FILED
United States Court of Appeals
Tenth Circuit

August 18, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANGEL AGUAYO,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

AMERICAN IMMIGRATION COUNCIL; NATIONAL IMMIGRANT JUSTICE CENTER,

Amici Curiae.

No. 20-9651

PETITION FOR REVIEW FROM AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Joseph Robertson, Student Attorney (Hans Meyer and Tania N. Valdez, Supervising Attorneys; Lauren Jones and Edgar Chavarria, Student Attorneys, University of Denver Sturm College of Law, Immigration Law and Policy Clinic, Denver, Colorado, with him on the briefs), for Petitioner.

Kohsei Ugumori, Senior Litigation Counsel, Office of Immigration Litigation (Brian Boynton, Acting Assistant Attorney General, and Leslie McKay, Acting Assistant Director, Civil Division, United States Department of Justice, Washington, District of Columbia, with him on the brief), for Respondent.

Mark Fleming, National Immigrant Justice Center, Chicago, Illinois; Katherine Melloy Goettel and Emma Winger, American Immigration Council, Washington, District of Columbia, filed an Amici Curiae Brief for the American Immigration Council and National Immigrant Justice Center in support of Petitioner.

Before **ROSSMAN**, **KELLY**, and **MURPHY**, Circuit Judges.

ROSSMAN, Circuit Judge.

Angel Aguayo filed a motion to terminate his removal proceedings, contending his state detention and transfer to U.S. Immigration and Customs Enforcement (ICE) custody was unlawful. The Immigration Judge (IJ) denied his motion, and the Board of Immigration Appeals (BIA) affirmed. Mr. Aguayo now petitions for review. Exercising jurisdiction under 8 U.S.C. § 1252, we deny the petition.

I

A

Mr. Aguayo is a native and citizen of Mexico.[1] In 1992, he entered the United States unlawfully. For over twenty-five years, Mr. Aguayo and his wife lived in Utah and raised four children. In March 2018, Mr. Aguayo's

[1] We draw the facts from the Agency Record, which we consider when reviewing a BIA decision for substantial evidence. *See Igiebor* v. *Barr*, 981 F.3d 1123, 1131 (10th Cir. 2020) ("[W]here the BIA determines a petitioner is not eligible for relief, we review the decision to determine whether the record on the whole provides substantial support for that determination.").

daughter—a United States citizen—filed a visa petition on her father's behalf.[2] After U.S. Citizenship and Immigration Services (USCIS) approved the visa petition, Mr. Aguayo lawfully remained in Utah and applied to become a legal permanent resident.[3]

On February 22, 2019, state law enforcement officers arrested Mr. Aguayo in Springville, Utah. He was later charged with two counts of possession of a forged document, use or possession of drug paraphernalia, and having an open container in a vehicle. At the time of his arrest, Mr. Aguayo also had pending misdemeanor state charges for issuing a bad check, shoplifting, possession or use of a controlled substance, and use or possession of drug paraphernalia.[4]

---

[2] Mr. Aguayo's daughter also filed a visa petition on behalf of Mr. Aguayo's wife, who likewise pursued adjustment of status.

[3] "An I-130 petition is the *first step* for an alien seeking adjustment of status. If approved, the petition permits an illegally present alien to remain in the country and request an adjustment of status." *United States* v. *Gonzalez-Fierro*, 949 F.3d 512, 523 (10th Cir. 2020) (citation omitted). Although Mr. Aguayo's unlawful entry into the United States would ordinarily have rendered him ineligible for adjustment of status, *see* 8 U.S.C. § 1255(a), that basis for ineligibility did not apply because his brother earlier filed a petition on his behalf on March 23, 2000. *See generally* 8 U.S.C. § 1255(i) (authorizing adjustment of status for certain noncitizens who unlawfully entered the United States without inspection if a petition was filed on their behalf on or before April 30, 2001).

[4] *See* Utah Code. Ann. §§ 76-6-505(1) (West 2010) (Issuing a Bad Check or Draft), 76-6-602 (Retail Theft (Shoplifting)), 58-37-8(2)(a)(i)

Mr. Aguayo was detained at the Utah County Jail. The day after his arrest, agents from the Department of Homeland Security (DHS) encountered Mr. Aguayo during a routine jail check. DHS then issued an immigration detainer—known as an "ICE hold"—for Mr. Aguayo.[5]

Mr. Aguayo remained at the Utah County Jail for about five months. On June 17 and 18, 2019, he pleaded guilty to some of the pending state charges.[6] He was sentenced to thirty days in the county jail.

Meanwhile, the visa petition proceedings initiated by Mr. Aguayo's daughter proceeded. On June 18, USCIS issued a notice scheduling Mr. Aguayo's initial status-adjustment interview for August 22, 2019.

On July 29, 2019, the Utah state court sentenced Mr. Aguayo to a term of 364 days' imprisonment on the forgery convictions, and an indeterminate term of imprisonment not to exceed five years on the bad

---

(Possession or Use of a Controlled Substance), 58-37a-5(1) (Use or Possession of Drug Paraphernalia).

Mr. Aguayo pleaded not guilty to the shoplifting charge in February 2019. This charge was still pending at the time of Mr. Aguayo's appeal to the BIA.

[5] The Agency Record does not include a copy of the immigration detainer or indicate exactly when it was issued. The parties do not dispute that an immigration detainer was issued for Mr. Aguayo.

[6] The Utah state court also dismissed without prejudice one of the paraphernalia charges, as well as the charge of possession or use of a controlled substance.

check conviction. In addition, the court ordered the sentences to run concurrently, that the sentences be suspended, and that Mr. Aguayo be credited 157 days for time already served in confinement. In the sentencing orders, the state court said: "Defendant may be released to [ICE] for deportation proceedings." AR.425, 455.

The next day, about twelve hours after the state court ordered Mr. Aguayo released, the Utah County Sheriff's Corrections Bureau (Utah County Officials) transferred Mr. Aguayo to ICE custody. Mr. Aguayo was then transported to an ICE facility in Orem, Utah, where he received a Notice of Custody Determination, a Notice of Rights and Request for Disposition, a Notice to Appear (NTA), and an arrest warrant.[7] DHS charged Mr. Aguayo as removable under § 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1182(a)(6).

On August 29, 2019, DHS initiated removal proceedings. Mr. Aguayo contested his removability. The IJ sustained the charge and designated Mexico as the country of removal. Because it found his conviction for possession of a forged document qualified as a "crime involving moral turpitude" under 8 U.S.C. § 1182(a)(2)(A)(i)(I), the IJ also concluded Mr.

[7] The NTA that Mr. Aguayo received incorrectly listed his custody location as Tacoma, Washington. He did not receive a corrected NTA until fifteen days later.

Aguayo was subject to mandatory detention under 8 U.S.C. § 1226(c)(1)(A). And because Mr. Aguayo challenged his removability, he was ineligible for voluntary departure. *See* 8 C.F.R. § 1240.26 (providing noncitizen must concede removability to be eligible for voluntary departure). Mr. Aguayo remained in ICE custody throughout his removal proceedings.

Mr. Aguayo missed his previously scheduled status-adjustment interview on August 22, 2019 because he was in custody. USCIS rescheduled the interview for October 7, 2019, but Mr. Aguayo, still detained, could not attend. USCIS then denied his visa petition and status-adjustment application. Mr. Aguayo's daughter filed a second visa petition on his behalf in November 2019.

B

On November 12, 2019, Mr. Aguayo moved to terminate his removal proceedings. He contended ICE violated the Fourth Amendment, the INA, and agency regulations by (1) issuing an immigration detainer asking Utah County Officials to hold him without a warrant for over twelve hours after his state sentences were suspended and he should have been immediately released; (2) taking him into ICE custody without a warrant or reason to believe he would likely escape before a warrant could be obtained; (3) issuing an arrest warrant before providing him with a valid NTA; and (4) failing to issue a properly authorized NTA, Notice of Custody

Determination, or arrest warrant. Mr. Aguayo argued his removal proceedings should be terminated because the agency regulations ICE allegedly violated were promulgated to benefit noncitizens, and the violations were both egregious and prejudicial. According to Mr. Aguayo, ICE's violations over a twelve-hour period between July 29 and July 30, 2019, caused his unlawful detention, which resulted in his inability to participate in his status-adjustment interviews and the ultimate denial of his visa application.

In opposing the motion to terminate, DHS first contended Mr. Aguayo failed to show ICE violated any statutes or regulations. The applicable regulation allowed the Utah County Officials to hold Mr. Aguayo for up to forty-eight hours after his release from state custody, DHS explained, and here, ICE arrived after only twelve. DHS also argued ICE lawfully took custody of Mr. Aguayo. And even if Mr. Aguayo could show ICE violated applicable law, DHS maintained he could not demonstrate prejudice.

On December 18, 2019, in an oral ruling, the IJ denied Mr. Aguayo's motion to terminate.[8]

[8] The IJ also entered a one-page form order denying Mr. Aguayo's motion because, "No good cause has been established for the above request"; "On account of the reasons set forth in the opposition which was filed"; "And on account in part for the reasons set forth on the record at the 12/18/19 Master Calendar hearing." AR.1506.

The IJ began by addressing Mr. Aguayo's arguments "relating to his prolonged detention and being held by Utah officials until he could be picked up and detained by ICE." AR.139. The IJ concluded "the regulation at 8 C.F.R. § 287.7(d) arguably allows it because it allows for a 48-hour detainer" and here, Mr. Aguayo was held for 12 hours after completing his state sentence. AR.139. Even if the regulation did not allow for Mr. Aguayo's prolonged detention, the IJ reasoned, "the remedy is addressed with the [Utah County Officials] who detained [him] . . . . not [DHS] or ICE." *Id.* Further, the IJ agreed with DHS that Mr. Aguayo was lawfully taken into ICE custody.

The IJ next concluded Mr. Aguayo had not "presented sufficient evidence to show adequate prejudice." *Id.* at 141. Alternatively, the IJ found that even if he could show prejudice, "the remedy under [BIA] precedent is to suppress the evidence. It's not termination." *Id.* The IJ observed Mr. Aguayo relied on Second and Ninth Circuit precedent in his motion to terminate, but the IJ explained "those cases aren't binding on this Court." *Id.* Further, the IJ did not "see any Tenth Circuit precedent cited in support of [Mr. Aguayo's] proposition that the remedy is termination [of removal proceedings]." *Id.*

The IJ also rejected Mr. Aguayo's arguments that the alleged violations were egregious, reasoning "even if somehow [Mr. Aguayo] could

show a Fourth Amendment violation[,] it must be so egregious it would [indiscernible] notions of fundamental fairness." *Id.* (third alteration in original). The IJ acknowledged he was "not able to find anything from the Tenth Circuit precisely on point defining what constitutes egregiousness in this context," *id.*, but he discussed conduct other courts had found egregious:

> [A] few examples that we found were cases involving coercion, physical abuse, arrests based on race or perceived ethnicity, a violation so severe that it rose to the level of no reason at all, brutal conduct that shocks the conscience and offends a community['s] sense of fair play and decency, government misconduct by threats, coercion or physical abuse, et cetera.

Id. at 141-42. The IJ concluded: "I don't see anything on this record that rises to that level." *Id.* at 142.

Having denied the motion to terminate, the IJ then agreed to set a status hearing on Mr. Aguayo's visa application. *Id.* at 146-47. Instead of pursuing adjustment of status from a USCIS interview, as he had originally expected, Mr. Aguayo had a hearing in front of the same IJ overseeing his removal proceedings.[9] The hearing lasted two days—May 22 and 27, 2020.

[9] Along with his status-adjustment application, Mr. Aguayo also filed an Application for Waiver of Grounds of Inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h)(1)(B). Mr. Aguayo filed a § 212(h) waiver because, absent a waiver, the IJ's determination he had been convicted of a crime involving moral turpitude made him *per se* inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I), and thus ineligible for adjustment of status under 8 U.S.C. § 1255(i).

Mr. Aguayo was represented by counsel, called witnesses, and introduced exhibits.[10] On June 4, 2020, in a written order, the IJ determined Mr. Aguayo did not merit a status adjustment because of his criminal history.[11] The IJ ordered Mr. Aguayo removed to Mexico.

C

On July 2, 2020, Mr. Aguayo appealed to the BIA. In his briefing to the BIA, Mr. Aguayo focused only on the IJ's denial of his motion to terminate removal proceedings. He argued first that the IJ should have granted termination because ICE violated the Fourth Amendment, the INA, and agency regulations by issuing the immigration detainer and unlawfully taking him into ICE custody. Mr. Aguayo maintained "his arrest was . . . an egregious Fourth Amendment violation," and he urged reversal because ICE's alleged violations *actually* prejudiced him.[12] According to Mr. Aguayo,

---

[10] In the proceedings before the IJ and the BIA, Mr. Aguayo was represented by student attorneys from the University of Denver Sturm College of Law Immigration Law and Policy Clinic. The DU Law Clinic also represents Mr. Aguayo in this petition.

[11] The IJ did not address the merits of Mr. Aguayo's § 212(h) waiver application because the IJ concluded, "Regardless of [Mr. Aguayo's] statutory eligibility, the Court finds he has not shown he merits a favorable exercise of discretion." AR.106.

[12] As we explain, BIA precedent provides two formulations of prejudice in cases like Mr. Aguayo's. "Where compliance with the regulation is mandated by the Constitution" or "an entire procedural framework, designed to insure the fair processing of an action affecting an individual is

he was prejudiced by being forced to pursue adjustment of status in front of an IJ. As he explained, adjusting his status in "an adversarial courtroom [against] trained government lawyers" is procedurally different from a non-adversarial interview with USCIS. *Id.* at 25 (citation omitted). Mr. Aguayo also argued he was prejudiced because his initial visa petition and adjustment of status applications were denied due to his detention by ICE, and he did not receive a status-adjustment hearing until "eight months after his scheduled interview." *Id.* Mr. Aguayo also asserted prejudice could be *presumed* under the BIA's decision in *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 329 (B.I.A. 1980), because the regulations violated were mandated by the Constitution. AR.24.

In its response, DHS first argued that because Mr. Aguayo was "removable as charged, the Immigration Judge lacked authority to terminate proceedings." *Id.* at 55 (citing *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462, 463 (A.G. 2018)).[13] Even if the IJ could grant termination of

---

created but then not followed by an agency," prejudice may be *presumed*. *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 329 (B.I.A. 1980). "As a general rule, however, prejudice will have to be specifically demonstrated," i.e., the petitioner must show they were *actually* prejudiced. *Id.*

[13] *Matter of S-O-G-* has since been overruled. In *Matter of Coronado-Acevedo*, the Attorney General confirmed immigration judges have the authority to terminate removal proceedings under certain circumstances. 28 I. & N. Dec. 648 (A.G. 2022).

removal, DHS maintained Mr. Aguayo "failed to demonstrate any actual [constitutional or regulatory] violation or prejudice." *Id.*

A single member of the BIA issued a written order affirming the IJ because "termination of [removal] proceedings was not warranted." *Id.* at 4. The BIA first held the IJ "properly determined that the regulations specifically allow for ICE to issue an immigration detainer for an alien no longer in criminal custody and that the local law enforcement agency shall then maintain custody of the alien for a period of up to 48 hours." *Id.* (citing 8 C.F.R. § 287.7(d)). The BIA did not pass on whether ICE's issuance of immigration detainers violated federal law or the Constitution, reasoning "we have no authority to entertain such challenges to the statutes and regulations we administer." *Id.* The BIA also did not pass on Mr. Aguayo's other alleged constitutional, statutory, and regulatory violations.

The BIA concluded the IJ had "reasonably determined that [Mr. Aguayo] did not demonstrate that the alleged violations prejudiced his interests." *Id.* "Although [Mr. Aguayo] argues that ICE committed multiple regulatory violations when officials arrested [him] and issued his Notice to Appear," the BIA reasoned that "he has not established that any of these offenses affected the outcome of his immigration proceedings." *Id.* (citing *Garcia-Flores*, 17 I. & N. Dec. at 329). The BIA was not persuaded Mr. Aguayo "was prejudiced by being forced to pursue adjustment of status

before the Immigration Court rather than before USCIS." *Id.* According to the BIA, Mr. Aguayo "speculates and provides no evidence that USCIS would have approved his adjustment application." *Id.*

"With regard to [Mr. Aguayo's] claim that ICE violated his Fourth Amendment rights such that prejudice is presumed," the BIA agreed with the IJ that Mr. Aguayo "has not shown that the purported violations were sufficiently egregious such that they transgressed notions of fundamental fairness." *Id.* (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984)). And the BIA concluded "in the absence of prejudice or egregious conduct, [Mr. Aguayo] has not established that he suffered any violation such that the proper redress would be termination of removal proceedings." *Id.*

This timely petition for review followed.

II

A

We review the BIA's legal determinations *de novo*, and its findings of fact for substantial evidence. *Ting Xue* v. *Lynch*, 846 F.3d 1099, 1104 (10th Cir. 2017). Under the substantial-evidence standard, "our duty is to guarantee that factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole." *Elzour* v. *Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004).

"Our scope of review directly correlates to the form of the BIA decision." *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1123 (10th Cir. 2007). Where, as here, a single member of the BIA affirms an IJ decision, we review the BIA's opinion, but "we are not precluded from consulting the IJ's more complete explanation of those same grounds." *Neri-Garcia* v. *Holder*, 696 F.3d 1003, 1008-09 (10th Cir. 2012) (citation omitted).

We have not considered, in a published case, whether a remand to the agency to terminate removal proceedings is a remedy within our arsenal, or what circumstances might justify termination. Consequently, we have not articulated a standard of review for the denial of a motion to terminate.

While they disagree on the facts that might support termination of proceedings, both Mr. Aguayo and the United States agree termination of "agency proceedings is warranted under certain circumstances." Pet. Br. at 13; *see also* Resp. Br. at 38 (discussing *Garcia-Flores* framework for termination of removal proceedings). And for good reason. At least two of our sister circuits have passed on the issue. In *Sanchez* v. *Sessions*, the Ninth Circuit explained termination of removal proceedings without prejudice is available if: "(1) the agency violated a regulation; (2) the regulation was promulgated for the benefit of petitioners; and (3) the violation was egregious, meaning that it involved conscience-shocking conduct, deprived the petitioner of fundamental rights, or prejudiced the

petitioner." 904 F.3d 643, 655 (9th Cir. 2018). In *Rajah* v. *Mukasey*, the Second Circuit eventually rejected the petitioner's request for termination. 544 F.3d 427, 446-47 (2d Cir. 2008). It explained "regulatory violations occurring *during a deportation hearing* that affect fundamental rights derived from the Constitution or federal statutes require . . . termination," *id.* at 446, but it held, based on the facts of the case before it, "pre-hearing regulatory violations are not grounds for termination, absent prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights," *id.* at 447. *Sanchez* grounded its termination remedy—as do the parties here—in the BIA's decision in *Garcia-Flores*, which provided for invalidation of agency proceedings after certain violations.

Accordingly, we assume we possess the authority to remand to the BIA for termination of removal proceedings.[14] We also assume, without

[14] In prior unpublished cases, we have entertained arguments regarding termination of removal proceedings and never concluded the remedy was unavailable. *See, e.g.*, *Castelan-Cruz* v. *Garland*, No. 21-9537, 2022 WL 803975 (10th Cir. Mar. 17, 2022); *Perez-Garcia* v. *Barr*, 814 F. App'x 356 (10th Cir. 2020). Other circuits have done the same. *See, e.g.*, *Zegrean* v. *Att'y Gen. of U.S.*, 602 F.3d 273 (3d Cir. 2010); *Hanggi* v. *Holder*, 563 F.3d 378, 383-84 (8th Cir. 2009) (assuming without deciding court had authority to review denial of motion to terminate).

The United States quotes *Luevano* v. *Holder*—"illegal police activity affects only the admissibility of evidence; it does not . . . serve as a basis for dismissing the prosecution"—for the proposition termination of removal

deciding, that termination of removal proceedings is an appropriate remedy for egregious statutory or regulatory violations.

As for the standard of review, the United States suggests a denial of a motion to terminate is reviewed for an abuse of discretion. Resp. Br. at 14. Mr. Aguayo does not argue otherwise, so we assume without deciding this standard of review is appropriate and apply it today.[15]

B

On appeal, Mr. Aguayo challenges only the BIA's denial of his motion to terminate removal proceedings.

In *Garcia-Flores*, the BIA adopted a two-prong test for "whether deportation proceedings should be" terminated.[16] 17 I. & N. Dec. at 328. According to this test, a petitioner must show (1) the agency violated a regulation that serves "a purpose of benefit to the [noncitizen]" and (2) the

---

proceedings would be an "extravagant remedy" "contrary to" our caselaw. Resp. Br. at 20-21 (quoting 660 F.3d 1207, 1213 (10th Cir. 2011)). We do not understand *Luevano* to bar termination. Instead, we read our holding there as clarifying the necessity of tailoring the remedy to the violation. *See Luevano*, 660 F.3d at 1213 ("Had [petitioner] shown [a Fourth Amendment] violation, he would be entitled to suppression of the evidence," not "dismissal of the proceedings.").

[15] The standard of review, however, is not dispositive to our resolution of this case. We would affirm even under a less deferential standard.

[16] *Garcia-Flores* uses the term "invalidated." 17 I. & N. Dec. at 328. But both parties, and the BIA itself, appear to accept that "invalidated" means "terminated" for our purposes.

regulatory violation "prejudiced interests of the [noncitizen] which were protected by the regulation." *Id.* (citations omitted). In other words, Mr. Aguayo's removal proceedings can be terminated only if he can show *first*, the agency violated a regulation enacted for his benefit, and *second*, he was prejudiced by this violation.

As we explain, we discern no error in the BIA's denial of Mr. Aguayo's motion to terminate removal proceedings. We assume Mr. Aguayo has proven prong one and thus proceed with the assumption DHS violated regulations enacted for Mr. Aguayo's benefit. But even assuming DHS *did* violate these regulations, Mr. Aguayo falters at the second prong because he has not shown his interests were prejudiced.

1

Mr. Aguayo first argues he was *actually prejudiced* by pursuing adjustment of status through an adversarial hearing rather than a non-adversarial USCIS interview. We disagree.

Garcia-Flores appears to contain two articulations of actual prejudice: (1) a noncitizen must show the violation "harmed [their] interests in such a way as to *affect potentially* the outcome of their deportation proceeding," or (2) a noncitizen must show that "such prejudice *affected* the outcome of the deportation proceedings." 17 I. & N. Dec. at 328, 329 (emphases added) (internal quotation marks omitted). The BIA considered Mr. Aguayo's

motion to terminate under the latter, apparently higher, standard, concluding he showed no effect on the outcome of his deportation proceedings. We need not decide which standard of actual prejudice applies because Mr. Aguayo does not satisfy either.[17]

On this point, Mr. Aguayo emphasizes adjustment hearings in immigration court are procedurally different from non-adversarial USCIS interviews because a petitioner appears in front of the IJ "in a pastel jumpsuit" and is "cross-examined in an adversarial courtroom by trained government lawyers, while in confinement apart from family." Pet. Br. at 48 (internal quotation marks and citation omitted). As a general matter, we are sympathetic to Mr. Aguayo's contention. But whether the adversarial nature of immigration court *potentially* affected or *actually* affected the outcome of removal proceedings is not self-evident. *See Garcia-Flores*, 17 I. & N. Dec. at 328-29. As the government points out, Mr. Aguayo had "a

[17] In its briefing and at oral argument, the government urged us to apply a "reasonable likelihood" standard to determine prejudice. Resp. Br. at 47 (relying on *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1208-09 (10th Cir. 2004)). After oral argument, the government filed a letter under Federal Rule of Appellate Procedure 28(j) to clarify its statements at oral argument "that the Board applies the prejudice standard of the relevant circuit." Notice of Clarification at 1. Mr. Aguayo moved to strike the government's letter, contending "the letter unconvincingly seeks to advance new arguments in an attempt to have the final word." Pet. Mot. Strike at 2. We deny Mr. Aguayo's motion to strike, but we need not resolve the merits of the dispute because Mr. Aguayo's claim is unavailing, no matter what understanding of prejudice is used.

full opportunity to present his case for adjustment of status before the [IJ]," Resp. Br. at 47, and he does not argue "he would have submitted more or different evidence to USCIS than he presented to the [IJ]," *id.* at 48. The BIA correctly determined Mr. Aguayo "speculates" but "provides no evidence that USCIS would have approved his adjustment application." AR.4.

Mr. Aguayo seeks to reinforce the distinction between an IJ hearing and a USCIS interview by pointing out that his wife, who was also scheduled for a USCIS interview in August 2019, "was able to attend [her] interview and successfully adjust her status." Pet. Br. at 49. We are unwilling to speculate that Mr. Aguayo's wife successfully adjusted her status because she participated in a USCIS interview. Substantial evidence supports the BIA's finding of no actual prejudice, and Mr. Aguayo has offered no availing contrary argument.

2

Mr. Aguayo also contends we can *presume* prejudice, because the violations at issue disrupted the entire procedural, statutory and regulatory framework. Pet. Br. at 47. We cannot agree.

As we have explained, the BIA's decision in *Garcia-Flores* established two potential understandings of actual prejudice. But the BIA also explained, "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"—or presumed—"prejudicial." 17 I. & N. Dec. at 329. The parties agree there appear to be two circumstances under which prejudice may be presumed under *Garcia-Flores* when the agency violates a regulation: (1) where compliance with the regulation is constitutionally required, or (2) where the regulation is part of a structure guaranteeing fair proceedings. *See* Resp. Br. at 38-39; Pet. Reply Br. at 19-20.

Neither option is availing for Mr. Aguayo.

Arguing the allegedly violated regulations are constitutionally mandated (prong 1), Mr. Aguayo does little more than refer to ambient Fourth Amendment considerations and appeals to the Supremacy Clause and separation of powers. *See* Pet. Reply Br. at 21-24. But as the government persuasively explains, "Merely asserting that regulations are consistent with constitutional interests does not demonstrate that the regulations are constitutionally mandated." Resp. Br. at 42.

On the procedural framework error (prong 2), Mr. Aguayo contends the alleged violations impaired a framework "designed to promote fair processing," Pet. Reply Br. at 24, and "an interlocking structure to protect the rights of noncitizens," *id.* at 25. But, as the government argues, the same regulations on which Mr. Aguayo relies "'provide internal guidance on

specific areas of law enforcement authority,' and 'do not, are not intended to, shall not be construed to, and may not be relied on to create any rights, substantive or procedural, enforceable at law by any part[y] in any matter, civil or criminal.'" Resp. Br. at 41 (quoting 8 C.F.R. § 287.12). Though the violations alleged by Mr. Aguayo may have affected *his* proceeding, he has not persuaded us that they undermined the entire procedural *framework* for his removal as understood in *Garcia-Flores*.

3

Whether as part of his *Garcia-Flores* presumed prejudice argument or as a discrete point, Mr. Aguayo urges us to presume prejudice because termination of proceedings is "an appropriate remedy for egregious conduct." Pet. Br. at 51. We must decline the invitation.

Mr. Aguayo contends the BIA erred by concluding the alleged violations were not egregious. According to Mr. Aguayo, ICE committed egregious violations by issuing an immigration detainer that requested Utah County Officials hold him in jail and by taking him into ICE custody without a warrant and without conducting a flight-risk assessment. *Id.* at 51-52. The BIA concluded termination was not "warranted" under these circumstances because Mr. Aguayo had "not shown that the purported violations were sufficiently egregious." AR.4.

On appeal, Mr. Aguayo relies in part on the Second Circuit's *Rajah* decision.[18] In opposition, the United States argues that case supports its position—that Mr. Aguayo was not entitled to termination of his removal proceedings. Resp. Br. at 21-22.

We agree with the government. In *Rajah*, four petitioners sought review of deportation orders issued by the BIA. 544 F.3d at 432. The

---

[18] Mr. Aguayo also contends the alleged violations are egregious by reference to *Cotzojay* v. *Holder*, 725 F.3d 172, 183 (2d Cir. 2013); *Yoc-Us* v. *Attorney General*, 932 F.3d 98, 113 (3d Cir. 2019); and *United States* v. *Khan*, 324 F. Supp. 2d 1177, 1187 (D. Colo. 2004). Pet. Br. at 50-53. We do not find these cases instructive for our analysis.

First, the violations in *Cotzojay* are factually different—and arguably more extreme—than the violations Mr. Aguayo alleges. In *Cotzojay*, ICE officers conducted a "deliberate, nighttime, warrantless entry into [the] individual's home, without consent and in the absence of exigent circumstances." 725 F.3d at 183. In Mr. Aguayo's case, although ICE officers took custody of Mr. Aguayo early in the morning, the officers did not enter his home without consent to take him into custody. Rather, he was already in Utah County Jail and had been for many months.

Likewise, the violations at issue in *Yoc-Us*, 932 F.3d 98, are factually different than those claimed by Mr. Aguayo. In *Yoc-Us*, petitioners alleged facts that "could support the conclusion that the illegal extension of the stop was solely 'based on race or perceived ethnicity.'" *Id.* at 113 (quoting *Oliva-Ramos* v. *Att'y Gen. of U.S.*, 694 F.3d 259, 279 (3d Cir. 2012)). Mr. Aguayo does not contend ICE arrested or detained him based on his race or ethnicity, thus *Yoc-Us* is not helpful.

Finally, we need not consider *Khan*, 324 F. Supp. 2d at 1187, which deals with the suppression of evidence in the criminal context and where the district court made no finding that the statutory and constitutional violations were egregious.

petitioners argued for termination of their removal proceedings because the Immigration and Naturalization Service (INS) violated agency regulations while registering, interrogating, and arresting them as part of a Special Call-In Registration Program instituted in the wake of the terrorist attacks of September 11, 2001. *Id.* at 432-33, 443. While the Second Circuit "assume[d] significant regulatory violations took place," *id.* at 446, it ultimately concluded the violations were "harmless, non-egregious, pre-hearing regulatory violations" that did not call for termination of removal proceedings without prejudice, *id.* at 448.[19]

The ICE violations alleged here are akin to those at issue in *Rajah*: Mr. Aguayo alleges ICE unlawfully detained him by issuing an immigration detainer in violation of the Fourth Amendment and the INA, 8 U.S.C. § 1357(d), and he maintains ICE took him into custody without first issuing an arrest warrant, in violation of the Fourth Amendment, the INA, 8 U.S.C. § 1357(a)(2), and agency regulation, 8 C.F.R. § 287.8(c)(2)(ii). The *Rajah* petitioners similarly asserted INS had arrested them without warrants in

[19] The Second Circuit either held or assumed in the petitioners' favor that INS had violated agency regulations by arresting petitioners without warrants; failing to inform one petitioner of his arrest and not informing two petitioners of their arrests until after substantial questioning; allowing the arresting officers to conduct two of the petitioners' post-arrest examinations; and using coercion to induce one petitioner to waive rights or make statements by questioning him for seven hours, broken up by two short periods in a cell. *Rajah,* 544 F.3d at 443-46.

violation of the same regulatory provision, § 287.8(c)(2)(ii), and without informing them of their arrests, in violation of 8 C.F.R. § 287.8(c)(2)(iii). 544 F.3d at 443-44. The *Rajah* petitioners also alleged INS violated 8 C.F.R. § 287.3(a) by having the arresting officer conduct two of the petitioners' post-arrest examinations and that INS violated 8 C.F.R. § 287.8(c)(2)(vii) by interrogating one petitioner for seven hours. *Id.* at 444-46. The Second Circuit found none of the violations to be egregious. Guided by the Second Circuit's analysis, we are not persuaded the violations alleged by Mr. Aguayo were egregious.

Here, the BIA agreed with the IJ that Mr. Aguayo had not shown egregious violations.[20] Although the IJ could find no Tenth Circuit precedent on point, he explained from the bench what conduct other courts have found egregious:

> [W]e found . . . cases involving coercion, physical abuse, arrests based on race or perceived ethnicity, a violation so severe that it rose to the level of no reason at all, brutal conduct that shocks the conscience and offends a community['s] sense of fair play and decency, government misconduct by threats, coercion or physical abuse, et cetera.

[20] The BIA agreed with the IJ, so "we are not precluded from consulting the IJ's more complete explanation." *Neri-Garcia*, 696 F.3d at 1008-09 (citation omitted).

AR.141-42. Then the IJ held, "I don't see anything on this record that rises to that level." *Id.* at 142. The BIA agreed with the IJ's determination, and so do we.[21]

We conclude substantial evidence supports the BIA's conclusion that, even assuming termination is available for egregious violations, Mr. Aguayo "has not shown that the purported violations were sufficiently egregious such that they transgressed notions of fundamental fairness." *Id.* at 4.

III

Mr. Aguayo has not shown he was prejudiced—under any applicable standard—by the denial of his motion to terminate removal proceedings. We **DENY** his petition for review. We also **DENY** his motion to strike.

[21] Although the Tenth Circuit has not passed on egregiousness in the context of motions to terminate, that does not preclude us from reviewing the BIA's findings here.