

FOREWORD

WHY IS FOIA IMPORTANT FOR YOUR TOOLKIT?: AN ANECDOTE

by Mark A. Prada*

Knowing where and how to find information is crucial to defending your clients' interests. This is even more so in the world of immigration defense where the agency often holds the keys to crucial knowledge about your case, but forswears any obligation to share it with you. Ethics and the dictates of rules directly on point—such as the one codified at 8 CFR § 1240.2(a)—be damned.

The need to aggressively pursue information can be demonstrated by anecdote. I once had a client, let's call her Lidia, whom I first met shortly after she was detained by CBP for daring to ride a Greyhound bus to visit family. As she had first entered the United States without inspection in the late 1980s, we were able to obtain a reasonable (for the detention center in question) bond given that she was eligible for relief under NACARA,¹ under INA §245(i), and for non-LPR cancellation. What needed more investigation was her claim that she had left the country and was admitted as a tourist some time before the enactment of IIRAIRA.²

To recount a story too crazy to not be true, Lidia had married a citizen during the early 90s and they had a child together. In an effort to provide Lidia with LPR status prior to the advent of unlawful presence bars, her husband filed an I-130 petition to set Lidia up for consular processing. Unfortunately, upon her departure abroad, Lidia's husband decided to divorce her and keep the child to himself.

Undeterred, Lidia assumed a false identity in her home country and obtained a new birth certificate and passport. (She even owns some land with ganado on it under her assumed identity!) Using her new paperwork, Lidia obtained a tourist visa from the consular post, and was thereafter admitted to the United States. The problem was that Lidia lost her passport with the admission stamp and the I-94 many years prior.

Luckily, Lidia still possessed identification under her assumed identity. We were able to have an attorney obtain travel records from the home country's appropriate ministry so we could know the date she flew into the United States. With this information, we filed requests under the Freedom of Information Act (FOIA), 5 USC § 552, with a slew of agencies—USCIS, CBP, OBIM, and the Department of State—and also filed a Form I-102 with USCIS for a replacement I-94.

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¹ Nicaraguan and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2193 (1997), *amended* by Pub. L. No. 105-139, 111 Stat. 2644 (1997).

² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, tit. III, subtit. A, 110 Stat. 3009-546.

Before the immigration judge, we asserted that Lidia had been admitted, to ensure her eligibility for 245(i) relief.³ This point was necessary to demonstrate when and how she reentered the United States to show that she was not subject to INA § 212(a)(9)(C)'s permanent bar. We demanded that the DHS be ordered to produce Lidia's admission records under the authority of INA §§ 240(c)(2) and 291, and *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010). Being outside the Ninth Circuit, the IJ essentially told us to kick rocks, but that he would he generously allow us all the continuances we needed. (I like to think that my argument about how DHS has a practice of constantly and flagrantly violating its statutory duty to respond to FOIA requests within 20 or 30 business days, 5 USC § 552(a)(6)(A)(i) and (B)(i), had something to do with it.)

Well, after several master hearings, dead ends, stonewalling, and the exhaustion of administrative FOIA appeals, the DHS component agencies gave up nothing. USCIS even denied the I-102 application by citing to 8 CFR § 101.2 as requiring it to only produce copies of "lawful admissions," and defining a "lawful admission" as one under a noncitizen's full true and correct name.

The light at the end of the tunnel was the State Department's acknowledgment that it found my client's visa records under her assumed name while declining to release copies of those records pursuant to INA § 222(f). Relying upon the provisions of 9 FAM 603.2-3(b) and (c)(a)(2), we administratively appealed this issue, and State produced the first piece of valuable information we could get our hands on: the visa number, foil number, visa type, and date of issuance.

And then we sued.

We sued the appropriate Service Center Director under the Administrative Procedure Act, 5 USC § 701 et seq., with respect to the I-102 denial, and we sued each and every DHS component agency that failed to give us what we wanted. (Under FOIA, you sue the agency itself, not a specific officer.) We had the option of choosing the District for the District of Columbia as our venue, 5 USC § 552(a)(4)(B), but we opted for our local district.

Fortunately, the matter settled. DHS did not want to give up a replacement I-94 because they didn't want to admit that my client was the person admitted under the assumed name. (Mind you, the photo ID under the assumed name was definitely my client.) But they gave us proof of the admission in the form of a printout of a "TECS - I94 Document Detail,"⁴ and stipulated in writing that "USCIS acknowledges that CBP has produced these documents, and agrees to recognize the authenticity of the CBP produced documents, and of any true and accurate copies thereof."

And then we made our case. Rather than move forward with relief and a hardship waiver request under INA § 212(i) before the IJ (with the attendant risk of removal if relief were denied), we convinced the IJ to terminate proceedings because Lidia was improperly charged as being inadmissible for being present without admission. Thus, in addition to using FOIA to clobber DHS counsel, we obtained a cool ruling from the IJ that an admission procured through fraud was

³ We had determined that Lidia was ineligible for NACARA adjustment given that the length of her time abroad broke the requisite continuous physical presence.

⁴ The Privacy Impact Assessment (PIA) for the TECS System is available at <https://www.dhs.gov/sites/default/files/publications/DHS-PIA-ALL-021%20TECS%20System%20Platform.pdf>. In addition to PIAs, agencies also publish System of Records Notices (SORNs) in the Federal Register. Reviewing PIAs and SORNs is a good way to familiarize yourself with the various databases that the agencies use, and can help you to refine and weaponize your FOIA requests.

still a procedurally lawful admission even though it was not substantively lawful (see *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010)), and Lidia was then free to pursue adjustment before USCIS.