

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUADALUPE FLORES-RODRIGUEZ,
Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 19-70177

Agency No.
A072-113-256

OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted February 10, 2021
San Francisco, California

Filed August 16, 2021

Before: Kim McLane Wardlaw and Ronald M. Gould,
Circuit Judges, and James David Cain, Jr.,* District Judge.

Opinion by Judge Gould

* The Honorable James David Cain, Jr., United States District Judge
for the Western District of Louisiana, sitting by designation.

SUMMARY**

Immigration

Granting Guadalupe Flores-Rodriguez’s petition for review of a decision of the Board of Immigration Appeals, and remanding, the panel held that the immigration judge (“IJ”) failed to put Flores-Rodriguez on notice that his alleged false claim of United States citizenship would be at issue during his hearing, and that such failure violated due process by denying Flores-Rodriguez a full and fair hearing.

Flores-Rodriguez, a Mexican citizen, entered the United States with his parents without inspection in 1989 when he was around two years old. When he was later arrested by the Department of Homeland Security (“DHS”) in 2010, he stated that he was a United States citizen and had a United States birth certificate. In immigration proceedings, he sought adjustment of status based on his marriage to a United States citizen, and claimed he never *knowingly* made a false claim to citizenship because he was raised to believe he was a citizen. At a 2012 hearing, the IJ stated that, if DHS pursued a false claim of citizenship charge, and that charge were sustained, Flores-Rodriguez would not be eligible for adjustment.

At a 2014 hearing, the IJ recommended that Flores-Rodriguez testify on the false claim issue. Flores-Rodriguez did so, emphasizing that up until his immigration proceedings, he always believed that he was born in the

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

United States. Flores-Rodriguez's wife and brother also testified to that effect. However, the IJ and BIA concluded that Flores-Rodriguez was ineligible for adjustment on the ground that he was inadmissible for making a false claim to citizenship.

The panel held that Flores-Rodriguez was not put on notice that his alleged false claim of citizenship would be at issue in his 2014 hearing. Rather, by that time, his alleged false claim of citizenship had not been raised by the IJ for two years, and the last time it had been discussed the IJ implied it would only be dispositive if DHS sustained a false claim of citizenship charge against him, but such a charge was never brought. Further, the panel explained that, because Flores-Rodriguez was not given notice, he did not brief the issue before the 2014 hearing, his attorney was not prepared to discuss it in detail, he was unable to provide witnesses or evidence on the matter, and the available witnesses were not prepared to discuss the issue. Specifically, he was unable to submit testimony from his purported midwife, a copy of his United States birth certificate, or his parents' testimony.

The panel further concluded that Flores-Rodriguez had suffered prejudice, explaining that the midwife's testimony alone may have affected the outcome of the case. The panel observed that, if Flores-Rodriguez had been given the chance to present the midwife's testimony, and the IJ found her credible regarding either the actual circumstances of Flores-Rodriguez's birth or the consistency of the story he had been told, the IJ may have reconsidered his determination that Flores-Rodriguez could not and did not believe he was a United States citizen in 2010.

The panel remanded to the BIA with instructions that it hold whatever future proceedings are necessary to ensure due process is given to Flores-Rodriguez before decision is made.

COUNSEL

Karen S. Monrreal-Salazar (argued), Law Offices of Karen S. Monrreal, Reno, Nevada, for Petitioner.

Paul Fiorino (argued) and Nancy Friedman, Senior Litigation Counsel; Ann C. Varnon, Trial Attorney; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

GOULD, Circuit Judge:

Guadalupe Flores-Rodriguez (“Flores-Rodriguez”) appeals the Board of Immigration Appeals’s decision finding him inadmissible under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(ii), because he allegedly falsely represented himself to be a United States citizen to avoid arrest by immigration officials. We have jurisdiction under 8 U.S.C. § 1252(a)(1), and we grant Flores-Rodriguez’s petition for review.

In March 1989, Flores-Rodriguez, a Mexican citizen, entered the United States with his Mexican national parents without inspection. Flores-Rodriguez was around two years old at the time. In 1992, Flores-Rodriguez’s father applied

for asylum. Flores-Rodriguez's father admitted that he entered the United States without inspection in 1989 with his wife and their two minor sons, and listed Flores-Rodriguez as having been born in Mexico in April 1987. In June 1993, Flores-Rodriguez's father was issued an Order to Show Cause and Notice of Hearing charging him, Flores-Rodriguez's mother, Flores-Rodriguez, and Flores-Rodriguez's older brother as deportable. After a hearing in 1994, an Immigration Judge ("IJ") ordered each family member deported. They were granted voluntary departure, but instead chose to stay in the United States under their alternative outstanding deportation orders.

In June 2010, Flores-Rodriguez was arrested by the Department of Homeland Security ("DHS") in Nevada, at the home he lived in with his two sons and their mother, Adria Galindo. During the arrest, Flores-Rodriguez stated that he was a United States citizen and had a United States birth certificate. In June 2010, DHS served Flores-Rodriguez with a Notice to Appear ("NTA"), charging him with removal under 8 U.S.C. § 1182(a)(6)(A)(i) (entry without inspection). At Flores-Rodriguez's November 2010 hearing, he denied the allegations and charges in the NTA.

In March 2011, Flores-Rodriguez married Adria, a United States citizen. At a March 2011 hearing, DHS submitted several documents to prove Flores-Rodriguez's alienage under 8 C.F.R. § 240.8(c). These documents included the 1993 Order to Show Cause, the 1994 IJ order, Flores-Rodriguez's Mexican birth certificate, and his father's 1992 asylum application, in which his father attested that he was born in Mexico and designated Flores-Rodriguez as an alien beneficiary. After the burden shifted to Flores-Rodriguez to rebut DHS's presumption of alienage, his attorney stated that Flores-Rodriguez had "no evidence to

rebut those allegations.” The IJ sustained the factual allegations and charge. After Flores-Rodriguez refused to designate a country for removal, Mexico was designated for him.

In a January 2012 hearing, a new IJ stated that the previous IJ had identified a “possible false claim to United States citizenship.” Flores-Rodriguez, through his attorney, acknowledged that he had “made representations” of being a United States citizen during his 2010 arrest, because he was raised to believe he was a citizen. His attorney also noted that after detaining and interviewing him, ICE “determined that they didn’t think it was appropriate to make a charge of making a false claim of citizenship based upon the circumstances.” At the time of the 2012 hearing, Flores-Rodriguez no longer claimed to be a United States citizen, but argued that he never *knowingly* made a false claim to citizenship and therefore was eligible to apply for adjustment of status based on his marriage to a United States citizen. The IJ informed Flores-Rodriguez and his attorney that “if DHS is pursuing a false claim to citizenship charge, if such a charge were sustained, the respondent wouldn’t be eligible for adjustment of status,” but did not mention the possibility that Flores-Rodriguez’s eligibility would be impacted absent such a charge.

At his hearing in January 2013, Flores-Rodriguez submitted his wife’s approved Form I-130, as well as an application for adjustment of status. DHS asserted that Flores-Rodriguez was not eligible for adjustment of status because of the 2010 entry without inspection charge.

Flores-Rodriguez then filed a motion seeking that the Immigration Court sua sponte reconsider its previous ruling regarding the time, place, and manner of his entry into the United States. At a January 2014 hearing, the IJ denied

Flores-Rodriguez's motion for reconsideration. Flores-Rodriguez did not seek cancellation of removal, admitting he could not satisfy the moral character requirement because he helped his parents unlawfully enter the United States in 2005 and 2008 when he drove them back into the country after trips to Mexico.

The IJ at the 2014 hearing also recommended that Flores-Rodriguez testify regarding whether he made a false claim to United State citizenship and therefore was barred from relief under 8 U.S.C. § 1182(a)(6)(C)(ii). Flores-Rodriguez testified he was born in April 1987, and attended school in Elko, Nevada, and by the time he was seven years old he believed he was born in the United States, because that is what his parents told him. He did not have any memory of the 1994 immigration proceeding and was never told by his family about the related deportation order. In 2001, Flores-Rodriguez used two resident alien cards and a social security card his mother gave him to represent that he was of legal working age. He stated he thought those documents were legal, even though he knew that someone else's signatures appeared on them. He used those documents to obtain employment. He also used the social security card to file taxes.

Flores-Rodriguez's parents gave him his United States birth certificate "as soon as they got it," when he was around 16. He was told the birth certificate was delayed because he had been born in a house, delivered by a midwife from the community, rather than in a hospital. He believed it was genuine and used it for proof of citizenship when needed. Shortly thereafter, Flores-Rodriguez used his false United States birth certificate and social security card to get a Nevada driver's license. Around the same time, he also tried to get a United States passport, but his application was

denied. In 2006, when Flores-Rodriguez went to Mexico, his mother gave him a Mexican birth certificate and told him to show it to Mexican border officials. She told him that he had a Mexican birth certificate because he was a dual citizen. When he returned to the United States, he just showed his driver's license.

From 2004 to 2010, Flores-Rodriguez drove to Mexico several times, and on at least three occasions showed his Nevada driver's license at the border. In 2006, he presented his Nevada birth certificate when he returned to the United States from Mexico.

Over the course of the hearing, Flores-Rodriguez emphasized that up until the immigration proceedings against him, he always believed he was born in the United States. He explained that he still saw himself as a United States citizen, and still believed he was born in Elko. However, he accepted the IJ's ruling that he had not provided sufficient evidence to prove citizenship, and acknowledged the finding that he is a Mexican citizen.

Flores-Rodriguez's wife, Adria, also testified. She stated that she always believed Flores-Rodriguez was a United States citizen because she had seen his birth certificate and social security card, they had bought a house and cars without problem, and he "had a respectable job." Flores-Rodriguez's mother had also told her that he was born in Elko, Nevada, and had gone into detail about the circumstances of his birth. Adria also did not know his parents and older brother were living in the United States without lawful status. She stated that she and her sons would remain in Elko if Flores-Rodriguez was ordered removed.

Flores-Rodriguez's younger brother, Eduardo, also testified. He was born in Elko, Nevada and also thought Flores-Rodriguez was born in Elko.

The IJ issued its decision in February 2014. In its decision, the IJ relied partly on a recording of the deportation hearing that Flores-Rodriguez attended with his parents and older brother. The IJ found that Flores-Rodriguez's Mexican birth certificate was legitimate, and that he possessed fake resident alien cards. Further, the IJ found his denied application for a citizen passport indicated Flores-Rodriguez knew his Nevada birth certificate was not persuasive evidence of United States citizenship. The IJ also noted that Flores-Rodriguez entered the United States from Mexico asserting that he was a United States citizen, and that when he became an adult, he claimed to be a citizen in June 2010, to avoid arrest. The IJ found that Flores-Rodriguez was ineligible for adjustment of status because he could not demonstrate admissibility to the United States for permanent residence.

In March 2014, Flores-Rodriguez filed a Notice of Appeal with the Board of Immigration Appeals ("BIA"). In February 2016, the BIA adopted and affirmed the IJ's decision. The BIA rejected Flores-Rodriguez's due process arguments, stating that the IJ properly resolved Flores-Rodriguez's claims based on the evidence, and that Flores-Rodriguez's hearing was fundamentally fair.

Following the BIA's decision, the Government filed in our court an unopposed motion to remand to the BIA to analyze Flores-Rodriguez's due process claim regarding the admission of a recording of the 1994 hearing, allowing Flores-Rodriguez the chance to address the 1994 tape recording or the IJ to not rely on it as a basis for his decision. We granted the motion.

In December 2018, on remand, the BIA vacated its February 2016 decision, excluded the 1994 audio-taped deportation hearing, and again dismissed the appeal. The BIA held this time that Flores-Rodriguez was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) (falsely claiming citizenship) because he had represented himself as a United States citizen to immigration officials to avoid arrest in June 2010. The BIA reasoned that the evidence showed Flores-Rodriguez could not have reasonably believed, and did not believe, that he was a United States citizen.

The BIA decided to not reach Flores-Rodriguez's argument that a false claim to citizenship under § 1182(a)(6)(C)(ii) must be made knowingly, because the IJ did not clearly err in finding that Flores-Rodriguez's claim that he was born in the United States and became a United States citizen at birth was not credible. The BIA also stated the IJ did not clearly err in making several findings. First, the IJ did not err in finding that by June 2010, Flores-Rodriguez "did not reasonably believe and in fact did not believe" he was a United States citizen, given evidence in the record of a delayed birth certificate from Nevada, a Mexican birth certificate, two fake resident alien cards, and a letter denying his application for a United States citizen passport. Second, the IJ did not err in finding that Flores-Rodriguez's Mexican birth certificate was legitimate and his two fake resident alien cards plus the denied passport application further supported the conclusion that he did not in fact believe he was a United States citizen.

The BIA observed that the IJ had properly weighed the evidence and was entitled to make reasonable inferences from the evidence in the record. The BIA reasoned that even if Flores-Rodriguez at first believed he was a United States citizen, his subsequent misrepresentation of citizenship to

immigration officials, combined with the other evidence, was enough to make him inadmissible. Finally, the BIA held it was not error to conclude Flores-Rodriguez did not meet the exception at 8 U.S.C. § 1182(a)(6)(C)(ii)(II), because his parents are not United States citizens and he admitted he assisted in their unlawful entry into the United States. The BIA was not persuaded by Flores-Rodriguez's remaining due process arguments, because the IJ resolved his claims based on the evidence, and it could not discern any evidence of bias, partiality, or personal animus. The BIA held Flores-Rodriguez completely asserted his claim, and the IJ's rejection of the claim did not constitute impermissible bias. This petition for review followed.

We grant the petition for review of the BIA decision because we conclude that a due process violation occurred, and caused Flores-Rodriguez prejudice.

“When, as here, the BIA conducts an independent review of the IJ's findings, this court reviews the BIA's decision and not that of the IJ.” *Valadez-Munoz v. Holder*, 623 F.3d 1304, 1307–08 (9th Cir. 2010) (quoting *Poblete-Mendoza v. Holder*, 606 F.3d 1137, 1140 (9th Cir. 2010)). We review factual findings for substantial evidence. *Shrestha v. Holder*, 590 F.3d 1034, 1039 (9th Cir. 2010). Under the substantial evidence standard, “administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” *Mairena v. Barr*, 917 F.3d 1119, 1123 (9th Cir. 2019) (quoting 8 U.S.C. § 1252(b)(4)(B)).

We review issues of law de novo. *Shrestha*, 590 F.3d at 1048. We also review constitutional issues de novo. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1246 (9th Cir. 2008).

“[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.” *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000); *see also Reyes-Melendez v. I.N.S.*, 342 F.3d 1001, 1006 (9th Cir. 2003). If an IJ’s actions prevent the introduction of “significant testimony,” that generally violates due process. *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1056–57 (9th Cir. 2005); *see also Kaur v. Ashcroft*, 388 F.3d 734, 737 (9th Cir. 2004) (“[I]t is an IJ’s duty to develop the record fully and fairly.” (citation omitted)). To warrant reversal for a violation of due process, the petitioner must also show prejudice, “which means that the outcome of the proceeding *may* have been affected by the alleged violation.” *Colmenar*, 210 F.3d at 971 (emphasis added).

We hold that Flores-Rodriguez was not put on notice that his alleged false claim of citizenship would be at issue in his 2014 hearing. Notice and an opportunity to be heard are fundamental elements of due process that have been long established in our law. *See e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Contrary to what basic due process requires, no such notice was available here. At Flores-Rodriguez’s 2012 preliminary hearing, the IJ discussed false claims of citizenship only in the context of a possible DHS charge, telling him that *if such a charge were sustained*, he would not be eligible for adjustment of status. At Flores-Rodriguez’s 2013 preliminary hearing—during which the final IJ hearing was scheduled—the issue was not raised at all.

In sum, by the time Flores-Rodriguez had his final hearing in 2014, his alleged false claim of citizenship had not been raised by the IJ for two years, and the last time it had been discussed the IJ implied it would only be

dispositive if DHS sustained a false claim of citizenship charge against him. DHS never even brought such a charge.

Although Flores-Rodriguez was not given notice, his alleged false claim of citizenship was, in the IJ's words, "the main issue" during his 2014 hearing and in the IJ's final decision. Because Flores-Rodriguez was not given notice, he did not brief the issue before the 2014 hearing, his attorney was not prepared to discuss it in detail, and he was unable to provide witnesses or evidence on the matter. The available witnesses were not prepared to discuss the false claim issue.¹ Flores-Rodriguez was not given the chance to prepare other witnesses and evidence addressing his beliefs regarding his United States citizenship. Among other things, Flores-Rodriguez was unable to submit testimony from his purported midwife, a copy of his United States birth certificate, or testimony from his parents, all of which could have aided his argument.

We conclude that the midwife's testimony alone was "significant," and "may" have affected the outcome of the hearing. *Colmenar*, 210 F.3d at 971. If Flores-Rodriguez had been given the chance to present testimony from the midwife, and the IJ found her credible regarding either the actual circumstances of Flores-Rodriguez's birth or the consistency of the story he had been told, the IJ may have reconsidered his determination that Flores-Rodriguez could not and did not believe he was a United States citizen in 2010. This is supported by the fact that the IJ wrote in his written decision that "[t]he claim that [Flores-Rodriguez]

¹ Although Flores-Rodriguez's wife was in fact able to provide some insight on the matter, it seems clear based on conversations in the record that Flores-Rodriguez and his attorney had not intended for or prepared her to testify on the subject.

was born with the assistance of a ‘midwife’ in Elko does not withstand scrutiny, particularly where the ‘midwife’ was a family friend accessible to the respondent, if he wanted to verify the circumstances of his birth.” This implies that if Flores-Rodriguez had asked the midwife about his birth, he would have heard a different story than the one presented at the hearing. But that is unsupported speculation. It is at least as plausible that if Flores-Rodriguez had asked the midwife to “verify the circumstances of his birth,” she would have repeated the story about his home delivery in Elko. The midwife’s testimony could have provided evidence of what she would *actually* say about the circumstances of Flores-Rodriguez’s birth.

The IJ’s failure to put Flores-Rodriguez on notice of this central issue in his case denied him “a full and fair hearing” by preventing him from submitting significant testimony and other evidence. *Colmenar*, 210 F.3d at 971. Because the IJ’s conduct potentially affected the outcome of the proceedings, Flores-Rodriguez has also suffered prejudice. *Id.* For these reasons, a due process violation warranting reversal has occurred.

We express no opinion whether, if Flores-Rodriguez had received notice and defended against the claim that he had made false claims of citizenship, he would have likely prevailed or to the contrary been held inadmissible. But what is of signal importance in our system of justice is that when a person is charged with a crime or charged with allegations warranting removal from the country, that person is fairly entitled to notice of the claims against him and an opportunity to be heard in opposition. Because that opportunity was not given here, we grant the petition and remand to the BIA with instructions that it hold whatever

future proceedings are necessary to ensure due process is given to Flores-Rodriguez before decision is made.

PETITION FOR REVIEW GRANTED.