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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Special Concurrence

PREGERSON, Circuit Judge.

I concur in Judge Noonan's memorandum disposition. But I write separately to emphasize how immigration officials treated Nguyen in disregard of the law and to highlight the unusual circumstances that surround his plight.

Hai Huu Nguyen is a man of slight build, standing five feet, eight inches tall and weighing 110 pounds. On the evening of Friday, May 5, 2000, Nguyen went out with friends in San Diego, his hometown. Nguyen drank at least seven bottles of beer. Sometime later that night, Nguyen's friends decided to drive to Tijuana, Mexico.

At the time his friends decided to drive to Tijuana, Nguyen was drunk. Because of his condition, Nguyen did not know that his friends had decided to leave San Diego and travel to Tijuana. Nguyen testified, "I didn't want to go to Mexico, but . . . . my friends took me there and I didn't know." Nguyen also did not know when he and his friends actually arrived in Mexico. While in Mexico, Nguyen and his friends continued to consume alcohol. Nguyen recalls very little about that night, except that he fell asleep at a bar. He is unsure if he lost consciousness.

Early the following morning, Nguyen's friends decided to return to California. Less than twenty-four hours after he had been driven out of San Diego,

at about 7:15 A.M., Nguyen arrived at the San Ysidro port of entry. He was asleep in the backseat of the car. When his friend's car approached the inspection booth, Nguyen was awakened and questioned by U.S. authorities. At the hearing before the IJ, Nguyen testified through a Vietnamese interpreter that he was abruptly awakened at the inspection booth and that his friends told him to "say that you are a citizen" "so [that] you can go home." This is what Nguyen did. He was then referred to secondary, where immigration officials determined that Nguyen, although residing legally in the U.S., was not a citizen. He was then arrested.

Later that same day, May 6, 2000, Nguyen recanted the statement that he was a U.S. citizen and was later admitted into the United States on humanitarian parole. Nguyen was charged with removability on two grounds: (a) pursuant to 8 U.S.C. § 1182(a)(6)(C)(ii), as an alien who falsely represented himself to be a citizen of the United States; and (b) pursuant to 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an alien not in possession of a valid, unexpired visa when he crossed the border from Tijuana to San Ysidro.

The government argued that Nguyen was inadmissible for falsely claiming U.S. citizenship to a border guard. The State Department Foreign Affairs Manual ("Foreign Affairs Manual") states that an alien taken into custody under suspicion of a false citizenship claim "shall be warned of the penalty imposed"–that is,

notified of the severe consequences of making such a misrepresentation–"at the outset of every initial interview." See 17-1 For. Aff. Man. - Visas 40.63, N4.3, N4.6. An alien must also be afforded the opportunity to make a timely retraction.

Nowhere does the record show that immigration officials notified Nguyen of the consequences of his statement that he was a U.S. citizen; instead, the record shows only that Nguyen timely retracted his statement that same day. The IJ's finding that Nguyen was inadmissible because he falsely claimed citizenship was manifestly contrary to law because nowhere does the record show that immigration officials (a) notified Nguyen of the severe consequences of misrepresenting his citizenship status; and (b) afforded Nguyen the opportunity to timely retract his statement.

Nguyen was born in 1971 in Saigon, Vietnam, where he completed twelve years of schooling. At about 17 or 18 years of age, after he had completed his schooling, Nguyen helped his mother sell used clothing in an open street market in Saigon. Nguyen testified that, before he and his family immigrated to the United States, Nguyen's father, Quan Huu Nguyen, worked as an interpreter and driver for RMK: Raymond International, Morrison-Knudsen.[1] RMK was an American

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[1] Nguyen testified before the IJ that his father's employer was "the U.S. firm . . . RMK." When asked what the initials "R.M.K." stood for, Nguyen could

(continued...)

construction engineering company which, beginning in 1962, was charged with building up the infrastructure of South Vietnam before and during the Vietnam War.[2]

On May 20, 1992, Nguyen, his parents, and his four siblings were granted parole into the United States for an indefinite period of time "in the public interest," pursuant to 8 U.S.C. § 1182(d)(5) (authorizing the Attorney General "in his discretion [to] parole into the United States temporarily under such conditions

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[1](...continued)
not recall. While the record shows that Nguyen's mother was not ultimately called to testify, Nguyen's attorney made the following offer of proof, which the IJ accepted into evidence:

> "[Nguyen's] father had to hide the fact that [Nguyen's father] worked for [the] American company. . . . [RMK] was an American construction company and after the communists took over[,] [Nguyen's] father had to hide [this] fact . . . because otherwise he would have been considered a traitor and they would have sent him to reeducation camp."

The attorney emphasized that Nguyen's mother's testimony was particularly important because Nguyen was "so young when the communists took over in 1975 [that the mother would] have a better recollection of what happened" to Nguyen's family.

[2] See Carter, James M. The Vietnam Builders: Private Contractors, Military Construction and the 'Americanization' of United States Involvement in Vietnam. Graduate Journal of Asia-Pacific Studies 2:2 (2004), pp. 45-46, *available at* http://www.arts.auckland.ac.nz/FileGet.cfm?ID=acbc4dd9%2D7373%2D49ad%2D9de1%2Dec137860b703 (PDF).

as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States.”). Nguyen entered the United States with his family on or about May 25, 1992.

Nguyen has lived in the United States for more than ten years. He possesses limited proficiency of the English language and cannot testify in court without the assistance of an interpreter. He has worked multiple technical assembly jobs to make a living. Nguyen’s mother, father and two of his siblings are U.S. citizens. Were it not for Nguyen’s misrepresentation—which he retracted on the same day it was made—he may well be a permanent resident today. Were it not for the fact that immigration officials failed to warn Nguyen of the penalty resulting from such a misrepresentation, thereby violating the Foreign Affairs Manual, Nguyen may well be more than a permanent resident today–he might have become a citizen.

Upon remand, I would hope that our compassionate government would consider Nguyen’s background, that his encounter with the border guard was guileless, that his entire family lives in the United States, and that his father, Quan Huu Nguyen, placed himself and his family in harm’s way by working as a driver and an interpreter for RMK, an American construction company charged with building up the infrastructure of South Vietnam before and during the Vietnam war.