its own regulations where they implicate a constitutionally or a statutorily protected right. *See Montilla v. INS*, 926 F.2d 162, 166-170 (2d Cir. 1991) (granting petition for review and remanding case where immigration judge violated regulation requiring respondent to state on the record whether he desired counsel and violation affected statutory right to counsel); *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). *See also Matter of Garcia*, 17 I&N Dec. 319, 320 (BIA 1980) (holding that a respondent’s statement admitting illegal entry was involuntary and not admissible where the person was not allowed to consult counsel”); *Leslie v. A.G. of the United States*, 611 F.3d 171, 180 (3d Cir. 2010) (“we hold that when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. *Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party.*”) (emphasis added).

Here, the CBP violated its regulations while instituting the instant proceedings against Ms. XXXX, including, but not limited to:

- (1) 8 C.F.R. § 235.3(b)(2)(i) (requiring examining officers to obtain “supervisory concurrence in accordance with paragraph (b)(7) of this section” before serving expedited removal order and seeking individual’s sign acknowledging receipt);
- (2) 8 C.F.R. § 235.3(b)(7) (requiring “[a]ny [expedited] removal order entered by an examining immigration officer . . . be reviewed and approved by the appropriate supervisor before the order is considered final” and mandating supervisors to “review of any claim of lawful admission or parole and any evidence or information presented to support such a claim, prior to approval of the order” and allowing the supervisor to “request additional information from any source” and from a further interview with the individual”); and
- (3) 8 C.F.R. § 292.5(b) (right to counsel during an examination in either primary or secondary inspection where “the applicant for admission has become the focus of a criminal investigation and has been taken into custody.”).

All of the foregoing regulations implicated Ms. XXXX’s fundamental rights derived from the Fifth Amendments, as well as from the immigration statutes. These regulations were

promulgated to protect individual rights that are guaranteed by the Constitution and by statute, including, the fundamental rights to due process; to protect against self-incrimination; and to representation.

Here, the same officer (Officer George) signed the expedited removal order as both the immigration officer and the supervisor in violation of 8 C.F.R. §§ 235.3(a)(2)(i), (b)(7), which requires that the order “must be reviewed and approved by the appropriate supervisor because the order is considered final” as well as the form itself, which contains a box for indicating if supervisory concurrence was obtained by telephone or other means, *see* Exhibit A.

Furthermore, on the face of Form I-212, CBP’s “admissibility interview” was entirely pretextual in that CBP Officer Prue was on notice of Ms. XXXX’s prior removal order. Only after completing that interview, did CBP read Ms. XXXX her *Miranda* rights, at which time she invoked her rights to remain silent and to have counsel and CBP called the AUSA to initiate a criminal investigation/prosecution. Significantly, however, upon learning of her prior removal order, Ms. XXXX had become the “focus” of a criminal investigation and, as she was not free to leave the port of entry, she was in CBP’s “custody.” Exhibit F. Thus, CBP violated 8 C.F.R. § 292.5(b) when it deprived her of the right to counsel at the port of entry.

In light of the violations of her statutory, regulatory and constitutional rights, and pursuant to the *Accardi* doctrine as announced by the Supreme Court and applied by the Second Circuit and the BIA, the expedited removal order against Ms. XXXX must be rescinded.

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B. The Expedited Removal Order Must Be Rescinded Because the U.S. District Court for the District of Vermont Declared Ms. XXXX's Prior Removal Order Fundamentally Unfair and CBP Failed to Give Effect to the Court's Order.

Just one day prior to CBP's issuance of the expedited removal order against Ms. XXXX, the U.S. District Court for the District of Vermont dismissed the § 1326(a) charge against her, stating "...the Immigration Judge's assumption and XXXX's counsel's acquiescence that a conviction under Conn. Gen. Stat. § 53(a)-124 qualified as an aggravated felony under the immigration code deprived XXXX of the opportunity to seek statutory cancellation of removal relief and judicial review and was fundamentally unfair to XXXX" and concluding that "but for her counsel's ineffective assistance, she would have been granted cancellation of removal." Exhibit B.

Here, CBP failed to properly consider the effect of that the District Court's order on Ms. XXXX's immigration status. Under 8 C.F.R. § 235.3(b)(5)(i), CBP may refer individuals with valid claims to lawful permanent resident status to an immigration judge for review of any expedited removal order in accordance with 8 C.F.R. §§ 235.3(b)(5)(i) and 235.6(a)(2)(ii). In addition, in such cases, CBP "may initiate removal proceedings against the alien under section 240 of the Act." 8 C.F.R. §§ 235.3(b)(5)(ii). Here, at a minimum, CBP was on notice of the District Court's order dismissing prosecution under 8 U.S.C. § 1326(a) (as U.S. Marshal immediately released Ms. XXXX to CBP custody) and failed to consider the impact of that order on her claim to lawful permanent resident status. Indeed, CBP was not free to ignore the District Court's order, which effectively restored Ms. XXXX to lawful permanent resident status, and, at a minimum, required CBP to invoke the regulatory procedures set forth in 8 C.F.R. § 235.3(b)(5) for individuals with non-frivolous claims to lawful permanent resident status. *Accord Nken v.*

Holder, 556 U.S. 418, 430 (2009) (“[A] determination that the BIA should have granted Nken’s motion to reopen would necessarily extinguish the finality of the removal order.”).¹

V. CONCLUSION

For the foregoing reasons, CBP should grant this motion, rescind the [REDACTED] expedited removal order and admit Ms. XXXX to the United States. In the alternative, CBP should allow her to withdraw her prior application for admission (*see* 8 U.S.C. § 1225(a)(4)) or place her in removal proceedings (*see* 8 U.S.C. § 1225(b)(2)(A)).

Date: [REDACTED]

Respectfully submitted,

Trina Realmuto
National Immigration Project of
the National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
(617) 227-5495 (fax)
trina@nipnlg.org

¹ As soon as practicable, undersigned counsel will file a motion seeking to reopen the Board’s [REDACTED] decision.