04-6143-ag

To Be Argued By:
JOHN A. MARRELLA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-6143-ag

FAUSTO JOSE IBARRA-AVALOS,

Petitioner,

-vs-

SECRETARY OF DEPT. OF HOMELAND SECURITY, DIRECTOR OF U.S. IMMIGRATION CUSTOMS ENFORCEMENT, ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF AND APPENDIX FOR RESPONDENTS

==========

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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review the petitioner's challenge to the BIA's final order dated October 29, 2004, dismissing his appeal and affirming the Immigration Judge's denial of his application for adjustment of status.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Board of Immigration Appeals correctly concluded that the Petitioner was not denied due process where his voluntary departure order – which he requested – appears not to have been signed personally by the Assistant District Director of the Immigration and Naturalization Service.

2. Whether this Court lacks authority to consider a due process claim relating to evidence that was allegedly received into evidence erroneously, where the Petitioner failed to exhaust his administrative remedies by raising the claim before the Board of Immigration Appeals and, in any event, the Petitioner had ample opportunity to contest such evidence.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-6143-ag

FAUSTO JOSE IBARRA-AVALOS,

Petitioner,

-vs-

SECRETARY OF DEPT. OF HOMELAND SECURITY, DIRECTOR OF U.S. IMMIGRATION CUSTOMS ENFORCEMENT, ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENTS

Preliminary Statement[1]

[1] For reasons unrelated to the merits of this case, the Government has filed a sealed motion to stay further briefing of this case pending resolution of an issue set forth therein.

Fausto Jose Ibarra-Avalos ("the Petitioner"), a native and citizen of Mexico, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated October 29, 2004 (Joint Appendix ("JA") 2-3). The BIA affirmed the decision of an Immigration Judge ("IJ") (JA 37-41) dated December 2, 2003, denying the Petitioner's application for adjustment of status under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering him to depart the United States. (JA 2 (BIA's decision), 41 (IJ's decision and order)). The Petitioner had entered the United States illegally in 1994, and had been arrested by officials of the Immigration and Naturalization Service ("INS") on September 18, 1997. (JA7). The Petitioner applied for and received permission to voluntarily depart, and an order issued on September 18, 1997, directing him to depart the United States on or before September 19, 1997. (JA 23). The issue before the IJ was whether the Petitioner proved by a preponderance of the evidence that he voluntarily departed the United States on September 19, 1997, as ordered. (JA 39). The IJ found that the Petitioner did not meet his burden of proof and concluded that his application for adjustment of status was, therefore, barred under Section 240B(d) of the INA. (JA 40). Under that Section, an alien who is permitted to depart voluntarily and fails to do so shall be ineligible for adjustment of status for 10 years.

In this appeal, the Petitioner does not contest the IJ's finding of fact concerning his failure to voluntarily depart on September 19, 1997. Rather, he claims that he was denied due process because the order granting him voluntary departure, dated September 18, 1997, was

signed by a person other than the Assistant Director of the INS, whose name was printed on the order. The Petitioner claims a further due process violation arising from the IJ's supposedly erroneous receipt and consideration of certain exhibits offered by the Government in the course of his removal proceedings. In light of these supposed errors, the Petitioner has asked this Court to remand the case to the BIA and the IJ for reconsideration.

Both of the Petitioner's claims are meritless. It was the Petitioner himself who requested voluntary departure, which was granted to him by the INS on September 18, 1997. Notwithstanding his suggestion that the order granting his request was improperly granted, the Petitioner has not shown any defect in the voluntary departure order that would implicate his due process rights. In any event, even if the alleged defect existed, it did not affect the fundamental fairness of the removal proceedings. Similarly, his objection to the Government exhibits in question was noted by the IJ, who gave him an opportunity to review and respond to that evidence. He did not respond. Now, after failing to raise this argument before the BIA, the Petitioner claims that he was denied due process by the IJ's admission of the evidence. However, the fact that the Petitioner had notice and an opportunity to be heard vitiates his claim of a constitutional violation.

Statement of the Case

On or about May 15, 1994, the Petitioner entered the United States illegally near Brownsville, Texas. (JA 207).

On September 18, 1997, the Petitioner was apprehended by INS officials in Puerto Rico and placed in removal proceedings. On that date, he requested and was granted voluntary departure by the Assistant District Director. (JA 7, 23). The Notice of Voluntary Departure required him to depart the United States at his own expense on or before September 19, 1997. (JA 23).

On November 14, 2002, the Petitioner was arrested by INS officials in Newport, Vermont. (JA 8). A Notice to Appear issued, charging the Petitioner with being a removable alien on the following grounds: he was an alien present in the United States who had not been admitted or paroled. (JA 204).

On June 17, 2003, the Petitioner appeared before Immigration Judge Michael W. Straus in Hartford, Connecticut, for a removal hearing. (JA 43-51). The Petitioner denied all allegations and charges against him and sought adjustment of status, or, in the alternative, voluntary departure. (JA 181-182). Further proceedings were held before Judge Straus in Hartford on October 3, 2003 (JA 52-65), November 17, 2003 (JA 66-83), and December 2, 2003. (JA 84-92). The Petitioner testified on his own behalf, as did his wife. (JA 55-65). The IJ also received evidence submitted by the Government. (JA 79-83).

At the conclusion of the hearing on December 2, 2003, the IJ rendered an oral decision finding that the Petitioner had not met his burden of showing by a preponderance of the evidence that he had voluntarily departed the United

States on September 19, 1997, and denying his application for adjustment of status. (JA 37-41). The IJ granted the Petitioner's application for voluntary departure. (JA 41).

On December 18, 2003, the Petitioner filed a timely notice of appeal to the BIA. (JA 27). On June 25, 2004, he filed a brief with the BIA. (JA 6).

On October 29, 2004, the BIA issued an order adopting and affirming the IJ's decision. (JA2-3).

On November 29, 2004, the Petitioner filed a timely petition for review with this Court. (Government's Appendix 1-2). The Petitioner remains free pending resolution of this appeal.

Statement of Facts

A. Petitioner's Entry into the United States and Application for Voluntary Departure

The Petitioner is a native and citizen of Mexico. (JA 7). He entered the United States at or near Brownsville, Texas, on or about May 15, 1997. (JA 207). On September 15, 1997, the Petitioner married Julianette Acevedo in Puerto Rico. (JA 7). He was arrested by INS officials in Puerto Rico on September 18, 1997. (JA 7). On the same day, the Petitioner applied for voluntary departure, which was granted by means of a one-page order requiring him to leave the United States no later than September 19, 1997. (JA 23). The order bears the printed name of an INS official, Robert J. Bowles, who is

identified as "Assistant District Director Examinations." Above this printed name there appears an illegible signature and the handwritten word "for" in front of the printed name of Robert J. Bowles. (JA 23).

The order of voluntary departure includes the following notice in bold typeface:

> Failure to depart on or before the specified date may result in withdrawal of voluntary departure and action being taken to effect your removal. Failure to depart on or before the specified date may also subject you to a possible civil penalty of not less than $1,000 and not more than $5,000, and render you ineligible for a period of 10 years for any further authorization for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Immigration and Nationality Act.

(JA 23).

B. The Petitioner's Failure to Voluntarily Depart

Pursuant to the voluntary departure order, the Petitioner was placed on a plane from San Juan, Puerto Rico, to Miami, Florida on September 19, 1997. (JA 7). The plan was to have INS officials meet the Petitioner when he arrived from Puerto Rico at Miami International Airport and escort him to his connecting flight to Mexico. (JA 7). According to INS reports, two INS officials met the Petitioner's flight when it arrived at Miami

International Airport on September 19, 1997, and boarded the plane with the intention of escorting the Petitioner to his connecting flight. Although they did not know the Petitioner, the INS officials had been provided with his general description, including physical characteristics and clothing. The Petitioner was not seated in his assigned seat and could not be found on the aircraft. The INS officials then searched the concourse, the terminal, and the vicinity outside of the airport, but did not find the Petitioner. After confirming with the head flight attendant who received the alien into the aircraft in San Juan, the INS officials concluded that the Petitioner had changed his clothing en route to Miami to evade apprehension. (JA 97-98).

The Petitioner remained in absconder status with the INS until November 14, 2002, when Border Patrol agents arrested him at Newport, Vermont. (JA 179-180). On the same day, removal proceedings commenced with the filing of a Notice to Appear, which charged the Petitioner with being a removable alien, present in the United States, who had not been admitted or paroled. (JA 204). The Petitioner subsequently filed a Form I-130, seeking adjustment of status based on his marriage to a United States citizen and his fathering two children who are United States citizens. (JA 181-182).

C. The Removal Hearing

On June 17, 2003, the Petitioner appeared before Immigration Judge Michael W. Straus in Hartford, Connecticut, for a removal hearing. (JA 43-51). The

Petitioner denied all allegations and charges against him and sought adjustment of status or, in the alternative, voluntary departure. (JA 181-182). Further proceedings were held before Judge Straus in Hartford on October 3, 2003 (JA 52-65), November 17, 2003 (JA 66-83), and December 2, 2003. (JA 84-92). The sole issue before the court was whether the Petitioner had voluntarily departed the United States pursuant to the order of September 18, 1997. (JA 39).

In his testimony, the Petitioner denied that he evaded INS officials at the Miami airport on September 19, 1997. He claimed that he left the airport on that day and, seeing no INS officials, boarded a bus to Texas, and from there returned to Mexico. (JA 59-60, 14-15). The Petitioner provided no documentation showing that he departed the United States on September 19, 1997, nor any evidence (aside from his own testimony) that he resided in Mexico for any period of time after entering the United States in 1994. The Petitioner offered no explanation as to why he did not try to contact the INS following his alleged return to Mexico. Based on U.S. Individual Income Tax Returns submitted to the court, it appears that the Petitioner resided in and around Hartford, Connecticut, during the years 2000 through 2002. (JA 145-161).

At the hearing on November 17, 2003, the attorney for the Government offered Exhibit 5, a series of INS reports relating to the Petitioner's escape at Miami International Airport (JA 93-98), and Exhibit 6, a copy of the voluntary departure order, dated September 18, 1997 (JA 99). The Petitioner requested an opportunity to respond to this

evidence, which the IJ granted. (JA 82). At the next hearing, on December 2, 2003, the Petitioner offered no response to the evidence, other than an objection based on the alleged untimeliness of the Government's submission of the two exhibits. (JA 85-86). The IJ declined to exclude the evidence, noting that it appeared to be relevant and the Petitioner had had an opportunity to review the exhibits before the December 2 hearing. (JA 40, 86). Exhibits 5 and 6 were marked as full exhibits on December 2, 2003. (JA 93, 99).

D. The Immigration Judge's Decision

On December 2, 2003, the IJ issued an oral decision denying the Petitioner's application for adjustment of status. (JA 37-41). The IJ based his decision on his determination that the Petitioner had not met his burden of proving by a preponderance of the evidence that he had departed the United States on September 19, 1997, in accordance with the voluntary deportation order of September 18, 1997. (JA 40). The IJ noted that the Petitioner had submitted no evidence, other than his own testimony, to support his claim that he had returned to Mexico on September 19, 1997. (JA 40).

The IJ therefore concluded that Petitioner, who would otherwise be eligible for adjustment of status, was statutorily barred from such eligibility for ten years. *See* 8 U.S.C. § 1229c(d)(1)(B). In lieu of removal, the IJ granted Petitioner's application for voluntary departure, and ordered that he depart before February 2, 2004. (JA

40-41). The Petitioner timely appealed the IJ's decision to the BIA. (JA 27).

E. The BIA's Decision

On appeal to the BIA, the Petitioner claimed a due process violation, arguing that the voluntary departure order issued on September 18, 1997, was defective and invalid because the signature on the order was not that of the Assistant District Director, Robert J. Bowles. (JA 9-19). In support of this argument, the Petitioner included another order signed by Mr. Bowles, in order to demonstrate that the signatures did not match. (JA 22). The Petitioner also challenged the IJ's adverse credibility finding, claiming that he had, in fact, complied with the order of voluntary departure by leaving the United States by bus on September 19, 1997. (JA 14-18). On October 29, 2004, the BIA adopted the decision of the IJ and dismissed Petitioner's appeal. (JA 2-3). Addressing itself to the alleged impropriety based on the signature on the voluntary departure order (which the Petitioner had not raised in the administrative proceedings before the IJ) the BIA acknowledged that it appeared that Mr. Bowles had not signed the order. Nevertheless, the BIA held that the signature on the voluntary departure order did not implicate the "fundamental fairness" of the removal proceeding. (JA 2). The BIA concluded its discussion of the Petitioner's claim as follows:

> The respondent conceded that he entered the United States in 1994 illegally, that he was caught by immigration officials, that he agreed to depart

> voluntarily. Indeed, the respondent claimed that he self deported. At no point did the respondent question the underlying merits of the voluntary departure order. Accordingly, the appeal is dismissed.

(JA 2). This petition for review followed.

SUMMARY OF ARGUMENT

1. The Petitioner has not shown any defect in the order of voluntary departure, nor is there any due process violation arising from the signature on that order. As a preliminary matter, the Petitioner should be judicially estopped from challenging the order, because it provided precisely the relief that he himself had requested. On the merits, the Petitioner has not rebutted the presumption of regularity attaching to official acts of public officers, so that simply disputing the identity of the official who *signed* the voluntary departure order does not disturb the presumption that the order was *authorized* by an appropriate official. Because agency regulations speak only to the question of authorization rather than signature, the Petitioner can point to no violation of internal agency rules. Even if he could demonstrate such a violation, it would not rise to the level of a due process violation or an impingement on the fundamental fairness of the proceeding, because the Petitioner suffered no prejudice from any alleged error. That is, absent the claimed error, the voluntary departure order would have been signed by a different official, and the Petitioner would have no claim that his voluntary departure order was invalid.

2. This Court lacks authority to consider the Petitioner's claim that the IJ erroneously received certain exhibits into evidence. The Petitioner failed to exhaust his administrative remedies by not raising the claim before the Board of Immigration Appeals. In any event, the Petitioner had ample opportunity to contest such evidence in his administrative hearing.

ARGUMENT

I. THE BIA PROPERLY REJECTED THE PETITIONER'S DUE PROCESS CLAIM BECAUSE THE SIGNATURE ON THE VOLUNTARY DEPARTURE ORDER DOES NOT IMPLICATE THE FUNDAMENTAL FAIRNESS OF THE PROCEEDINGS

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

1. Voluntary Departure

Section 240B of the INA "permit[s] an alien voluntarily to depart the United States at the alien's own expense . . . in lieu of being subject to [removal] proceedings . . . or prior to the completion of such proceedings, if the alien is not deportable" under the INA. 8 U.S.C. § 1229c. If an alien is permitted to voluntarily

depart and fails to do so, the INA provides for a civil monetary penalty of $1,000 to $5,000. *See* 8 U.S.C. § 1229c(d)(1)(A). In addition, any alien who fails to depart "shall be ineligible, for a period of 10 years, to receive any further relief" under various provisions of the INA, including adjustment of status. *Id.* Section 1229c also requires that "[t]he order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. § 1229c(d)(3).

The authority to permit voluntary departure may be exercised by various agency officials, including district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations. *See* 8 C.F.R. § 240.25(a). Pursuant to INA regulations, "[v]oluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions." 8 C.F.R. § 240.25(c).

2. Standard of Review

This Court reviews the Petitioner's due process claims *de novo*. *See Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004). To the extent that this appeal turns on the sufficiency of the factual findings underlying the IJ's

determination[6] that the Petitioner failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004); *see Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004).

C. Discussion

The Petitioner's principal argument on appeal is based on little more than a minor detail -- a signature -- on his voluntary departure order, which he is trying to bootstrap into a due process violation. On September 18, 1997, the Petitioner, having been arrested by the INS after entering the United States illegally, requested voluntary departure, pursuant to Section 240B of the INA, 8 U.S.C. § 1229c. The INS granted his request the same day and issued a Notice of Voluntary Departure (JA 23), ordering the Petitioner to depart the United States on September 19, 1997. It appears that the person who actually signed the Notice of Voluntary Departure is not the INS official whose name is printed at the bottom of the document. (JA

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where the BIA adopts that decision. *See* 8 C.F.R. § 1003.1(a)(7) (2005); *Secaida-Rosales v. INS*, 331 F.3d 297, 305 (2d Cir. 2003); *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Where, as here, "the BIA adopts the decision of the IJ and supplements the IJ's decision," this Court "review[s] the decision of the IJ as supplemented by the BIA." *Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005).

23). Based on nothing more than these facts, the Petitioner alleges that he has been denied due process.

As a preliminary matter, it is worth noting that the Petitioner has admittedly violated the immigration laws of United States, having entered the country illegally in 1994. He has taken advantage of the rights and privileges available to him as an alien under the immigration laws of the United States, but now finds himself statutorily barred from adjustment of status because the IJ concluded that he failed to voluntarily depart the United States on September 19, 1997, as he was required to do. *See* 8 U.S.C. § 1229c(d) (alien who fails to voluntarily depart is ineligible for relief for a period of 10 years). Now, rather than challenging the IJ's findings of fact, he is claiming that the underlying voluntary departure order was somehow defective. For the reasons set forth below, this argument is meritless.

1. The Petitioner Should Be Judicially Estopped from Challenging an Order That He Himself Requested

The Petitioner claims that the order granting *his own* request for voluntary departure was defective in that it appears to have been signed by a person other than the INS official whose name is printed on the order. Setting aside the merits of this argument, the Petitioner should be judicially estopped from seeking discretionary relief and then further delaying his removal by claiming error in the grant of the very relief he sought. *See generally Zedner v. United States*, 126 S. Ct. 1976, 1987-88 (2006) (describing

doctrine of judicial estoppel: "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.") (internal quotation marks and alterations omitted); *United States v. Young*, 745 F.2d 733, 752 (2d Cir. 1984) ("not even the plain error doctrine permits reversal on the ground that the trial court granted a defendant's request to charge") (collecting cases); *cf. United States v. Wells*, 519 U.S. 482, 487-88 (1997) (noting that appellate courts have "stated more broadly under the 'invited error' doctrine that a party may not complain on appeal of errors that he himself invited or provoked the [district] court . . . to commit") (internal quotation marks omitted).

Moreover, it is worth noting that 8 U.S.C. § 1229c(f) provides in relevant part that "no court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure . . . ." *Id.* It stands to reason that if an alien cannot appeal the *denial* of an order of voluntary departure, an alien similarly should not be permitted to appeal the *grant* of such an order. To allow such an appeal would, in the words of this Court in another context, require the immigration processes to "tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure from the country as long as possible." *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976).

2. The Petitioner Has Failed to Show That the INS Violated Its Own Procedures

It is well settled that "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *see also U.S. Postal Service v. Gregory*, 534 U.S. 1, 10 (2001). Under this principle, absent clear evidence to the contrary, the order of voluntary departure in this case must be presumed valid. The Petitioner has presented no evidence that the order was not properly authorized; rather, he has merely shown that the signature at the bottom of the order does not appear to be the signature of Assistant District Director Robert J. Bowles. Presumably, the Petitioner would argue that the person who signed the order was not authorized to do so. This is not clear evidence sufficient to overcome the presumption of administrative regularity.

The Petitioner has not questioned the underlying merits of the departure order, as noted in the BIA decision (JA 2), nor has he claimed that Mr. Bowles, or another INS official vested with the same authority, did not authorize the order. The only fact he offers is that Mr. Bowles did not sign the order.[7]

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[7] The regulation implementing the voluntary departure provision of the INA identifies various officials who may exercise the authority to permit a voluntary departure, *see* 8 (continued...)

Under 8 C.F.R. § 240.25(a), which the Petitioner cites, there were several INS officials who were authorized to permit voluntary departure. Therefore, even if Mr. Bowles did not sign the order, and even if only those persons authorized to grant voluntary departures may sign the orders, the Petitioner has nonetheless failed to show that the order was not signed by a person with authority to permit voluntary departures. Merely noting that Robert J. Bowles did not sign the voluntary departure order does not constitute the requisite clear evidence necessary to overcome the presumption of administrative regularity.

In *Diaz-Soto v. INS*, 797 F.2d 262 (5th Cir. 1986), the Fifth Circuit considered an alien's claim that his copy of an order to show cause was defective in that it was not actually signed by the INS official who had authority to issue the order (and whose name was indicated on the order), but by some unknown person. Rejecting this argument, the court stated that "[w]e harbor no doubt that 'issue' need not be equated with 'sign.' Conceptually, 'issue' is . . . more akin to 'authorize' than to the mechanics of signature-affixing." *Id.* at 264. The court went on to observe that it was the nationwide practice of

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[7] (...continued)
C.F.R. § 240.25(a), but is silent on who may *sign* a voluntary departure order. In this case, the fact that another person signed "for" Robert J. Bowles suggests that the signor acted with the knowledge and consent of Mr. Bowles, and therefore in compliance with internal regulations. *Cf. United States v. Diaz-Soto*, 797 F.2d 262, 264 (5th Cir. 1986) (distinguishing act of issuing an order from act of signing an order).

the INS for an INS official to authorize subordinate agents to sign service copies of orders to show cause, while the authorizing official would sign the original for the administrative record. *Id.* at 263-264 & n. 2. *See also Ali v. Gonzales*, 435 F.3d 544 (5th Cir. 2006) (rejecting similar claim by alien regarding a notice to appear). In both *Diaz-Soto* and *Ali*, the Fifth Circuit rejected claims of due process violations arising from the allegedly defective orders, noting in each case that the alien had not shown any prejudice arising therefrom. In rejecting the alien's claim in *Diaz-Soto*, the court also cited the presumption of administrative regularity with respect to formal actions by agency officials. 797 F.2d at 264. *Cf. Thapa v. Gonzales*, No. 06-1973-ag, mem. op. at 21-22 (2d Cir. August 16, 2006) (expressing serious doubt about alien's claim that service copy of notice to appear was invalid because it lacked signature of issuing official, where the NTA filed with the immigration court bore the proper signature).[8] These cases support the Government's position here that the Petitioner has failed to show that the voluntary departure order was in any way defective and has failed to offer evidence sufficient to overcome the presumption of administrative regularity. Furthermore, these cases

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[8] *See also Benson v. INS*, 9 F.3d 106, 1993 (Table) WL 406799, at *1 (6th Cir. 1993) (rejecting as speculative alien's claim that order to show cause was defective because it was not signed by designated official, but by an agent, holding that "such a procedure is sufficient in the absence of any prejudice to the alien."). This case is cited pursuant to Rule 28(g), United States Court of Appeals for the Sixth Circuit, permitting citation of unpublished decisions in briefs.

foreclose any due process claim where, as here, the Petitioner has not shown any prejudice as a result of the alleged defect in the agency's action.

3. There Was No Due Process Violation

Even if the Petitioner had offered clear evidence that the order of voluntary departure was issued in error, it would not support his due process claim. In the immigration context, "the core of due process is the right to notice of the nature of the charges and a meaningful opportunity to be heard." *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) (internal quotation marks omitted). The Petitioner is not alleging that he was denied notice or an opportunity to be heard. The issue of who signed the order granting him the privilege of voluntary departure is, quite simply, utterly irrelevant to these "core" elements of due process. *Cf. Avendano-Espejo v. DHS*, 448 F.3d 503, 506 (2d Cir. 2006) (per curiam) (alien cannot "dress up" a routine claim as a constitutional challenge in order to obtain judicial review); *Saloum v. U.S. Citizenship & Immig. Svcs.,* 437 F.3d 238, 243 (2d Cir. 2006) (holding that alien's "talismanic invocation of the language of 'due process'"does not suffice to confer jurisdiction over claim). As the BIA noted, "the signature on the voluntary departure order does not implicate the fundamental fairness of the hearing." (JA 2).

4. The Alleged Error Regarding the Voluntary Departure Order Did Not Affect the Petitioner's Fundamental Rights or the Fundamental Fairness of the Removal Proceeding

In certain circumstances, not present here, an agency's failure to follow its own internal procedures with respect to an action of the agency may form the basis for invalidating that action. For example, in *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991), the INS failed to adhere to its own regulation regarding an alien's right to counsel in a deportation hearing. This Court, relying on *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (vacating deportation order because procedure did not conform to applicable regulations), reversed the agency's final order of deportation and remanded the case for further proceedings without requiring the alien to make a showing of prejudice. The *Montilla* court relied on the so-called *Accardi* doctrine, which "is premised on fundamental notions of fair play underlying the concept of due process." *Montilla*, 926 F.2d at 167. The *Montilla* court noted, however, that it was not deciding the case on constitutional grounds, stating that the *Accardi* doctrine is a "judicially-evolved rule ensuring fairness in administrative proceedings." *Id.* at 168.

Here, the Petitioner relies on *Montilla* to argue that the INS's alleged failure to follow its own procedures regarding the authorization and signing of voluntary departure orders amounts to a denial of due process. The Petitioner's argument ignores this Court's careful

qualification of the *Accardi* doctrine, which acknowledged that it is not always the case "that every time an agency ignores its own regulation its acts must subsequently be set aside." *Id.* at 167. According to the *Montilla* court, the *Accardi* doctrine does not apply where "the agency regulation that was departed from governed *internal agency procedures* rather than, as here, the rights or interests of the objecting party." *Id.* (emphasis added); *see, e.g., United States v. Caceres*, 440 U.S. 741 (1979) (no due process violation where federal agency failed to follow its own internal regulations regarding authorization of electronic surveillance). In light of this qualification, the INS's alleged failure to follow its own internal procedures regarding the authorization and signing of voluntary departure orders, even if true, would not require reversal of that agency's action. In any event, *Montilla*, by its own terms, does not give rise to a due process claim for a party aggrieved by an agency action.

In a subsequent decision addressing a claim under *Montilla*, this Court observed that "where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statute, we believe it is best to invalidate a challenged proceeding only upon a showing of prejudice to the rights sought to be protected by the subject regulation." *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994); *see also Douglas v. INS*, 28 F.3d 241, 245-46 (2d Cir. 1994) (same). These cases require a reviewing court to consider the question of whether the alleged INS error affected a fundamental right and, if not, whether the Petitioner suffered prejudice to the rights associated with the agency action.

Here, the Petitioner has not argued, and cannot argue, that the identity of the INS official who signs a voluntary departure order in any way "affect[s] fundamental rights derived from the Constitution or a federal statute." *Waldron*, 17 F.3d at 518. The procedures pursuant to which voluntary departure orders are authorized and signed are purely internal rules, the violation of which would have no effect on an alien's fundamental rights. *Cf. Montilla*, 926 F.2d at 167 (distinguishing regulations governing "internal agency procedures" from those affecting "the rights or interests of the objecting party"). As the BIA properly held in this case, "[t]he signature on the voluntary departure order does not implicate the fundamental fairness of the hearing." (JA 2).

The Petitioner claims that he has been prejudiced by the supposed irregularity in the voluntary departure order, noting that his prospective return to Mexico will compel him to leave his wife and children. Setting aside the obvious fact that he could bring his wife and children to Mexico with him, the Petitioner misconstrues the meaning of the term "prejudice." Although he would prefer to remain in the United States rather than depart to Mexico, that is not the sort of prejudice required to be shown in cases of alleged administrative malfeasance. Rather, he would have to show how the agency action in question compromised his ability to present the merits of his case to the IJ in his removal proceedings. *See, e.g., Douglas*, 28 F.3d at 246. Because the voluntary departure order was issued at his own request, he can hardly complain now that he is prejudiced by the agency's accommodation of his request. Also, since the order was issued on September

18, 1997, more than five years before he was rearrested in Vermont, and almost six years before his first administrative hearing, it is difficult to see how an alleged agency error on that order had any effect whatsoever on the fairness of his subsequent removal proceedings.

Ordinarily, a party claiming prejudice will show that he detrimentally relied on an agency's representation. As noted in the BIA's decision, the Petitioner has not contested the merits of the underlying departure order (JA 2), nor has he claimed that, because of the allegedly invalid signature, he failed to understand the nature of the proceeding or the consequences of voluntary departure. There is no basis to conclude that the identity of the person who signed the voluntary departure order had any effect on the Petitioner's conduct and he has not attempted to show that he "reasonably relied on agency regulations promulgated for his benefit and has suffered substantially because of their violation by the agency." *Caceres*, 440 U.S. at 752. If Robert J. Bowles had in fact personally signed the voluntary departure order on September 18, 1997, the Petitioner would be in precisely the same posture he is today, albeit without a frivolous due process claim to argue in this Court. *Cf. Caceres*, 440 U.S. at 753 ("precisely the same prejudice would have ensued if" the agency had correctly followed its internal procedures).

II. THE PETITIONER FAILED TO EXHAUST HIS CLAIM THAT THE IJ ERRED IN CONSIDERING CERTAIN EXHIBITS, AND THE CLAIM IS MERITLESS IN ANY EVENT

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

The INA requires that all available administrative remedies be exhausted before an alien seeks judicial review of a final removal order. *See* 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as a right . . . ."). In this regard, "[u]nder the doctrine of exhaustion of administrative remedies, a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995) (internal citations and quotation marks omitted).

Exhaustion doctrine in the immigration context requires more of an alien than the bare filing of an appeal before the BIA. Instead, this Court "has consistently applied an *issue exhaustion* requirement to petitions for review from the BIA." *Zhong v. Dep't of Justice*, No. 02-4882, 2006 WL 2260480, at *10 (2d Cir. Aug. 8, 2006) (emphasis added); *id.* at *13 ("Consistent with the strong

prudential rationale for requiring all issues raised on appeal to have been presented below, our circuit applies an issue exhaustion doctrine to petitions for review from the BIA."). Although the Court in *Zhong* distinguished "issue exhaustion" (which is waivable) from "claim exhaustion" (which is jurisdictional), it has reaffirmed that issue exhaustion is still mandatory if asserted in a timely fashion. *Id.* at *3-*15 & n.24. As the Court explained, "when an applicant for asylum or withholding of removal has failed to exhaust an issue before the BIA, and that issue is, therefore, not addressed in a reasoned BIA decision, we are, by virtue of the 'final order' requirement of § 1252(d)(1), usually unable to review the argument." *Id.* at *13; *see also Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994) (declining to consider constitutional claim for ineffective assistance of counsel that was not raised before the BIA).

More recently, in *Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005), this Court addressed "the level of specificity at which a claim must have been made to have been 'exhausted' under § 1252(d)(1)." *Gill* noted that in *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), the Court held that the exhaustion requirement would not permit a petitioner to raise "a whole new category of relief" on appeal, and in *Foster v. INS*, 376 F.3d 75, 78 (2d Cir. 2004) (internal quotation marks omitted), it held that "we require petitioner to raise issues to the BIA in order to preserve them for review." At the same time, *Gill* stated that the Court has "never held that a petitioner is limited to the exact contours of his argument below." *Id.* The *Gill* decision went on to hold that "§ 1252(d)(1) bars the

consideration of bases for relief that were not raised below, and of general issues that were not raised below, but not of specific, subsidiary legal arguments, or arguments by extension, that were not raised below." *Id.*

It is of note that among the purposes served by the exhaustion requirement contained in § 1252(d) are "to [1] ensure that the INS, as the agency responsible for construing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims," *Theodoropoulos v. INS [Theodoropoulos II]*, 358 F.3d 162, 171 (2d Cir.), *cert. denied*, 125 S. Ct. 37 (2004); (2) to 'avoid premature interference with the agency's processes,' *Sun v. Ashcroft*, 370 F.3d 932, 940 (9th Cir. 2004); and (3) to 'allow the BIA to compile a record which is adequate for judicial review.' *Dokic [v. INS]*, 899 F.2d [530] at 532 [(6th Cir. 1990)]." *Ramani v. Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004).

While this Court has recognized that there are some circumstances in which a petitioner's failure to raise issues before the BIA may not prevent an appellate court from considering unexhausted issues, those circumstances are very limited. For example, in *United States v. Gonzalez-Roque*, 301 F.3d 39, 47-48 (2d Cir. 2002), it was noted that the BIA does not have jurisdiction to adjudicate constitutional issues. It therefore follows that exhaustion would not be required for a petitioner to seek judicial review of a constitutional claim, where the BIA could not have provided any relief. *See Ravindran v. INS*, 976 F.2d 754, 762-63 (1st Cir. 1992)(noting that simply alleging

that an error violated due process does not render that claim unreviewable by BIA, and hence exempt from administrative exhaustion requirement). Also, in *Theodoropoulos II*, this Court noted that in *Booth v. Churner*, 532 U.S. 731, 736 & n.4 (2001), the Supreme Court suggested a petitioner will not be required "to exhaust a procedure from which there is no possibility of receiving any type of relief." 358 F.3d at 173.

Recently, in *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 52-53 (2d Cir. 2004), the Court held that under the unusual facts in that case, it would invoke "the narrow leeway afforded by *Theodoropoulos II* . . . to prevent manifest injustice."[9] *Marrero Pichardo*, however, did not purport to overrule *Theodoropoulos II*, and should not be read to "support the proposition that a court can find jurisdiction to overrule an agency result whenever jurisdiction will assist a sympathetic petitioner[.]" *Gill*, 420 F.3d at 97 (Jacobs, J., dissenting).

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[9] Pichardo had multiple DUI convictions. An IJ found that two of those convictions constituted aggravated felonies, and Pichardo, who appeared *pro se* before the IJ, was ordered removed to his home country of the Dominican Republic. Shortly thereafter, this Court held in *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001), that a felony DUI conviction under the same statute involved in Pichardo's state convictions was not a "crime of violence" for purposes of defining an aggravated felony. *See* 374 F.3d at 49-50.

C. Discussion

The Petitioner claims a due process violation arising from the IJ's reception of two items of evidence offered by the Government at the hearing on November 17, 2003: (1) a series of INS reports relating to the Petitioner's escape at Miami International Airport on September 19, 1997 (Exhibit 5) (JA 93-98); and (2) a copy of the voluntary departure order, dated September 18, 1997 (Exhibit 6) (JA 99). He appears to be arguing that the Government's offer and the IJ's receipt of these items violated the local operating rules for the Executive Office of Immigration Review, which requires parties to file motions, applications, and other materials 10 days before a scheduled hearing. The Petitioner also argues that these exhibits were marked for identification purposes only, and were not admitted as full exhibits. Finally, the Petitioner complains that he was not given an opportunity to examine these documents before they were introduced by the Government. The Petitioner argues that the IJ's adverse decision, announced on December 2, 2003, was based on these items of evidence, which he claims were erroneously admitted.

1. The Petitioner Has Waived Any Claim of Error by the IJ Because He Failed To Exhaust Administrative Remedies

Because the Petitioner failed to raise his evidentiary challenge before the BIA, he has failed to exhaust this issue as required by 8 U.S.C. § 1252(d)(1). Although the

Petitioner objected at the hearing to the IJ's admission into evidence of Government Exhibits 5 and 6, he did not raise the issue on appeal to the BIA. The First Circuit's decision in *Ravindran* is particularly instructive in this regard. In that case, an alien "complain[ed] of defects of translation, *evidentiary rulings*, and judicial conduct in his individual hearing, irregularities which the BIA could have corrected if brought to its attention. The Board has the power to remand a case to the Immigration Judge to remedy deficiencies in proof or procedure." 976 F.2d at 763 (emphasis added). The First Circuit concluded that the alien's failure to exhaust his administrative remedies "deprived this court of jurisdiction to hear this issue." *Id.* Because issue exhaustion is mandatory when timely raised by the Government, *see Zhong*, 2006 WL 2260480, at *13-*15, the Petitioner's argument is deemed waived before this Court. *See also United States v. Gonzalez-Roque*, 301 F.3d 39, 48 (2d Cir. 2002) ("While the BIA does not have jurisdiction to adjudicate constitutional issues . . . procedural errors correctable by the BIA must first be raised with the agency") (internal quotation marks and alteration omitted); *Valbrun v. Hogan*, 439 F.3d 136, 137 (2d Cir. 2006) (per curiam) (holding that alien waived "due process" claim rooted in an asserted procedural defect which would have been correctable by the administrative tribunal – the IJ's failure to advise alien of all possible forms of relief before alien voluntarily withdrew BIA appeal – by failing to raise that claim before the BIA).

The Petitioner's claim of error raises no constitutional issue for review, nor does it involve questions that could

not have been addressed by the BIA, had they been properly presented. Furthermore, this matter does not involve the type of unusual facts on which the Court in *Marrero Pichardo* "invoke[d] the narrow leeway afforded by *Theodoropoulos II*" to prevent a manifest injustice. 374 F.3d at 53. The BIA routinely addresses and adjudicates allegations of violation of due process. *Ravindran*, 976 F.2d at 762-63. Accordingly, the petition for review should be denied on this ground for lack of administrative exhaustion.

2. Even This Claim Had Been Properly Exhausted, It Lacks Merit and, in Any Event, the Alleged Error Did Not Prejudice the Petitioner

Even if the Petitioner's claim of error in his removal proceedings were adjudicable by this Court, it is nonetheless without merit and should be rejected. Because the Petitioner clearly received notice and a reasonable opportunity to be heard regarding the contested evidence, he has no basis for claiming a due process violation. *See Brown v. Ashcroft*, 360 F.3d at 350.

Contrary to the Petitioner's assertion, the Government's offer of Exhibits 5 and 6 was not untimely and the IJ's reception of these exhibits did not violate the Local Operating Procedures for the United States Immigration Court for Hartford, Connecticut ("Local Operating Procedures"). Procedure 3, relating to filing deadlines, provides that "[a]ny application or supporting written material, except for impeachment purposes, shall

be filed with the Court no later than ten (10) days prior to the scheduled individual hearing." Local Operating Procedures, Procedure 3.A. In this case, there was a series of four hearings held on June 17, 2003, October 3, 2003, November 17, 2003, and December 2, 2003. The exhibits to which the Petitioner objects were offered by the Government at the conclusion of the hearing on November 17, 2003 (JA 82-83). This was 15 days before the next and final hearing on December 2, and therefore in compliance with the Local Operating Procedures.[10] At the time Exhibit 5 was offered, the Petitioner objected and requested an opportunity to review the document and respond to it: "If I may, Your Honor, I would like to have some time to review it and then I'll be more than glad to answer by December 2 or 10 days before." (JA 82). The IJ granted this request as to both Government Exhibits 5 and 6. (JA 82).[11] The Petitioner's assertion that he was "not given the opportunity to examine the documents before they were introduced by the Service" (Petitioner's Brief at 12) is, therefore, misleading in that he was given an opportunity to examine and respond to these documents immediately after they were offered and before they were

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[10] The Local Operating Procedures also permit an IJ, in his or her discretion, "to waive a requirement or deadline upon a showing of emergent circumstances, exigent circumstances, or good cause." Local Operating Procedures, Procedure 1.C.

[11] At the end of the November 2, 2003, hearing, the IJ appears to have offered both parties a chance to offer additional evidence in advance of the scheduled hearing on December 2: "Any party want to submit documents or briefs before the hearing date (indiscernible)." (JA 83).

admitted into evidence as full exhibits. Moreover, in asking the IJ for additional time to respond, the Petitioner implicitly recognized that a party may submit materials to the court up to 10 days before a scheduled hearing.

At the final administrative hearing on December 2, 2003, the Petitioner, having received ample opportunity to review Exhibits 5 and 6, offered no response on the merits. (JA 85-86). Instead, he objected on the grounds that they were not filed in accordance with the local rules. (JA 85). In the absence of any meaningful response by the Petitioner, and in light of the manifest relevance of the documents, the IJ declined to exclude the Government's evidence. (JA 86). Although the IJ did not utter the supposedly talismanic words "Exhibits 5 and 6 are admitted as full exhibits," it is clear that he overruled the Petitioner's objection to the exhibits and expressed his intention to consider them as part of the administrative record: "All right, well, it seems to be relevant evidence. You've had time to look at it so, and it seems to relate to the respondent." (JA 86). Moreover, both exhibits have exhibit stamps on them indicating that they were admitted for identification purposes on November 18, 2003,[12] and as full exhibits on December 2, 2003. (JA 93, 99).

Finally, even if this Court were to find that the IJ erroneously admitted Exhibits 5 and 6, there would be no basis for remanding the case. As discussed above, where an agency fails to follow its own regulations, an appellate

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[12] In fact, the exhibits were admitted for identification purposes on November 17, 2003.

court will not remand the case without a showing of prejudice that resulted from such failure. *See Waldron*, 17 F.3d at 518. In this case, the IJ gave the Petitioner more than two weeks to examine the exhibits and respond to them, thereby curing any prejudice that could have resulted from the Government's supposedly untimely offer of proof. Without any showing of prejudice or harm, the alleged error would not merit a remand.

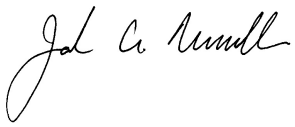
CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Dated: August 18, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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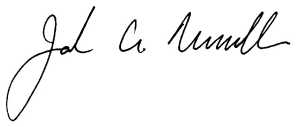
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,417 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



JOHN A. MARRELLA
ASSISTANT U.S. ATTORNEY

Addendum

8 U.S.C. § 1229c (2006). Voluntary departure

(a) Certain Conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

. . . .

(d) Civil penalty for failure to depart

(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien –

(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect, prior to March 31, 1977), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

8 U.S.C. § 1252(d) (2006). Review of final orders

A court may review a final order of removal only if –

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

8 C.F.R. § 240.25 (2006). Voluntary departure – authority of the Service.

(a) Authorized officers. The authority contained in section 240B(a) of the Act to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to proceedings under section 240 of the Act by district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations.

. . . .

(c) Decision. The authorized officer, in his or her discretion shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action–Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HARTFORD, CONNECTICUT
(Effective September 6, 1999)

LOCAL OPERATING PROCEDURES

PREAMBLE

These rules are adopted under the authority of 8 C.F.R. § 3.40 for the purpose of facilitating the convenient, efficient, and orderly conduct of the business of the United States Immigration Court in Hartford, Connecticut ("the Court"): These rules govern the procedures within the jurisdiction of the United States Immigration Court in Hartford, Connecticut.

PROCEDURE I:
General

A. All matters shall proceed at the time and date scheduled for hearing. All parties shall be prepared to go forward with their cases at that time.

B. Failure to comply with these procedures may result in the submission or issue in question being found or ruled conceded, denied, evidentiary weight diminished, rejected, and/or waived against the party failing to comply.

C. The procedures set forth herein shall not diminish the Immigration Judge's discretion to order a deadline and procedure be followed in a specific case or to waive a requirement or deadline upon a showing of emergent circumstances, exigent circumstances, or good cause.

PROCEDURE 2:
Filing Procedure

A. Unless required to file in open Court, the filing of written materials for the Court may be accomplished in person at the reception window during regular business hours, by mail, or by other delivery service. No receipt or filing by facsimile is authorized.

B. In all consolidated cases, there shall be submitted a separate copy of each submission for placement in each individual Record of Proceeding, except a "master exhibit" may be filed in the lead individual's file for supporting documentation applicable to more than one individual. The applicable individual's name and A-file number shall be prominently displayed on each submission.

C. All written materials in support of any application or motion shall be filed as follows:

1. Indexed, as to multiple documents and exhibits with each separately listed;

2. Paginated consecutively by number, at the

bottom of the page between the center and right margin of each page, except as to promulgated application forms; and

3. Tabbed, as to multiple documents and exhibits either for each separate listing or related grouping, on the right side and commencing with the letter designation "A."

D. A properly executed certificate of service on the opposing party shall be on the last page of each submission and shall specifically describe the submission.

PROCEDURE 3
Filing Deadline

A. Any application or supporting written material, except for impeachment purposes, shall be filed with the Court no later than ten (10) days prior to the scheduled individual hearing.

B. All parties shall file with the Court no later than ten (10) days prior to the scheduled individual hearing a proposed witness list containing:

1. A brief proffer of each witnesses' testimony;
2. Length of the testimony; and
3. Language in which the witness will testify.

C. Any motion to change venue, continue, or reschedule an individual hearing shall be filed with the Court no

later than thirty (30) days prior to the scheduled individual hearing.

D. A response to any motion shall be filed with the Court no later than seven (7) days following date of service, if personal service, and no later than ten (10) days following service of the motion by mail.

PROCEDURE 4:
Written Motions in General

A. All written motions shall be in a "legal-motion" format containing:

1. Caption identifying:
   a.. Court;
   b. Name of the respondent/applicant;
   c. A-file number;
   d. Type of proceedings; and
   e. Scheduled hearing date;
2. Title of motion;
3. Text specifying reasons for the motion;
4. Date;
5. Signature; and
6. Certificate of service.

A "letter" format is unacceptable, except those filed by unrepresented respondents/ applicants.

B. Unless a written motion has been granted, all parties shall be present and prepared to proceed with the hearing as scheduled.

PROCEDURE 5:
Motions for Change of Venue

In addition to complying with 8 C.F.R. §§ 3.20, 3.23(a) and 3.32, all written motions for change of venue shall contain the respondent's/applicant's:

1. Plea to all original and additional or substituted allegations and charge(s):
2. Designation of a country in the event of deportation/removal or a refusal to designate such a country;
3. Relief to be sought; and
4. Date and time of the scheduled hearing before the Immigration Judge.

PROCEDURE 6:
Motions for Withdrawal of Representation

All written motions for withdrawal of representation shall state:

1. The reason(s) for the withdrawal;
2. That a good faith effort was made to locate alternative representation;
3. That the client was notified of the:
   a. Date of any scheduled deadlines and hearing(s) before the Immigration Judge;
   b. Necessity of appearing at such hearing; and
   c. Consequences of failure to appear;
4. Evidence of the respondent's/applicant's consent to withdraw or a statement of why

evidence of such consent is unobtainable; and

5. The last known address and phone number of the respondent/applicant.

PROCEDURE 7:
Notice of Appearance

In addition to complying with 8 C.F.R. § 3.17(a), an original promulgated Notice of Entry of Appearance (Form EOIR-28) shall be accurately, completely, and separately filed with the Court for each individual being represented. It shall not be included only as a part of an exhibit. In any consolidated matter, there shall be a separate notice for each individual Record of Proceeding.

This case is cited in the Respondent's brief and included in this addendum pursuant to Rule 28(g), United States Court of Appeals for the Sixth Circuit, permitting citation of unpublished decisions in briefs.

United States Court of Appeals, Sixth Circuit

Victor Olusegun BENSON,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Nos. 93-3256, 93-3575.

October 8, 1993

AFFIRMED.

Before: NORRIS and SUHRHEINRICH, Circuit Judges, and JOINER, Senior District Judge. **[FN*]**

ORDER

****1** Victor Olusegun Benson, a Nigerian citizen, moves for pauper status, moves to hold the case in abeyance, and petitions for review of orders of the Board of Immigration Appeals affirming an order to deport him and denying his motion to reopen the proceedings. These consolidated cases have been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

Benson entered a guilty plea in 1991 to a charge of importation of heroin. He was sentenced to and served two years imprisonment. He was subsequently issued an order to show cause why he should not be deported based on his conviction of an aggravated felony. He initially appeared before an Immigration Judge on November 5, 1992. The hearing was continued to November 17, to allow him to obtain counsel. He again appeared without counsel and was granted a continuance until November 30, when he appeared without counsel a third time. The hearing was again continued until December 14. On that date, Benson was still without counsel, and the Immigration Judge proceeded with the hearing over his objections and his refusal to participate. Benson was ordered deported based on the documentary evidence of his aggravated felony conviction. He appealed to the Board of Immigration Appeals. He was granted one extension of time in which to file a brief and denied a second requested extension. No brief was filed. The Board then affirmed the order of deportation. Benson petitions for review of that order in Case No. 93- 3256. The Board also denied Benson's later motion to reopen the proceedings. He petitions for review of that order in Case No. 93-3575.

Benson argues in his appellate brief that he was denied counsel before the Immigration Judge, that he was denied the opportunity to present his case to the Board when his second motion for an extension to file a brief was denied, that the order to show cause was not signed by the designated official, and that he should not be deported because it was part of his plea agreement in his criminal

case that he would not be.

Upon review, we affirm the orders for the reasons stated by the Board of Immigration Appeals. There is no Sixth Amendment right to counsel in civil deportation proceedings. *See Lozada v. INS*, 857 F.2d 10, 13 (1st Cir.1988). Benson was not denied due process by the absence of counsel or the denial of an extension in which to file a brief, because he can show no substantial prejudice which resulted. *See Ibrahim v. United States INS*, 821 F.2d 1547, 1550 (11th Cir.1987). Once the deportation proceedings commenced, deportation was statutorily mandated based on his aggravated felony conviction, and no relief was available. *See Martins v. INS*, 972 F.2d 657, 659-61 (5th Cir.1992) (per curiam).

The order denying Benson's motion to reopen the proceedings was not an abuse of discretion. *See INS v. Doherty*, 112 S.Ct. 719, 725 (1992). The motion was based on the claim that the order to show cause was not signed by the proper official, but by an agent. This claim is purely speculative. Moreover, such a procedure is sufficient in the absence of any prejudice to the alien. *See Diaz-Soto v. INS*, 797 F.2d 262, 264 (5th Cir.1986).

****2** Finally, Benson argues on appeal that he should not be deported because it was part of his plea agreement, due to threats against his life by Nigerian associates of heroin traffickers whom he helped convict. The record, which contains the plea agreement, does not reflect any such understanding. Benson submits a copy of a letter from the United States Attorney to the District Director asking for

discretionary consideration of this factor. The letter predates the order to show cause in this case, and was therefore apparently unpersuasive. Benson cites to no statutory authority for granting relief at this stage of the proceeding. Moreover, this argument was not presented to the Immigration Judge or the Board of Immigration Appeals and need not be reviewed by this court. *See Brotherhood of Locomotive Engineers v. ICC*, 909 F.2d 909, 912-13 (6th Cir.1990).

Accordingly, the motion for pauper status is granted, the motion to hold the case in abeyance is denied, and the orders of the Board of Immigration Appeals are affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

FN* The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

Benson v. INS, 9 F.3d 106, 1993 (Table) WL 406799 (6th Cir. 1993)

GOVERNMENT'S APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Fausto Jose Ibarra-Avalos Petitioner	)	A76 682 257 NOT DETAINED
VS. SECRETARY OF DEPT. OF HOMELAND SECURITY, DIRECTOR OF U.S. IMMIGRATION CUSTOM ENFORCEMENT, HON. JOHN ASHCROFT, ATTORNEY GEN. Respondents/Defendants	)	**PETITION FOR REVIEW**
	)	NOV 24, 2004

PETITION FOR REVIEW

Petitioner, Fausto Jose Ibarra-Avalos through his Attorney, respectfully requests the Court to review the decision of the Board of Immigration Appeals (Copy of notice attached hereto as Exhibit A), because the BIA erred in dismissing the petitioners appeal.

Respectfully submitted,
Jose Fausto Jose Ibarra-Avalos
By his Attorney,

Jose DelCastillo, Esq.
DelCastillo & Associates
255 Main Street, Suite 2
Hartford, CT 06106
(860) 527-8886, ext 104

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Petition for Review was served by first-class mail, postage prepaid on: November 24, 2004. to the

United States Court of Appeals,
Second Circuit
40 Foley Square
New York, NY 10007

On this 24 day of NOV 2004

Dated:

Jose L. DelCastillo, Esq.
DelCastillo & Associates
255 Main Street, Suite 2
Hartford, CT 06106
(860) 527-8886, ext 104

ANTI-VIRUS CERTIFICATION

Case Name: Ibarra-Avalos v. Secy, Homeland Security

Docket Number: 04-6143-ag

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 8/18/2006) and found to be VIRUS FREE.

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Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: August 18, 2006