

Regulatory Violations / Administrative Exclusionary Rule

To exclude evidence based on the noncompliance with DHS regulations, the alien must meet a heavy burden of proving that: (1) the regulation was not adhered to; (2) the regulation was intended to serve a purpose of benefit to the alien; and (3) the violation prejudiced the alien's interest in that it affected the outcome of the proceedings. See *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980); see also *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979). Compliance with regulatory requirements is relevant in assessing the voluntariness of statements and thus their admissibility into evidence. See 8 C.F.R. §§ 287.1, 287.3, 287.5. Once the alien establishes a prima facie regulatory violation, the burden shifts to DHS to justify the manner in which the evidence was obtained. See *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).

A. Miranda-Type Advisals; 8 C.F.R. § 287.3

While Miranda requirements are not controlling in removal proceedings, federal regulations require that an arrested alien be advised of the reasons for her arrest and be advised that any statements made may be used against her in a subsequent proceeding. See 8 C.F.R. § 287.3. It further provides that the "examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys." *Id.* The Ninth Circuit has concluded that the officer's failure to warn the alien of his right to counsel does not violate this particular regulation. See *Trias-Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975).

1. Violation

The respondent must have been under arrest for the regulatory warnings to be required. See 8 C.F.R. § 287.3. "The standard for determining whether a person is under arrest is not simply whether a person believes that he is free to leave, but rather whether a reasonable person would believe that he or she is being subjected to more than 'temporary detention occasioned by border-crossing formalities.'" See *United States v. Hernandez*, 322 F.3d 592, 596-97 (9th Cir. 2003) (citation omitted).

Stops and routine questioning are the norm at the border in the primary inspection areas. In most cases, the earliest that a person could be in custody is at the point when she is moved into a secondary inspection area and asked to exit her vehicle while it is searched.

See *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997).

2. Purpose of Benefit

The very nature of the regulation indicates that it serves a purpose of benefit to respondents by providing that a respondent shall be advised of certain rights, namely that a respondent is warned that statements could be used against them in proceedings.

Note: no cases on this element.

3. Prejudice

"To show prejudice, the [respondent] must establish more than that he would have availed himself of the procedural protections; he must produce 'concrete evidence' that the violation had the potential for affecting the outcome of the proceeding." See *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989) (citation omitted). In general, prejudice occurs when evidence supporting removability arises after the alleged violation. See *Garcia-Flores*, 17 I&N Dec. at 329.

Example: The respondent made certain statements to the CBP officer before she was warned. These disclosures directly relate to the charge of removability. Therefore, the respondent was prejudiced because the failure to warn her led directly to her alleged incriminating statements which were the basis of the NTA.

B. Arrest Without a Warrant; 8 C.F.R. § 287.3(c)(2)(ii)

This regulation provides that an arrest warrant “shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.” 8 C.F.R. § 287.3(c)(2)(ii).

1. Violation

Example: This Court agrees that the officers violated this provision upon effectuating the warrantless arrest of the respondent since the facts as alleged do not indicate that the respondent was likely to escape before a warrant could be obtained. See *id.*

2. Purpose of Benefit

The regulations providing procedural safeguards for aliens detained inside their home and arrested without a warrant were clearly promulgated in order to benefit the alien. See, e.g., *Garcia-Flores*, 17 I&N Dec. at 329 (finding that 8 C.F.R. § 287.3 was intended to serve a benefit to the alien).

3. Prejudice

“To show prejudice, the [respondent] must establish more than that he would have availed himself of the procedural protections; he must produce ‘concrete evidence’ that the violation had the potential for affecting the outcome of the proceeding.” See *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989) (citation omitted). In general, prejudice occurs when evidence supporting removability arises after the alleged violation. See *Garcia-Flores*, 17 I&N Dec. at 329.

C. Interrogation Following Arrest Without a Warrant; 8 C.F.R. § 287.3(a)

The regulations requires that an alien arrested without a warrant “be examined by an officer other than the arresting officer,” but “[i]f no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer. . . may examine the alien.” 8 C.F.R. § 287.3(a).

1. Violation

Example: The officer and his partner arrested the respondent without a warrant and then they interrogated him the following day. Since almost twenty-four hours transpired before the respondent was interrogated, this Court finds that the officers had more than sufficient time to find another qualified officer to conduct the examination of the respondent and that they therefore violated this regulation.

2. Purpose of Benefit

Note: no cases on this element.

3. Prejudice

"To show prejudice, the [respondent] must establish more than that he would have availed himself of the procedural protections; he must produce 'concrete evidence' that the violation had the potential for affecting the outcome of the proceeding." See *Hernandez-Luis*, 869 F.2d at 498 (citation omitted). In general, prejudice occurs when evidence supporting removability arises after the alleged violation. See *Garcia-Flores*, 17 I&N Dec. at 329.

D. Disclosure of Asylum Application Information; 8 C.F.R. § 208.6(a)

The regulations prohibit disclosure of information in or pertaining to an asylum application to third parties without the written consent of the applicant. See 8 C.F.R. § 208.6(a). The purpose of the regulation is to prevent disclosure of information that would allow a third party to link an alien's identity with the fact that the alien has applied for asylum in the United States, presumably to protect the alien's safety. See *Zhen Nan Lin v. United States DOJ*, 459 F.3d 255, 263 (2d Cir. 2006). The purpose of the regulation is not to protect aliens from having fraud or other criminal activity revealed to the Government. Although 8 C.F.R. § 208.6 clearly serves a purpose of benefit to the respondent, any violation of the regulation cannot be said to have prejudiced the respondent's interests which were protected by the regulation.

1. The respondent will not have been prejudiced, for example, if evidence supporting a finding of removability arose prior to the regulatory violation. See *Garcia-Flores*, 17 I&N Dec. at 329.