PROCEDURAL CHALLENGES TO REMOVAL PROCEEDINGS

by

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"Any coward can fight a battle when he's sure of winning; but give me the man who has pluck to fight when he's sure of losing"

George Eliot, from her work *Janet's Repentance*

I. INTRODUCTION

Procedural challenges to removal proceeding have not received much attention in recent years. Prior to the 1996 amendments to the Immigration and Nationality Act (INA), when an alien was placed in deportation proceedings, the best strategy often was to concede deportability and apply for relief. In many cases, raising procedural challenges would only have unnecessarily lengthened the proceedings. However, since the 1996 amendments, relief is not as widely available, and it is now necessary to strengthen our skills in raising and effectively arguing procedural challenges to removal proceedings.

Sections of the INA and the regulations that were drafted to implement the INA contain procedural safeguards that must be followed to protect an alien's rights. These provisions are often not complied with in practice. Violations of these procedural safeguards taint the removal proceedings and eventually the removal order. Courts have held that an agency's failure to adhere to its regulations taints the act of the agency, thereby requiring reversal of such an act. Other courts have held that a violation of a regulation required by statute or the Constitution is a per se violation of due process. In light of this support from the courts, procedural challenges may provide immigration attorneys with new means for challenging the removal of aliens who may not be eligible for relief.

The following provides a list of some of the objections that can be raised in removal proceedings. The objections are based on the controlling statute and the regulations. In addition, this article provides a discussion of pertinent decisions of the federal circuits. This is not meant to be an exhaustive analysis of all federal circuit cases, and you should conduct research and analysis of the relevant federal cases in your jurisdiction.

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II. OBJECTIONS AND AUTHORITY

A. Objections Based on the Statute

1. Failure to Provide an Alien with a Current List of Available Counsel as Required by the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§ 1101 *et seq.)* (hereinafter INA); INA § 239(a)(1)(E)(ii), 8 USC § 1229(a)(1)(E)(ii)

Section 239 of the INA states that an alien who is served with a Notice to Appear (NTA) and placed in removal proceedings must "be provided . . . a current list of counsel prepared under subsection (b)(2)." Subsection (b)(2) states that a current list of counsel is one that is "updated not less than quarterly." If, at the time an alien is served with an NTA, he is not given a current list of counsel, then his rights protected by INA § 239(a)(1)(E)(ii) have been violated. The same is even more true if an alien is given no list of available counsel. An alien's right to a current list of counsel must be protected and enforced.

2. No Specification of the Consequences of Failure to Provide Address and Telephone Information as Required by INA § 239(a)(1)(F)(iii), 8 USC § 1229(a)(1)(F)(iii)

INA § 239(a)(1)(F)(i) provides that an alien must produce a "written record of an address and telephone number at which the alien may be contacted respecting proceedings." INA § 239(a)(1)(F)(iii) explains that the NTA must specify "the consequences. . . of failure to provide address and telephone information." An alien needs to know what privileges and rights he will forfeit and what liabilities he will incur by failing to provide contact information. If he is not advised of the consequences, and he does not act in accordance with the requirements, he should not be held to have forfeited any of his privileges and rights nor should he be held to have incurred any liabilities. The statute requires that an alien be informed of the consequences of withholding contact information. An NTA that does not advise an alien of these consequences at the time it is served is invalid as a matter of law.

3. No Time and Place Listed on the NTA as Required by INA § 239(a)(1)(G)(i), 8 USC § 1229(a)(1)(G)(i)

Section 239(a)(1)(G)(i) provides that a "time and place at which the proceedings will be held" be included on the NTA at the time it is served. There is no exception or excuse allowed in the statute for not fulfilling this requirement. Expecting the court to notify an alien at a latter time does not fulfill the requirement. The statute requires that the time and place for proceedings be listed on the NTA at the time it is served. Accordingly, to be valid under the statute, both the time and

place of the removal hearing must be stated on the NTA at the time it is served on an alien.

4. No Specification of the Consequences of Failure to Appear as Required by INA § 239(a)(1)(G)(iii), 8 USC § 1229(a)(1)(G)(iii)

INA § 239(a)(1)(G)(iii) requires that an NTA include the "consequences... of the failure, except under certain circumstances, to appear at [removal] proceedings." An alien must know what privileges and rights he will forfeit and what liabilities he will incur by a failure to appear. If he is not advised of the consequences, and he does not act in accordance with the requirements, he should not be held to have forfeited any of his privileges and rights nor should he be held to have incurred any liabilities. The statute requires that an alien be informed of the consequences of failing to appear at removal proceedings. An NTA that does not advise an alien of the consequences of failing to appear at removal proceedings at the time it is served is invalid as a matter of law.

5. Failure of the INS to Meet its Burden of Proof as Required by INA § 240(c)(3)(A)

Under INA § 240(c)(3)(A), if an alien has been admitted to the United States, the INS "has the burden of establishing by clear and convincing evidence that. . . the alien is deportable." Section 240(c)(3)(A) further states, "[n]o decision of deportability shall be valid unless it is based on reasonable, substantial, and probative evidence." It is not enough for the INS to allege simply that an alien is deportable; it must be held to its burden of proof.

B. Objections Based on the Regulations

1. Failure to Advise an Alien of His Right to Contact Consul as Required by 8 CFR § 236.1(e)

Under 8 CFR § 236.1(e) every alien detained "shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." This regulation is clearly drafted in mandatory language and contemplates that such notification be given immediately after detention of an alien. An alien must be advised of this right to communicate with his county's diplomatic post before commencement of removal proceedings.[1] The aim of the regulation is to place an alien in contact with his country's diplomatic personnel immediately after he is detained so that he may utilize whatever assistance

[1] *See* Supplementary Information to Interim Rule, 62 Fed. Reg. 10312, 10322 (Mar. 6, 1997) ("The Service is required to comply with this requirement before commencement of removal proceedings.").

the diplomatic officer may render, including the rendition of legal counsel at no expense to the alien. A notification that comes days, weeks, or months after the detention of an alien may be meaningless.

2. Failure to Issue an NTA in Accordance with 8 CFR § 239.1(a)

Only certain individuals are authorized to issue an NTA. 8 CFR § 239.1(a) lists these individuals by title. The only exception is for those officers who are temporarily acting in a capacity listed in 8 CFR § 239.1(a). If an NTA is issued by an individual other than one of the 22 individuals listed in the regulation, or if the signatory is not properly appointed to serve in an "acting" capacity, then the NTA is void. The regulation does not allow for a third-party to issue the NTA (*i.e.*, "Jane Doe for (actual officer)" or "(actual officer) by Jane Doe"). 8 CFR § 239.1(a) simply requires that the NTA be signed by one who is authorized to do so and no one else. Otherwise the NTA could be signed by any employee of the INS, including the clerk in mail room or the receptionist at the front desk. Recognizing the serious consequences that flow from the issuance of an NTA and the institution of removal proceedings, 8 CFR § 239.1(a) aims to vest the authority to issue an NTA in a very select number of INS employees.

3. Questioning of an Alien by the Arresting Officer as Prohibited by 8 CFR § 287.3(a)

8 CFR § 287.3(a) provides that an "alien arrested without a warrant of arrest . . . will be examined by an officer other than the arresting officer." The only exception to this rule is when "no other qualified officer is readily available" to question the alien and when taking the alien to be questioned by another officer would "entail unnecessary delay." Accordingly, for an officer to arrest and question an alien there must be no one else available, within reason, to question the alien. This requirement implies that the arresting officer must verify whether another officer is available. If the arresting officer does not verify that there is no other officer available or simply disregards this procedure, there is a violation of 8 CFR § 287.3(a) which is designed to protect an alien's rights.

4. No Advisement of an Alien's Rights as Required by 8 CFR § 287.3(c)

8 CFR § 287.3(c) requires that when an alien is arrested without a warrant, he must be advised of the reasons for the arrest, must be told of the right to be represented at no cost to the government, and must be warned that any statement made may be used against him in a subsequent proceeding. Additionally, the examining officer must provide an alien with a list of free legal services available in the district where the proceedings will be held. These warnings and procedures protect an alien from unknowingly submitting to questioning that could lead to his

ultimate removal without being advised of his rights and without the presence of legal counsel. Thus, before an alien is questioned by an immigration officer, he must be advised of his rights and opportunities. He must be afforded the opportunity to obtain counsel to aid him in developing an adequate and fair defense to the charges against him.

III. VIOLATION OF THESE STATUTORY AND REGULATORY PROVISIONS REQUIRES DISMISSAL OR REVERSAL OF REMOVAL PROCEEDING

A. The *Accardi* Rule

In *Accardi v. Shaughnessy*, the Supreme Court stated that if the Board of Immigration Appeals (BIA) acts "contrary to existing regulations . . . [the alien] should receive a new hearing before the [BIA]."[2] Not following its own regulations was held to be reversible error. The *Accardi* decision sprang from an earlier Supreme Court decision in *Columbia Broadcasting System, Inc. v. United States*.[3] *Columbia Broadcasting System* held that the rules promulgated by a federal agency, which regulate the rights and interests of others, are controlling upon the agency.[4] If individuals are entitled to rely on the regulation, then the agency is bound by it and a violation of it is reversible error.[5] The *Accardi* rule has since been applied in several different contexts.[6]

Failure of an agency to follow its own rules has been held to violate the due process envisioned in the Constitution. A showing of prejudice or harmful error is generally not required.[7] The Supreme Court has also stated that "[a] court's duty to enforce an agency

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[2] 347 U.S. 260, 268 (1954).

[3] 316 U.S. 407 (1942).

[4] *Id.* at 422.

[5] *Id.*

[6] *See, e.g., Service v. Dulles*, 354 U.S. 363 (1957) and *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (used to vacate discharges of government employees); *Yellen v. United States*, 374 U.S. 109 (1963) (used to overturn a criminal contempt conviction).

[7] *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Montilla v. INS*, 926 F.2d 162, 169 (2d Cir. 1991) ("Careless observance by an agency of its own administrative processes weakens its effectiveness in the eyes of the public because it exposes the possibility of favoritism and of inconsistent application of the law"); *but see contra Waldron v. INS*, 17 F.3d 511 (2d Cir. 1994) (automatic reversal required only when the violation is a fundamental right derived from the Constitution or federal statute).

regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law."[8]

In summary, *Accardi* requires a federal agency to comply with the regulations it chooses to impose on itself because others rely on those regulations to protect their rights and to govern their conduct. Violation of a regulation when the regulation is prescribed by federal statute or the Constitution constitutes prejudice per se.

B. Application of *Accardi* in the Federal Courts of Appeals

1. The First Circuit

The First Circuit applied the *Accardi* rule in *United States v. Leahey*.[9] In *Leahey*, the court addressed whether the failure of the Internal Revenue Service (IRS) "to follow its own published general procedure, requiring its Special Agents to give certain warnings on initial contacts with taxpayers they are investigating" required the exclusion of evidence obtained from the interview.[10] The court recognized that the special procedures adopted by the IRS requiring that warnings be given were adopted for the "specific purpose of insuring 'uniformity in protecting the Constitutional rights of all persons.'"[11] The court explained that the failure of an agency to adhere to its regulations does not always violate due process, but that in this case where there was

> (1) a general guideline, deliberately devised, aiming at accomplishing uniform conduct of officials which affects the post-offense conduct of citizens involved in criminal investigation; and (2) an equally deliberate public announcement, made in response to inquires, on which many tax payers and their advisors could reasonably and expectably rely. . . the agency had a duty to conform to its procedure, that citizens have a right to rely on conformance, and that the courts must enforce both the right and duty.[12]

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[8] *United States v. Caceras*, 440 U.S. 741, 749 (1979).

[9] 434 F.2d 7 (1st Cir. 1970).

[10] *Id.* at 7-8.

[11] *Id.* at 9.

[12] *Id.* at 11.

Because the IRS had not followed its procedures, the court affirmed the district court's decision granting the motion to supress the statements obtained by the IRS officers.[13]

The First Circuit again considered the effect of an agency's failure to adhere to its regulations in *Navia-Duran v. INS*.[14] In *Navia-Duran*, an alien was arrested late at night without a warrant, subjected to extensive questioning by INS officers, and coerced into signing a statement admitting that she had remained in the United States after her visitor's visa lapsed without requesting an extension.[15] Following her arrest, she was not advised of her rights to counsel at a deportation hearing or warned that any statement she made could be used against her in future proceedings.[16] The court relied on the Supreme Court's decisions in *Accardi* and *Wixon*, as well as its own decision in *Leahey*, in reasoning that the INS's compliance with its regulations was necessary to protect an alien's due process rights.[17] The court recognized that 8 CFR § 287.3 required that an alien arrested without a warrant be advised of her right to counsel at a deportation hearing and also that any statement she made could be used against her a subsequent proceeding.[18] Because such warnings were not given to the alien, the court ruled that her statement was inadmissible and remanded the matter to the INS for a new hearing without the use of the statement.[19] In a footnote, the court also recognized that

> [t]he regulation also provided for examination of the alien by other than the arresting officer "unless no other qualified officer is readily available." 8 CFR § 287.3. Of course, when an alien is spirited away late at night to INS headquarters, it is unlikely that another officer will be readily available. Surely that regulation does not condone midnight interrogations. Its spirit if not its letter was certainly breached.[20]

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[13] *Id.*

[14] 568 F.2d 803 (1st Cir. 1977).

[15] *Id.* at 805.

[16] *Id.*

[17] *Id.* at 808-09.

[18] *Id.* at 809.

[19] *Id.*

[20] *Id.* at 810 n. 9.

In short, the First Circuit has recognized that due process may require an agency to comply with its regulations.

2. The Second Circuit

The Second Circuit addressed the *Accardi* issue in *Montilla v. INS.*[21] In *Montilla*, the issue before the court was whether the immigration judge failed to follow the regulation protecting an alien' right to counsel.[22] The alien was served with a motion to show cause and was brought before an immigration judge for a deportation hearing.[23] Noting that the alien was present without counsel, the immigration judge told the alien that he had the right to have an attorney represent him at no cost to the government and gave him a list of attorneys who might be available to represent him.[24] The alien was then asked if he wanted an attorney or if he wanted to proceed without one.[25] The alien answered that he did not know, and the immigration judge adjourned the hearing so that the alien could decide what he wanted to do.[26] When the hearing resumed about fifteen days later, the immigration judge stated, "Mr. Montilla, we met on the 25th day of January, 1989, and I read all your rights at that time. At that time sir, you asked for more time to determine what you wanted to do," and then began the hearing.[27] The immigration judge did not ask the alien whether or not he wanted to be represented by counsel.[28]

The court noted that 8 CFR § 242.10 (1990) states that an alien has a right to counsel at no cost to the government and that 8 CFR § 242.16(a) (1990) requires that an alien be informed of his right to counsel and given a list of free legal services at the deportation hearing.[29] 8 CFR § 242.16(a) further requires the immigration judge to require the alien to state whether or not he desires representation.[30] The

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[21] 926 F.2d 162 (2d Cir. 1991).

[22] *Id.* at 166.

[23] *Id.* at 164.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 166.

[30] *Id.*

court then turned to a discussion of the *Accardi* doctrine stating that it is premised on "fundamental notions of fair play underlying the concept of due process" and recognizing that the doctrine "has continued vitality, particularly where a petitioner's rights are 'affected.'"[31] The court discussed, but refused to adopt, the prejudice test standard.[32] The court then held that "where the violated agency regulation governs individual interests, the *Accardi* doctrine requires reversal irrespective of whether a new hearing would produce the same result" and reversed and remanded the case to the BIA.[33]

In a more recent decision, *Waldron v. INS*, the Second Circuit held that a showing of prejudice is required to obtain relief where an agency's violation of its regulations does not implicate statutory or constitutional rights.[34] In this case, an alien was found to be deportable, and he challenged his deportation on the grounds that the INS failed to follow its own regulations.[35] The alien argued that the INS violated 8 CFR § 242.2(g) by not notifying him of his privilege to contact diplomatic consular officials and violated 8 CFR § 3.7 by failing to certify his case to the BIA.[36] The court referred to its decision in *Montilla* and stated, "the reasons for adopting a 'no prejudice' standard are particularly important where fundamental rights derived from the Constitution or federal statutes are implicated."[37] The court stated that this is true even where the regulations require more safeguards than required by the Constitution or the statute from which it is derived.[38] The court, however, held that "where an INS regulation does not affect fundamental rights derived from the Constitution or a federal statue, we believe it is best to invalidate a challenged proceeding only upon a showing of prejudice."[39] The court then concluded that neither 8 CFR § 242.2(g) nor 8 CFR § 3.7 implicated fundamental constitutional or

[31] *Id.* at 167 (citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)).

[32] *Id.* at 168.

[33] *Id.* at 170 (citing *Yellin v. United States*, 374 U.S. 109, 121 (1963); and *Accardi*, 347 U.S. at 268).

[34] 17 F.3rd 511 (2d Cir. 1994).

[35] *Id.* at 514-15.

[36] *Id.* at 514.

[37] *Id.* at 518.

[38] *Id.*

[39] *Id.*

statutory rights, and, because the alien had not shown prejudice, upheld the order of deportation.[40]

While the Second Circuit clearly recognizes the duty of an agency to adhere to its regulations affecting individuals' rights, it may now require a showing of prejudice when the agency fails to do so.[41]

3. The Third Circuit

The Third Circuit has also addressed the *Accardi* principle. In *Kelly v. Railroad Retirement Board*, the court considered whether the Railroad Retirement Board's failure to adhere to its regulations had violated the petitioner's right to due process.[42] Petitioner applied for a disabled child's annuity under the Railroad Retirement Act, and in the process of considering her application, the Board violated its regulations by obtaining additional evidence on petitioner's application without notifying her and offering her an opportunity to rebut the evidence, and also by contacting the petitioner directly to question her on her application in disregard of her right to counsel as guaranteed by the regulations.[43] The court recognized that with respect to the Board's violations of the regulations, it was not necessary to address the constitutional question of whether petitioner's due process rights were violated because "an agency's violation of its regulations is sufficient to taint its act."[44] Discussing the Board's violations, the court, citing *Accardi*, stated, "[a]n action undertaken by an agency contrary to its regulations is illegal and of no effect."[45] The court then ruled that the evidence the Board obtained in violation of its regulations would be given no effect when the court reviewed the Board's decision denying petitioner's application for substantial evidence.[46]

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[40] *Id.* at 518-19.

[41] *See also Jian v. INS*, 28 F.3d 256, 259 (2d Cir. 1994) (requiring a showing of prejudice where the INS violated a regulation pertaining only to "agency created rights and privileges" and not rights protected by the Constitution or a federal statute) (citing *Waldron*, 17 F.3d at 518).

[42] 625 F.2d 486 (3d Cir. 1980).

[43] *Id.* at 490.

[44] *Id.*

[45] *Id.* at 492 (*citing Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Accardi*, 347 U.S. at 268.

[46] *Id.* at 493.

The Third Circuit again considered the *Accardi* principle in *Marshall v. Lansing*.[47] In this case, the United States Parole Commission appealed from a grant of habeas corpus to a federal prisoner by a district court upon a finding that the prisoner's parole release guidelines were improperly determined.[48] The Parole Commission challenged the district court's original remand of the case to the Commission for a fuller explanation of its reasoning.[49] The court pointed to 18 USC § 4206(b) (1982), which required the Parole Commission to "state with particularity the reasons" for a denial of parole, and concluded that where the Parole Commission's conclusion "is not readily apparent from the indictment, the facts surrounding his arrest, or the presentence investigation report," the formal statement must include "the crucial missing logic." [50] In upholding the district court's remand of the case for a fuller explanation, the court stated that the "principles of due process require an agency to follow its own regulations, which have the force of law."[51] The court continued, "a court can set aside agency action that fails to comply with the agency's own regulations, at least where the regulations are designed to protect the individual grievant."[52]

In sum, the Third Circuit requires an agency to comply with its regulations and will refuse to give effect to agency action taken in violation of agency regulations.

4. The Fourth Circuit

The Fourth Circuit applied the *Accardi* in *United States v. Heffner*.[53] Defendant was convicted of two counts of "willfully furnishing his employer. . . false and fraudulent statements of federal income tax withholding exemptions."[54] He challenged his conviction on the grounds that the IRS agents neither warned him that they were investigating the possibility of a criminal prosecution for tax fraud nor advised him of his right to retain counsel as required by the IRS procedures instituted

[47] 839 F.2d 933 (3d Cir. 1988).

[48] *Id.* at 936-37.

[49] *Id.* at 941.

[50] *Id.* at 941-42.

[51] *Id.* at 943.

[52] *Id.*

[53] 420 F.2d 809 (4th Cir. 1969).

[54] *Id.* at 810.

for the purpose of protecting the constitutional rights of persons suspected of criminal tax fraud.[55] The court relied on the *Accardi* doctrine and stated that "an agency of the government must scrupulously observe rules, regulations, or procedures which it has established."[56] The court explained that while the IRS was not obliged to adopt standards more rigorous than those required by the Constitution, once it did it was required to adhere to them.[57] Based on the IRS agents' violations of IRS procedures, the court reversed and remanded defendants case because "the *Accardi* doctrine. . . requires reversal irrespective of whether a new trial will produce the same verdict."[58]

The Fourth Circuit follows the *Accardi* principle.[59] It requires adherence to agency regulations even where those regulations contain more protections than are required by the Constitution. The Fourth Circuit does not require a showing of harm or prejudice where an agency has deviated from its regulations.

5. The Fifth Circuit

The *Accardi* rule has also been acknowledged by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit applied the *Accardi* rule in a case against the Federal Trade Commission, *Pacific Molasses Co., et al. v. FTC*.[60] The FTC had violated a pre-trial order to provide the petitioner's counsel with a list of all of the government's witnesses and evidentiary documents within 15 days of the start of hearings.[61] The list and documents were not provided, and the court found that error to be prejudicial to the petitioner.[62] The court held that "[w]hen an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed."[63] Then, applying the *Accardi* principle, the court

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[55] *Id.* at 811.

[56] *Id.*

[57] *Id.* at 812 (quoting *Dulles*, 354 U.S. at 388).

[58] *Heffner*, 420 F.2d at 813.

[59] *See also Morris v. McCaddin*, 553 F.2d 866 (4th Cir. 1977); *Electronic Components Corp. of North Carolina v. National Labor Relations Board*, 546 F.2d 1088 (4th Cir. 1976); *Brennan v. Gilles & Cotting Inc.*, 504 F.2d 1255, 1260 (4th Cir. 1974); *United States v. Laird*, 494 F.2d 709 (4th Cir. 1974).

[60] 356 F.2d 386 (5th Cir. 1966).

[61] *Id.* at 388

[62] *Id.* at 387, nt. 3 (stating "[w]e do find prejudice in this case").

[63] *Id.* at 389.

explained that once an agency defines the procedural rules by which it "desires to have its actions judged," it forfeits its right to violate those rules without repercussions.[64] Thus, unless the FTC rigorously applied all of its procedural rules in reaching its decision, no penalty could be imposed on the petitioner.[65]

Two more recent decisions of the Fifth Circuit, *Arzanipour v. INS*[66] and *Perales v. Casillas*,[67] have stated that an agency violation of its regulation is a per se denial of due process if the regulation is required by the Constitution or by the statute. In *Arzanipour*, the petitioner contested a dismissal of his appeal to the BIA.[68] He claimed he was not notified of his right to appeal, as required by 8 CFR § 3.3(a), which states in part, "a person affected by a decision who is entitled to appeal. . . shall be given notice of his. . . right to appeal."[69] The Fifth Circuit explained, after citing *Accardi*, that "the failure to adhere to regulations can constitute a denial of due process of law. . . [if] the regulation is required by the constitution or a statute."[70] Thus, the only qualification on a regulation being a "per se denial of due process" is that the regulation be "required by the constitution or a statute."[71]

In *Perales*, the district court granted an injunction to a class of aliens, which, in part, regulated what the INS could consider in making decisions concerning voluntary departure and employment authorization.[72] The Fifth Circuit vacated those parts of the injunction dealing with the above decision-making power, stating that those decisions have been "committed to agency discretion by law."[73] The class argued that the INS had violated its own regulations, which gave rise to a claim for

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[64] *Id.* at 390.

[65] *Id.* at 391. *See also Alamo Express, Inc. v. United States*, 613 F.2d 96 (5th Cir. 1980) and *Superior Trucking Co., Inc. v. United States*, 615 F.2d 703 (5th Cir. 1980) (vacating orders of the Interstate Commerce Committee granting emergency temporary authorities because they were made without giving notice to the existing carriers as required by 49 USC § 10928, 43 Fed. Reg. 58,701 (1978), which had been the agency's consistent past practice).

[66] 866 F.2d 743 (5th Cir. 1989).

[67] 903 F.2d 1043 (5th Cir. 1990).

[68] 866 F.2d at 745.

[69] *Id.* at 746.

[70] *Id.*

[71] *Id.*

[72] 903 F.2d at 1045.

[73] *Id.*

relief under the Administrative Procedures Act (APA), Title 5 USC §§701-706.[74] However, the court could find no regulation that was violated.[75] Without reaching the issue of the need for prejudice in violation of a regulation, the court stated that review of INS "decisions is permissible only where statutory language sets constraints on the agency's discretion."[76] Then, the court followed *Arzanipour*, quoting "this court has recently held that 'the failure of an agency to follow its own regulations is not. . . a *per se* denial of due process unless the regulation is required by the constitution or a statute.'"[77]

One additional Fifth Circuit case worth noting is *Anwar v. INS*.[78] In this case the alien argued his due process was violated by the BIA when his request for "an extension of time to file a brief before affirming the decision of the immigration judge denying Anwar asylum and withholding deportation" was denied.[79] The court stated, "due process challenges to deportation proceedings require an initial showing of substantial prejudice."[80] Based on this statement, one might conclude that the Fifth Circuit requires substantial prejudice before a due process challenge may be grounds for reversal of a decision of the BIA. *Anwar*, however, is distinguishable from the *Arzanipour* and *Perales*. The court in *Anwar* stated that the error the alien claimed as grounds for relief is not a "procedural error correctable by the BIA, but rather, in essence, a challenge to the regulations regarding the submission of briefs."[81] Thus, the holding of *Anwar* would appear to be limited to challenges to regulations regarding the submission of briefs, and is inapplicable to cases dealing with violations of procedures required by the regulations or the statue.

In *Calderon-Ontiveros v. INS*[82] and *Howard v. INS*,[83] two cases dealing with due process, but not involving violations of procedural requirements found in the

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[74] *Id.* at 1050.

[75] *Id.*

[76] *Id.* at 1048.

[77] *Perales*, 903 F.2d at 1050 (*citing Arzanipour*, 866 F.2d at 746).

[78] 116 F.3d 140 (5th Cir. 1997).

[79] *Id.* at 141.

[80] *Id.* at 144.

[81] *Id.* at 144 n 4.

[82] 809 F.2d 1050 (5th Cir. 1986).

[83] 930 F.2d 432 (5th Cir. 1991).

federal statutes or regulations, the Fifth Circuit held that "[in] the administrative law context. . . due process is violated only if the government's actions substantially prejudice the complaining party."[84] In *Calderon-Ontiveros*, at a deportation hearing in which the alien was represented by counsel, the immigration judge asked the alien a series of questions designed to determine whether the alien had entered the United States illegally in the past.[85] The immigration judge also questioned the alien about a report offered as evidence by the INS and refused the alien's attorney's request to read the report prior to the questioning.[86] The alien's attorney was so upset by the conduct of the immigration judge that he refused to put on evidence in support of his client and asked that the hearing be terminated on the grounds that his client's due process rights had been violated.[87] The immigration judge refused this request and ruled against the alien.[88] On appeal the alien argued that the immigration judge had interfered with his right to counsel.[89] The Fifth Circuit held that the immigration judge's conduct did not prejudice the alien or deny the alien a "full and fair hearing," and that, accordingly, the alien's due process rights had not been violated.[90]

In *Howard*, the alien was indicted on criminal charges during the period in which he was involved in deportation proceedings.[91] The alien argued that he did not answer certain questions during his deportation hearing in order to avoid incriminating himself in his criminal case, and that, as a result, he was denied due process and a fair hearing.[92] The Fifth Circuit stated, "[t]he government violates due procedural due process 'only if [its] actions substantially prejudice the complaining party.'"[93] The court then held that no substantial prejudice had occurred in this case because the immigration judge had deemed the alien's refusal to plead to the

[84] *Calderon-Ontiveros*, 809 F.2d at 1052.

[85] *Id.* at 1051.

[86] *Id.*

[87] *Id.* at 1051-52.

[88] *Id.* at 1052.

[89] *Id.*

[90] *Id.* at 1052-53.

[91] *Howard*, 930 F.2d at 436.

[92] *Id.*

[93] *Id.* (*quoting Calderon-Ontiveros*, 809 F.2d at 1052).

allegations as denials, not admissions.[94] The court further stated that even had the alien testified, the outcome of his deportation hearings would not have been different because he had been convicted of crimes for which the finding of alienage was a necessary element and he was not able to collaterally attack the facts which his convictions established in deportation proceedings.[95]

In sum, the Fifth Circuit has held that violations of procedural requirements found in federal statutes or regulations required by federal statutes are *per se* violations of the due process clause, and other forms of violations constitute reversible error only if they prejudice the alien.

6. The Sixth Circuit

The Sixth Circuit also recognizes the *Accardi* doctrine. In *Hollingsworth v. Balcom*, the Sixth Circuit considered whether the Navy violated its own regulations when processing appellant's application for a discharge from the Navy as a conscientious objector.[96] The court noted that the Navy's regulations allow an applicant for a discharge as a conscientious objector to appear with counsel and to have his personal interview with an officer "knowledgeable in polices and procedures relating to conscientious objector matters."[97] The court then stated that "[c]ourts have regularly insisted that when an administrative agency, including a branch of the armed services, has established rules and regulations for its own internal procedures, these rules and regulations cannot then be ignored by them even in the exercise of discretionary authority."[98] Because appellant's right to counsel was not respected by the Navy when it conducted his personal interview, the court reversed and remanded with instructions that the action be remanded "to the appropriate administrative authorities to the end that appellant's conscientious objector application may be reopened for consideration in accordance with the applicable Defense Department regulation and principles enunciated herein."[99]

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[94] *Id.* at 436-37.

[95] *Id.* at 437.

[96] 441 F.2d 419, 419-20 (6th Cir. 1971).

[97] *Id.* at 421 (*citing* Department of Defense Directive 1300.6 (May 10, 1968)).

[98] *Id.* at 421 (*citing Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969); *Schatten v. United States*, 419 F.2d 187, 191 (6th Cir. 1969); *Hammond v. Lenfest*, 398 F.2d 705, 710 (2d Cir. 1968)).

[99] *Id.* at 425.

The Sixth Circuit also addressed the *Accardi* doctrine in *Bates v. Sponberg.*[100] In this case a professor challenged the Board of Regents deviation from its own regulations. The court recognized the *Accardi* rule, stating "[w]hile courts have generally invalidated adjudicatory actions by federal agencies which violated their own regulations promulgated to give a party a procedural safeguard."[101] The court, however, continued, "we conclude that the basis for such reversals is not. . . the Due Process Clause, but rather a rule of [federal] administrative law."[102] Based on this conclusion, the court held that the *Accardi* principle did not apply to Eastern Michigan University, a state agency.[103]

The Sixth Circuit recognizes the *Accardi* principle as applying to all federal administrative agencies. Where *Accardi* applies, the Sixth Circuit has held that it requires adherence to agency regulations even where discretionary decisions are being made.

7. The Seventh Circuit

The Seventh Circuit recognized the *Accardi* rule in *Pearce v. Director of Workers' Compensation Programs.*[104] Petitioner filed a claim for compensation with the Department of Labor after he was injured in an accident while working for McDonnell Douglas Corporation in Thailand.[105] He was granted compensation benefits for temporary and total disability by the deputy commissioner.[106] Petitioner then filed a motion for modification of the award seeking a lump sum payment and requesting an evidentiary hearing.[107] Following a series of motions, but no hearing, the deputy commissioner denied petitioner's request.[108] Petitioner appealed the decision of the deputy director to the Benefits Review Board arguing in part that the

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[100] 547 F.2d 325 (6th Cir. 1976).

[101] *Id.* at 330.

[102] *Id.*

[103] *Id.* at 331.

[104] 647 F.2d 716 (7th Cir. 1981).

[105] *Id.* at 717.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 719.

deputy commissioner should have ordered a hearing.[109] The Board affirmed the decision of the deputy commissioner, and petitioner appealed.[110]

The court summarized the relevant statues and regulations and then stated

> [w]hen Pearce filed his motion for a commutation of his compensation payments to a lump sum award with the deputy commissioner and at the same time asked for a hearing, it was the plain duty of the commissioner to transfer the case to the Chief Administrative Law Judge for a hearing in which findings of fact and conclusions of law would be made and a compensation order entered by the administrative law judge. . . . The deputy commissioner made the findings and conclusions and entered the order when he had no authority to do so, and in doing so he violated the statute and the regulations.[111]

The court also concluded that the Board violated the statute and the regulations by reviewing the deputy commissioner's order where it had no authority to do so.[112] The court then invoked the *Accardi* principle, stating, "reasonable regulations promulgated pursuant to statutory authority have the force and effect of law."[113] The court held that government agencies must adhere to their regulations, and, because the deputy commissioner and the Board had violated statutory and regulatory provisions, the court reversed the decision of the Board and remanded the case with instructions that it be sent to the Chief Administrative Law Judge for a hearing as required by the statute and the regulations.[114]

The Seventh Circuit recognizes the *Accardi* doctrine with respect to regulations promulgated pursuant to statutory authority.[115]

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[109] *Id.*

[110] *Id.* at 720.

[111] *Id.* at 724-25.

[112] *Id.* at 725.

[113] *Id.* at 726.

[114] *Id.*

[115] *See also Miller v. Henman*, 804 F.2d 421 (7th Cir. 1986) (recognizing the *Accardi* doctrine, but finding that it is not applicable to the Bureau of Prison's internal rules not promulgated under the Administrative Procedure Act or published in the Code of Federal Regulations); *Cardoza v. Commodity Futures Trading Commission*, 768 F.2d 1542 (7th Cir. 1985) (recognizing the *Accardi* doctrine in a discussion regarding whether a decision of the Commodity

8. The Eighth Circuit

The Eight Circuit recognized the *Accardi* doctrine in *Rural Electrification Administration v. Northern States Power Company.*[116] This case addressed the question of whether the administrator of the Rural Electrification Administration had complied with certain regulations promulgated by the administrator for handling loans.[117] Appellees raised *Accardi*, and the court distinguished *Accardi* from the case at hand, stating, "[t]he action of the Administrator in this case is to effect a loan consistent with the policy of the Rural Electrification Act and does not operate to deprive appellees of any rights."[118] The court continued, "[a]ppellees are not being *granted* or *denied* a loan in violation of the law or in violation of the regulations having the force of law," and declined to apply the *Accardi* principle.[119]

9. The Ninth Circuit

The Ninth Circuit applied the *Accardi* doctrine in *Mendez v. INS.*[120] In *Mendez*, an alien was found deportable based on a conviction for a crime involving moral turpitude with a sentence of one year.[121] Following the dismissal of the alien's appeal, his sentence was vacated and a nine month sentence was reimposed.[122] Following this, the alien was sent a notice to appear for deportation.[123] Notice was not sent to the alien's counsel of record.[124] The alien reported to the INS and explained that his original sentence had been vacated, but he was deported the same

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Futures Trading Commission to deny review of an exchange disciplinary action is subject to judicial review); *Gaballah v. Johnson*, 629 F.2d 1191 (7th Cir. 1977) (declining to apply the *Accardi* doctrine, but stating that it applies where rules "confer important procedural benefits upon individuals").

[116] 373 F.2d 686 (8th Cir. 1967).

[117] *Id.* at 687-88.

[118] *Id.* at 694, nt. 13.

[119] *Id.* (*quoting Rural Electrification Admin. v. Central Louisiana Elec. Co.*, 354 F.2d 859, 865 (5th Cir. 1966) (emphasis in original).

[120] 563 F.2d 956 (9th Cir. 1977).

[121] *Id.* at 957.

[122] *Id.*

[123] *Id.*

[124] *Id.*

day without being allowed to contact counsel.[125] The alien challenged his deportation on the grounds that "failure to notify his attorney of the order to report for deportation, as required by the regulations, deprived him of his right to judicial appeal and to administrative procedures which could have resulted in the vacating of his order of deportation."[126] The court recognized that "[c]ourts have looked with disfavor upon actions taken by federal agencies which have violated their own regulations."[127] The court then stated that the INS's failure to notify the alien's counsel was a violation of both 8 CFR § 292.5(a) and the alien's right to counsel as provided by the INA.[128] Accordingly, the court held that INS had to admit the alien into the United States with the same status he had prior to his deportation to allow him to "pursue any administrative and judicial remedies to which he is lawfully entitled."[129]

The Ninth Circuit again addressed the *Accardi* doctrine in *United States v. Calderon-Medina*.[130] Two aliens were deported, and they challenged their deportation on the ground that the INS had violated 8 CFR § 242.2(e) (1978) by failing to notify them that they could communicate with Mexican consular or diplomatic officers.[131] The district courts dismissed the cases against the aliens on the grounds that the INS had violated this regulation.[132] The Ninth Circuit, however, stated, "[v]iolation of a regulation does not invalidate a deportation proceeding unless the regulation serves a purpose of benefit to the alien."[133] The court continued, "[v]iolation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the alien which were protected by the regulation."[134] Because the district courts had not made any findings of harm and because the aliens did not identify evidence of harm in the record, the court reversed the orders

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[125] *Id.*

[126] *Id.* at 958.

[127] *Id.* at 959.

[128] *Id.*

[129] *Id.*

[130] 591 F.2d 529 (9th Cir. 1979).

[131] *Id.* at 530.

[132] *Id.*

[133] *Id.* at 531.

[134] *Id.*

dismissing the cases against the aliens.[135] The court further provided that on remand the aliens should be "allowed the opportunity to demonstrate prejudice resulting from the INS regulation violations" and directed the district court to determine whether the violations "harmed the aliens' interests in such a way as to affect potentially the outcome of their deportation proceedings."[136] If the district court found prejudice, it was instructed to dismiss the cases against the aliens.[137]

In sum, the Ninth Circuit requires administrative agencies to comply with their own regulations, but will not invalidate an agency action in violation of its regulations without a showing that the violation harmed an interest of the alien that it was designed to protect.

10. The Tenth Circuit

The Tenth Circuit applied the *Accardi* doctrine in *Edwards v. Califano*.[138] Appellant appealed, on behalf of her two minor children, a decision of the Secretary of Health, Education and Welfare denying the children child insurance benefits under the Social Security Act.[139] Appellee filed the claim on behalf of her two minor children arguing that her husband was presumptively dead under the regulations because he left their home in 1964 and was not heard from again.[140] (Appellee filed the application on November 30, 1972).[141] 8 CFR § 404.705(a) states,

> Whenever it is necessary to determine the death of an individual in order to the determine the right of another to a monthly benefit. . . [if] such individual has been unexplainedly absent from his residence and unheard of for a period of 7 years, the Administration, upon satisfactory establishment of such facts and in the absence of any evidence to the contrary, will presume that such individual has died.[142]

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] 619 F.2d 865 (10th Cir. 1980).

[139] *Id.* at 866.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 867.

The court held that appellee had established that her husband was unexplainably absent as required by the regulation and that the Secretary had not rebutted the presumption of death.[143] The court then cited *Accardi* and reversed and remanded the decision stating, "the Secretary cannot ignore the plain terms of his own regulations."[144]

11. The Eleventh Circuit

The Eleventh Circuit recognized the *Accardi* principle in *Simmons v. Block.*[145] This case dealt with the sale of property by the Department of Agriculture's Farmers Home Administration.[146] The FHA sold a piece of property to a bidder who bid cash, even though his bid was lower than another bidder's credit bid.[147] Rather than complying with the regulations governing the sale of property, the FHA followed an "internal policy" giving preference to cash bids within five percent of credit bids.[148] The court noted that "failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct," and that "courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself."[149] Because the FHA did not meticulously adhere to its regulations, the court remanded the case stating that, with respect to the sale of the property in question, the "equitable solution is to have the State Director or designated staff member scrupulously follow the guidelines of 7 CFR § 1955.116(b)."[150]

In short, the Eleventh Circuit has recognized the *Accardi* rule and requires agencies to act in accordance with their regulations.

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[143] *Id.* at 868.

[144] *Id* at 869. The Tenth Circuit also recognized the *Accardi* doctrine in *United States v. Lockyer*, 448 F.2d. 417, 421 (10th Cir. 1971), but stated that it did not apply to unpublished regulations designed to facilitate internal administration and not for the protection of individual rights or interests.

[145] 782 F.2d 1545 (11th Cir. 1986).

[146] *Id.* at 1547.

[147] *Id.* at 1550.

[148] *Id.*

[149] *Id.* at 1550 (*citing Boyd v. Secretary of Agriculture*, 459 F. Supp. 418 (D.S.C. 1978); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969).

[150] *Id.*

12. The District of Columbia Circuit

The District of Columbia Circuit has also recognized the *Accardi* principle. In *Sangamon Valley Television Corporation v. United States*, the court addressed a rule making decision of the Federal Communications Commission.[151] In this case, seven weeks after the filing deadline for comments on the proposed reassignment of channels, an interested party sent each commissioner a letter arguing in favor of his position.[152] The FCC eventually decided in favor of such interested party and its decision was challenged.[153] In reviewing the decision of the FCC, the court relied on the *Accardi* principle, stating "[a]gency action that substantially and prejudicially violates an agency's rules cannot stand."[154] The court noted that although at the time of its decision the FCC had no "general regulations governing rule-making," there were rules in place prescribing cut off dates for certain filings.[155] Because the FCC did not act in compliance with these rules, the court vacated the order of the FCC and remanded the case to the FCC to hold a hearing to consider the nature of the ex parte communications.[156]

The District of Columbia Circuit again considered the *Accardi* rule in *Massachusetts Fair Share v. Law Enforcement Assistance Administration.*[157] This case arose after the Law Enforcement Assistance Administration purported to deny petitioner's application for a grant under the Urban Crime Prevention Program.[158] Petitioner argued that the LEAA lacked the power under the procedures established for the administration of the Urban Crime Prevention Program to unilaterally deny its application.[159] The court found that under the applicable procedures, the LEAA was not allowed to act unilaterally in denying an application, but was required to work cooperatively with the Agency for Voluntary Service (ACTION).[160] The court

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[151] 269 F.2d 221 (D.C. Cir. 1959).

[152] *Id.* at 224.

[153] *Id.*

[154] *Id.* (*citing Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

[155] *Id.* at 225.

[156] *Id.*

[157] 758 F.2d 708 (D.C. Cir. 1985).

[158] *Id.* at 709.

[159] *Id.* at 709.

[160] *Id.* at 710.

then stated, "[i]t has been long settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated."[161] The court continued, "[t]his precept is rooted in the concept of fair play and in abhorrence of unjust discrimination, and its ambit is not limited to rules attaining the status of formal regulations."[162] Because the LEAA acted outside its authority in unilaterally denying petitioner's application, the court reversed its decision and remanded the case for further consideration consistent with the procedures outlined for considering applications for grants under the Urban Crime Prevention Program.[163]

The District of Columbia Circuit recognizes the *Accardi* principle and requires adherence to agency policies and regulations.[164]

IV. A HEARING IS REQUIRED TO DETERMINE THE NATURE AND THE SCOPE OF THE INS' VIOLATIONS OF THE CONSTITUTION, THE STATUTE, AND THE REGULATIONS

Agencies are required to comply with their regulations. Where an agency deviates from its regulations, courts will reverse the agency action and remand the case for reconsideration in compliance with the regulations. Therefore, when the INS fails to adhere to the procedures outlined in the statute or in the regulations, immigration attorneys should object and ask for a hearing to determine whether the INS violated the statute or its regulations. If it is determined that the INS did, in fact, violate the statute or its regulations, immigration attorneys should, in reliance on *Accardi*, ask that the proceedings against the alien be dismissed without prejudice.

An agency that violates its own rules with impunity has no incentive to follow rules. What then is the purpose of the rules themselves other than to deceive an alien into believing that he will be protected by rules that are fictitious in practice. Surely the regulations promulgated by the Attorney General to govern the conduct of INS were not intended to be frivolous words with no purpose. For the regulations to have meaning, they must be upheld. An immigration court is the proper avenue, following the institution of removal proceedings, to remedy violations of the Constitution, the statute, and the regulations. Proceeding forward with removal proceedings even where the INS has violated the Constitution, the statute, and the regulations relying on the cursory excuse that the violations did not prejudice an alien simply encourages the violation of aliens' rights in removal proceedings and casts a dark cloud of uncertainty over removal proceedings. No less

[161] *Id.* at 711.

[162] *Id.* (Footnotes omitted).

[163] *Id.* at 712.

[164] *See also Geiger v. Brown*, 419 F.2d 714 (D.C. Cir. 1969).

than aliens' due process rights are at stake.[165] It is those rights that are intended to be protected by the regulations and the statute.

Declining to demand that the INS abide by the rules imposed on it, whether by the Constitution, the statute, or the regulations, would also permit the INS to apply the law in a discriminatory way. Such turning of the eye to the agency's violations may lead to "favoritism and inconsistent application of the law."[166] An alien that makes a good impression could be granted the full extent of procedural protections, while an alien who makes an unfavorable impression on the INS could be injured by not being afforded his rights. The regulations were surely designed to protect all to whom they apply.

The *Accardi* rule ensures fairness and equality in administrative proceedings. Terminating removal proceedings without prejudice is not a drastic measure. It is a required measure that would encourage, and in fact demand, compliance with INS' regulations, the statute and the Constitution, ensuring an equal and consistent opportunity for an alien's claim to be heard. The INS is always free to exercise its prosecutorial discretion and to place an alien in removal proceedings again when and if it chooses to follow the law.

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[165] *Animashaun v. INS*, 990 F.2d 234, 238 (5th Cir. 1993) ("It is clearly established that the Fifth Amendment of the United States Constitution entitles aliens to due process of law in deportation proceedings") (citing *Reno v. Flores*, 507 U.S. 292 (1993)).

[166] *Montilla v. INS*, 926 F.2d 162, 169 (2d Cir. 1991).