

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OSCAR OLIVAS,

Petitioner,

v.

BILLY WHITFORD, Port Director of
Calexico West Port of Entry, Customs
and Border Protection; PETE FLORES,
Director of Field Operations, San Diego
Field Office, Customs and Border
Protection; R. GIL KERLIKOWSKE,
Commissioner of Customs and Border
Protection; JEH JOHNSON, Secretary
of Homeland Security; JOHN KERRY,
Secretary of State,

Respondents.

Case No.: 14-cv-1434-WQH-BLM

ORDER

HAYES, Judge:

The matters before the Court are the Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief filed by Petitioner (ECF No. 1) and the Motion to Supplement the Record filed by Respondents (ECF No. 235).

I. PROCEDURAL BACKGROUND

On June 12, 2014, Petitioner filed a “Petition for a Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief,” naming as Respondents two local

1 Customs and Border Patrol (CBP) officials, the Commissioner of the CBP, the Secretary
2 of Homeland Security, and the Secretary of State. (ECF No. 1). Petitioner brings a claim
3 for habeas relief pursuant to 28 U.S.C. § 2241 on the grounds that he is “a natural-born
4 U.S. citizen” who was “unlawfully exiled to Mexico” when “CBP officials unlawfully
5 refused to allow him to enter the United States.” *Id.* ¶¶ 1–2. Petitioner brings the following
6 four claims: (1) Right of U.S. Citizen to Return to United States under the Fifth and
7 Fourteenth Amendments and the Non-Detention Act; (2) Right of U.S. Citizen Against
8 Unlawful Detention under the Fifth and Fourteenth Amendments and the Non-Detention
9 Act; (3) Violation of Fifth Amendment (Procedural Due Process); and (4) Violation of
10 Fifth Amendment (Substantive Due Process). Petitioner asserts jurisdiction under § 2241,
11 “§ 1331 (federal question),” “§§ 2201–02 (declaratory relief),” “Federal Rule of Civil
12 Procedure 65 (injunctive relief), and the Fifth and Fourteenth Amendments to the U.S.
13 Constitution.” *Id.* at 4. Petitioner requests that this Court: “Issue a writ of habeas corpus
14 ordering Defendants to allow Plaintiff to enter the United States without detaining him,”
15 “Declare the Plaintiff is a U.S. citizen,” “Declare that any order directing or authorizing
16 Plaintiff’s removal from the United States was entered in violation of the Due Process
17 Clause of the Fifth Amendment and/or other applicable law and is therefore null and void,”
18 and “Enjoin Defendants and their officers, agents, servants, employees, attorneys, and/or
19 successors from prohibiting Plaintiff from entering the United States and/or detaining him
20 at or after such entry” *Id.* at 20–21.

21 On June 16, 2014, the Court ordered Respondents to show cause why the Petition
22 should not be granted. (ECF No. 5).

23 On July 8, 2014, Respondents filed a return to the Petition. (ECF No. 12). In the
24 Return, Respondents allege that “[o]n December 17, 2010, Petitioner’s mother, Ms. Olivas-
25 Cervantes, was interviewed by a consular officer at the U.S. Consulate in Ciudad Juarez,
26 Mexico.” *Id.* at 2. “During the interview, Ms. Olivas-Cervantes signed an affidavit stating
27 that Petitioner was not born in Los Angeles, but was born in a clinic in Tijuana, Mexico.”
28 *Id.* at 3. “On or about August 22, 2011, Petitioner applied for admission to the United

1 States at the Calexico Port of Entry, claiming he was a U.S. citizen.” *Id.* at 4. “The CBP
2 officer who was processing Petitioner’s application for admission prepared documentation
3 to commence removal proceedings before an Immigration Judge (‘IJ’) . . . [t]wo notices to
4 Appear (‘NTA’) were prepared, and both appeared to have been ‘cancelled,’ under 8 C.F.R.
5 § 239.2 prior to the commencement of proceedings.” *Id.* at 5.

6 On July 22, 2014, Petitioner filed a traverse. (ECF No. 15).

7 On August 14, 2014, the Court issued an amended Order denying a motion to dismiss
8 the Petition, referring the matter for expedited discovery, and stating, “The Court finds that
9 the Petition adequately alleges a colorable claim of citizenship, and subject-matter
10 jurisdiction exists in this Court.” (ECF No. 23).

11 On March 2, 2015, the Court denied a motion to dismiss filed by Respondents on
12 the ground that 8 U.S.C. §1252(e)(3) deprives the Court of subject matter jurisdiction. The
13 Court found that judicial review of Petitioner’s claim is not precluded by § 1252(e)(3)
14 “because it is not a challenge to the validity of expedited removal proceedings” and “[t]here
15 is no allegation that a removal proceeding took place or that an order was issued.” (ECF
16 No. 72 at 13).

17 In August of 2015, the parties filed supplemental briefing regarding the standard and
18 burden of proof. (ECF Nos. 96, 99, 102, 104, 105, 108). On November 2, 2015, the Court
19 issued an Order ruling on motions in limine and stating:

20 Petitioner has asserted a non-frivolous claim of U.S. citizenship and this Court
21 has jurisdiction pursuant to 28 U.S.C. § 2241 over Petitioner’s habeas petition
22 challenging his exclusion from the United States. *See Flores-Torres v.*
23 *Mukasey*, 548 F.3d 708, 712–13 (9th Cir. 2008) (finding that the court had
habeas jurisdiction where petitioner challenged his detention in the absence
of a final order of removal).

24 Pursuant to 28 U.S.C. § 2243, Petitioner is entitled to an evidentiary hearing
25 to prove the disputed fact that he was born in El Monte, California and that he
26 is entitled to an order allowing him to enter and remain in the United States.
The Court will hold an evidentiary hearing to “summarily hear and determine”
27 the disputed fact of petitioner’s place of birth and citizenship. 28 U.S.C. §
28 2243.

1 Petitioner bears the burden of establishing, by a preponderance of the
2 evidence, that he is being unlawfully excluded from the United States because
3 he is a citizen of the United States by birth. *See Snook v. Wood*, 89 F.3d 605
4 (9th Cir. 1996) (“It is the petitioner’s burden to prove his custody in violation
5 of the Constitution, laws or treaties of the United States.”). *See also Berenyi*
6 *v. District Director, Immigration & Naturalization Serv.*, 385 U.S. 630, 670–
7 71 (1967) (finding that when a person outside of the United States seeks a
8 declaration of citizenship, “[h]e is the moving party, affirmatively asking the
Government to endow him with all the advantages of citizenship. . . . [I]t has
been universally accepted that the burden is on the alien applicant to show his
eligibility for citizenship in every respect.”).

9 (ECF No. 126 at 3–4). The Court further noted,

10 In the immigration context the government brings the action to remove a non-
11 citizen who is currently residing in the United States or to expatriate a current
12 citizen and therefore the burden of proof may shift to the government. *See*
13 *e.g., Perez v. Brownell*, 356 U.S. 44, 47 n. 2 (1958) (“The Government must
14 prove the act of expatriation on which the denial [of a declaration of
15 nationality] was based by ‘clear, unequivocal, and convincing’ evidence . . .
16 .” (internal citations and quotation marks omitted)); *Lim v. Mitchell*, 431 F.2d
17 197, 199 (9th Cir. 1970) (shifting the burden from Plaintiff to the government
to rebut Plaintiff’s evidence of citizenship when Plaintiff was living in the
United States and had previously been given a certificate of identity as a
citizen after a hearing before the Board of Special Inquiry).

18 *Id.* at 4 n.1. The Court held a four-day evidentiary hearing beginning on November 12,
19 2015. (ECF Nos. 135, 137–39).

20 On June 28, 2016, the Court denied the Petition, concluding that “Petitioner has not
21 met his burden to prove that he is being unlawfully excluded from the United States
22 because he is a citizen of the United States by birth.” (ECF No. 167 at 39).

23 On August 16, 2017, the Court ordered entry of judgment in favor of Respondents
24 and against Petitioner as to all claims in this action, concluding that the Court lacked
25 jurisdiction over the remaining claims. (ECF No. 212).

26 On November 29, 2018, the Court of Appeals vacated this Court’s August 16, 2017
27 Order, stating, “The district court erred in requiring Olivas to bear the burden of proving
28 his citizenship by a preponderance of the evidence. Instead, as we held in *Mondaca-Vega*

1 *v. Lynch*, a burden-shifting framework applies in alienage determination cases.” *Olivas v.*
2 *Salazar*, 743 F. App’x 890, 890–91 (9th Cir. 2018) (citing *Mondaca-Vega v. Lynch*, 808
3 F.3d 413 (9th Cir. 2015)); ECF No. 230 (same). The Court of Appeals remanded to this
4 Court to weigh the evidence using the *Mondaca-Vega* framework, “in which the
5 government presents evidence of alienage, the petitioner responds with substantial credible
6 evidence of citizenship, and then the burden shifts back to the government to prove alienage
7 by clear and convincing evidence.” *Id.* at 891. The Court of Appeals rejected the
8 government’s argument that *Mondaca-Vega* applies only in removal proceedings, not in
9 this action for habeas and declaratory relief. *Id.* at 890 n.1. The Court of Appeals stated,

10 Olivas was served with a Notice to Appear (“NTA”), which should have
11 triggered a hearing before an immigration judge. But because the government
12 failed for over two years to file the NTA with the immigration court, no
13 hearing was ever scheduled. After repeated unsuccessful attempts to inquire
14 about the status of his hearing, on June 12, 2014, Olivas filed this suit seeking
15 determination of his citizenship status. . . .

16 [T]he government concedes that had it commenced removal proceedings by
17 filing the NTA, as it admits at oral argument that it was required to do, *see* 8
18 C.F.R. §§ 1235.3(b)(5), 1235.6, 1003.13, 1003.14(a), *Mondaca-Vega* would
19 squarely control. Olivas claims that for two years, he called the government’s
20 hotline number weekly, and visited the border at least seven times, to inquire
21 about a hearing. He claims that agents threatened him with detention if he
22 persisted. The government may not benefit from its own negligence.

19 *Id.* at 890 & n.1.

20 On May 8, 2019, Respondents filed the Motion to Supplement the Record, on the
21 grounds that additional evidence is necessary to identify the correct basis of subject matter
22 jurisdiction and apply the burden-shifting framework on remand. (ECF No. 235).

23 On May 9, 2019, Respondents filed supplemental briefing on the Petition. (ECF No.
24 238).

25 On May 22, 2019, Petitioner filed a response in opposition to the Motion to
26 Supplement the Record. (ECF No. 242).

1 On May 22, 2019, Petitioner filed a response in opposition to Respondents'
2 supplemental briefing on the Petition. (ECF No. 241).

3 On June 19, 2019, Respondents filed a reply in support of the Motion to Supplement
4 the Record. (ECF No. 246).

5 On June 19, 2019, Respondents filed a reply in support of their supplemental briefing
6 on the Petition. (ECF 247).

7 On July 11, 2019, the Court heard oral argument. (ECF No. 248).

8 **II. MOTION TO SUPPLEMENT THE RECORD**

9 Respondents request that the Court admit for all purposes, under the residual hearsay
10 exception of Federal Rule of Evidence 807(a), the affidavit signed by Delia Perez,
11 Petitioner's mother, at the U.S. Consulate in Ciudad Juarez on December 17, 2010 (the
12 Juarez Statement), which the Court previously admitted for impeachment purposes only.¹
13 Respondents contend that the Court should receive additional documents because the Court
14 of Appeals "changed the basis of subject matter jurisdiction and flipped the burden of
15 proof." (ECF No. 246 at 2). Respondents contend that the requirements of the residual
16 hearsay exception are satisfied because the Juarez Statement has numerous equivalent
17 circumstantial guarantees of trustworthiness and contains direct, freestanding evidence of
18 the material fact of Petitioner's birthplace. Respondents contend that admitting the Juarez
19 Statement is in the interest of justice because the State of California amended Petitioner's
20 birth certificate to indicate the falsity of Petitioner's original birth certificate based on the
21 Juarez Statement. Respondents contend that the conclusion of the Court of Appeals, that
22 this Court did not abuse discretion by admitting the Juarez Statement for impeachment
23 only, "is *orbiter dictum* and lacks context" because neither party challenged this Court's
24

25
26 ¹ Rule 807(a) provides: "Under the following circumstances, a hearsay statement is not excluded by the
27 rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803
28 or 804: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as
evidence of a material fact; (3) it is more probative on the point for which it is offered than any other
evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the
purposes of these rules and the interests of justice." Fed. R. Evid. 807(a).

1 evidentiary rulings on appeal. *Id.* Respondents assert that the Juarez Statement is more
2 probative than Perez’s trial testimony because the Juarez Statement occurred when Perez
3 “was caught off guard, after forty years, when confronted with the inconsistencies in the
4 birth registration and her story about the circumstances of [Petitioner’s] birth.” *Id.* at 6.

5 Petitioner contends that Respondents waived the argument that the Juarez Statement
6 satisfies the residual hearsay exception by failing to raise the residual hearsay exception
7 before this Court or the Court of Appeals. Petitioner contends that Respondents are
8 precluded from pursuing the residual hearsay exception at this stage in the litigation.
9 Petitioner contends that the conclusion of the Court of Appeals, that this Court did not
10 abuse discretion by admitting the Juarez Statement for impeachment only, constitutes the
11 law of the case. Petitioner contends that no departure from the law of the case is justified
12 under the circumstances. Petitioner contends that the residual hearsay exception
13 requirements are not satisfied. Petitioner asserts that the affidavit is not more probative
14 than any other evidence because Perez was available to testify and did testify. Petitioner
15 contends that admitting the affidavit is not in the interests of justice because Respondents
16 had the opportunity to investigate and prove its case and failed to produce evidence of
17 foreign birth.

18 In addition, Respondents request that the Court admit documents related to the
19 CBP’s August 23, 2011 determination that Petitioner was inadmissible; in particular, the
20 cover page, form I-860, form I-296, form I-862, form I-213, and a TECS printout.²
21 Respondents assert that they seek admission of the documents “to establish the basis of this
22 Court’s subject matter jurisdiction and not for the truth of the matters stated therein.” (ECF
23 No. 235-1). Respondents contend that the documents demonstrate that the exclusive basis
24 of the Court’s jurisdiction in this case is 8 U.S.C. § 1252(e)(2)(A) by showing that
25

26
27 ² “[T]he Treasury Enforcement Communication System (‘TECS’) . . . is an investigative tool of the
28 Department of Homeland Security that keeps track of individuals entering and exiting the country and of
individuals involved in or suspected to be involved in crimes.” *United States v. Cotterman*, 709 F.3d 952,
958 & n.3 (9th Cir. 2013).

1 Petitioner was processed for expedited removal proceedings pursuant to a determination of
2 inadmissibility. Respondents contend that the documents are now relevant to subject
3 matter jurisdiction because the Court of Appeals “has, in effect, reversed this Court’s prior
4 ruling” that subject matter jurisdiction is proper under general § 2241 habeas. (ECF No.
5 246 at 4). Respondents contend that the records are admissible as administrative records.
6 Respondents assert that the entire administrative record was identified in the pretrial order,
7 and that Respondents seek to admit documents selected from that record.

8 Petitioner contends that the Court should not admit the documents because
9 Respondents had a full and fair opportunity to offer all available evidence regarding
10 Petitioner’s citizenship, and the Court ordered Respondents to do so. Petitioner contends
11 that the references to *Mondaca-Vega* and an expedited removal regulation in the remand
12 order do not convert this case into a proceeding for review of an expedited removal order.
13 Petitioner asserts that the references confirm that Petitioner is entitled to a de novo judicial
14 determination of citizenship. Petitioner asserts that Respondents did not previously
15 advance an expedited removal theory or properly identify the documents. Petitioner asserts
16 that he was determined inadmissible and “released to Mexico” without any sort of removal
17 order. Petitioner asserts that the Court of Appeals confirmed, and Respondents
18 acknowledged on appeal, that Petitioner was not in removal proceedings. Petitioner asserts
19 that the Court previously determined at the evidentiary hearing that the I-213 and TECS
20 printout were not admissible for the truth of the matter asserted. Petitioner contends that
21 the documents are inadmissible because they are irrelevant, lack foundation, and contain
22 multiple levels of hearsay. Petitioner contends that the business records hearsay exception
23 does not apply to government agency records and the public records exception does not
24 apply to statements of third parties without a legal duty to report.

25 The Court of Appeals has stated that “a district court is limited by this court’s remand
26 in situations where the scope of the remand is clear.” *Mendez-Gutierrez v. Gonzales*, 444
27 F.3d 1168, 1172 (9th Cir. 2006). In remanding this case, the Court of Appeals directed this
28 Court “to apply the burden-shifting framework set forth in *Mondaca-Vega*” for purposes

1 of determining whether Petitioner is an “alien.” *Olivas*, 743 F. App’x at 891. The Court
2 of Appeals further stated, “The district court did not abuse its discretion in admitting Delia
3 Perez’s out-of-court statement solely for impeachment purposes. In the district court and
4 now on appeal, the government has identified no hearsay exception that would apply.” *Id.*

5 The Court finds that the scope of the remand is clear and limited to weighing the
6 evidence in accordance with *Mondaca-Vega*. *Cf. Abdulrafi v. Lockyer*, 121 F. App’x 226,
7 227 (9th Cir. 2005) (stating expressly that appellant was permitted to supplement the
8 record; remanding to the district court “to reconsider its denial of Abdulrafi’s petition in
9 light of this new evidence”); *see also Creech v. Ramirez*, No. 1:99-CV-00224-BLW, 2017
10 WL 1129938, at *11 (D. Idaho Mar. 24, 2017) (“[T]his case is before this Court on a limited
11 remand. It is not a free-for-all. Specifically, there is no language in the Ninth Circuit’s order
12 suggesting that the Court of Appeals empowered this Court to reopen the record and accept
13 additional, post-remand evidence.”). In addition, the transcript of the October 22, 2015
14 hearing reflects the following statements regarding the burden of proof and the presentation
15 of evidence:

16 THE COURT: And what I would envision is that . . . the petitioner would
17 go forward with all the evidence that you have, whatever evidence that you
18 have that you think is relevant to your burden, you put it all on; you don’t hold
19 anything back; you put everything on that you think you should put on, and
20 then the respondent goes forward; they put on all the evidence that they have,
21 and then at the conclusion, if you have any rebuttal you put that on.

22 And then at some point I would indicate, all right, here’s the legal matter;
23 here’s the burden that you had; and whether it is I agree with the Government
24 or I agree with you, it is either you have met it or you haven’t met it, and it is
25 not the case that that is going to have any impact on the presentation of
26 evidence.

27 If you have a burden, you go forward with all the evidence that you have, and
28 then Mr. Bettwy, he puts on evidence that he puts on, and if you have rebuttal,
you put it on . . . whether I agree with the Government or I agree with you[,] that that legal determination would not affect the presentation of evidence. Do you agree?

MS. RIVERA: I agree with that, Your Honor.

THE COURT: Do you agree, Mr. Bettwy?

MR. BETTWY: Yes, Your Honor.

1 THE COURT: All right. . . . I wanted to avoid . . . a situation where petitioner
2 puts their case on, the Government -- respondent puts their case on, and
3 suppose there is no rebuttal, and then I conclude -- suppose I was to conclude
4 that the Government was right. What I didn't want to happen is the petitioner
5 would be in the position to say, oh, wait a minute, I didn't think that; we
6 thought we had the burden to go forward with some evidence; we went
7 forward with some evidence, and then the burden shifted to them, and had we
8 known that you were going to put the burden on us for the entirety of the case,
9 we had this other evidence we would have put on, and, you know, we were
10 misled by your, you know, your failure to rule. And so I don't want there to
11 be, you know, misunderstanding

[I]s it fair to say that petitioner is in agreement that it doesn't matter with
12 respect to the presentation of evidence whether the Court determines the
13 Government is right on the burden or the Court determines the petitioner is
14 right on the burden. That legal decision obviously may affect the outcome of
15 the case, but it will not have any impact on the presentation of the evidence.
16 Do you agree?

17 MS. RIVERA: That's right, Your Honor, with respect to the presentation of
18 evidence at trial.

19 THE COURT: You agree as well, Mr. Bettwy?

20 MR. BETTWY: I believe -- yes, Your Honor. With respect -- from the
21 Government's point of view, I suppose I would be thinking wors[t] case
22 scenario is we have the burden of proving by clear and convincing evidence,
23 but it would not affect -- we wouldn't be holding back with that thought
24 otherwise

25 (ECF No. 222 at 31–33). The record reflects that the parties have had the opportunity to
26 present all available evidence and agreed that the burden of proof would not affect the
27 presentation of the evidence. The record reflects that the Court declined to consider the
28 Juarez Statement or the I-213 report for the truth of the matter asserted. *See* ECF 167 at
36 n.11; ECF No. 147 at 26:12–13. The record does not provide grounds to disturb the
Court's previous evidentiary rulings. The record does not provide grounds to depart from
the Court's previous orders stating that subject matter jurisdiction in this matter is pursuant
to § 2241, based on Petitioner's non-frivolous claim of U.S. citizenship and the absence of
a final order of removal. *See* ECF No. 126 at 3. The mandate of the Court of Appeals does

1 not require reconsideration of evidentiary rulings or subject matter jurisdiction in this case.
2 Respondent's motion to supplement the record is denied.

3 III. ANALYSIS ON REMAND

4 Respondents contend that the government's burden of proof at the first step of the
5 *Mondaca-Vega* framework, in the context of this case, has not been established by case
6 law. Respondents contend that the government's initial burden is necessarily less than
7 clear and convincing evidence because the government usually bears the burden of clear
8 and convincing evidence when removing or deporting a person, and the government
9 usually bears no burden of proof when a person seeks admission to the United States.
10 Respondents contend that the government's initial burden is necessarily less than clear and
11 convincing evidence because, in cases analogous to this case, the government bears a clear
12 and convincing evidence burden only when there has been a prior determination of
13 citizenship. Respondents contend that the Court of Appeals necessarily agreed with this
14 Court's conclusion that there was no prior citizenship determination in this case.
15 Respondents contend that, if there was a prior citizenship determination, the Court of
16 Appeals would have remanded for Respondents to prove that Petitioner is not a citizen by
17 clear and convincing evidence, rather than remanding for application of the *Mondaca-Vega*
18 framework. Respondents contend that the government's burden in this case is satisfied by
19 Petitioner's judicial admissions and the evidence on the record.

20 Petitioner contends that the first step of the *Mondaca-Vega* framework requires the
21 government to provide direct admissible evidence that Petitioner was born in Mexico.
22 Petitioner contends that there is no legal distinction between deportation proceedings and
23 inadmissibility proceedings; rather, both deportation and exclusion occur in removal
24 proceedings, in which the government has the burden of proof by clear and convincing
25 evidence. Petitioner contends that this Court's conclusion that there was no prior
26 citizenship determination was necessarily displaced because the Court of Appeals cited *Lee*
27 *Hon Lung v. Dulles*—a case in which the government had the burden of proof of clear and
28 convincing evidence because there was a prior citizenship determination. (ECF No. 241

1 at 42–43 (citing 261 F.2d 719, 724 (9th Cir. 1958))). Petitioner contends that Respondents
2 fail to carry the government’s burden of clear and convincing evidence because the
3 evidence in this case is scant, indirect, and inconclusive. Petitioner contends that
4 impeaching testimony that Petitioner was born in the United States does not provide
5 evidentiary value in support of the government’s case. Petitioner contends that any absence
6 of evidence cuts against Respondents, who bear the burden of proof at this stage in the
7 litigation.

8 Once a petition for a writ of habeas corpus is filed in federal court pursuant to 28
9 U.S.C. § 2241, the court must comply with the procedures set forth by 28 U.S.C. § 2243:

10 A court, justice or judge entertaining an application for a writ of habeas corpus
11 shall forthwith award the writ or issue an order directing the respondent to
12 show cause why the writ should not be granted, unless it appears from the
13 application that the applicant or person detained is not entitled thereto. . . .

14 The person to whom the writ or order is directed shall make a return certifying
15 the true cause of detention. . . .

16 The applicant or the person detained may, under oath, deny any of the facts
17 set forth in the return or allege any other material facts.

18 The return and all suggestions made against it may be amended, by leave of
19 court, before or after being filed.

20 The court shall summarily hear and determine the facts, and dispose of the
21 matter as law and justice require.

22 28 U.S.C. § 2243. The Court previously determined that Petitioner was entitled to an
23 evidentiary hearing regarding the disputed fact of Petitioner’s birthplace. Based on the
24 evidence presented at the evidentiary hearing, the Court will “summarily hear and
25 determine” the disputed fact of Petitioner’s birthplace and citizenship. *See* 28 U.S.C. §
26 2243. The findings of fact in this case, set forth in the Court’s previous order, were not
27 disturbed by the Court of Appeals and are not repeated here. *See* ECF No. 167 at 4–27.

28 Petitioner claims in his habeas petition that he was born in Los Angeles in 1969 and
that, in 2011, CBP officials unlawfully refused to allow him to enter the United States and
removed him to Mexico, where he now resides. (ECF No. 1 ¶ 1–2, 13, 44). “[T]he habeas
petitioner generally bears the burden of proof.” *Garlotte v. Fordice*, 515 U.S. 39, 46

1 (1995). However, in this case, the Court of Appeals remanded with instructions to apply
 2 the framework set forth in *Mondaca-Vega* to resolve the disputed fact of Petitioner’s
 3 birthplace and adjudicate Petitioner’s claims for relief pursuant to 28 U.S.C. § 2241, 28
 4 U.S.C. §§ 2201–02, Rule 65, and the Fifth and Fourteenth Amendments. *Olivas*, 743 F.
 5 App’x at 891.³

6 The *Mondaca-Vega* court set forth the following framework:

7 The government bears the ultimate burden of establishing all facts supporting
 8 deportability by clear, unequivocal, and convincing evidence. . . . When,
 9 however, the government offers evidence of foreign birth, a rebuttable
 10 presumption of alienage arises, shifting the burden to the alleged citizen to
 11 prove citizenship. . . . Upon production by a petitioner of substantial credible
 12 evidence of the citizenship claim, this presumption bursts and the burden
 shifts back to the government to prove the respondent removable by clear and
 convincing evidence.

13 *Id.* at 419 (quotations and alterations omitted). In addition, the remand order states that the
 14 government has the burden to set forth “evidence which is clear, unequivocal, and
 15 convincing,” when “one has, over a long period of years, acted in reliance upon a decision
 16 . . . admitting him as a citizen of the United States” *Olivas*, 743 F. App’x at 890–91
 17 (citing *Lung*, 261 F.2d at 724). The plaintiff in *Lung* was born in 1899 in Hawaii and, in
 18 1924, immigration authorities “rendered a decision admitting [the plaintiff] as a Hawaiian-
 19 born citizen of the United States.” 261 F.2d at 720. In 1957, the government denied the
 20 plaintiff’s passport application, and he brought an action seeking a declaratory judgment
 21 of citizenship. *Id.* The Court of Appeals stated that the plaintiff was “required to establish
 22 his citizenship by a fair preponderance of the evidence,” “the ordinary burden of proof
 23 resting on plaintiffs in civil actions,” which was satisfied in that case by the 1924 decision
 24 admitting the plaintiff as a citizen. *Id.* The Court of Appeals held that the government

25
 26
 27 ³ In *Mondaca-Vega*, the Court of Appeals reviewed a removal proceedings order, stating, “[O]ur alienage-
 28 determination cases often describe the government’s burden as proof by clear, unequivocal, and
 convincing evidence. . . . We use the term ‘alienage determination’ to refer to adjudications made pursuant
 to 8 U.S.C. § 1252(b)(5)(B) and 8 U.S.C. § 1503(a).” 808 F.3d at 418, 420 & n.6.

1 could rebut the plaintiff's evidence only by "clear, unequivocal, and convincing" evidence.
2 *Id.*

3 In both *Mondaca-Vega* and *Lung*, the government had a clear and convincing
4 evidentiary burden at one or more stages in the analysis. In *Mondaca-Vega*, the
5 government starts out with a clear and convincing evidentiary burden, is relieved of that
6 burden if the presumption applies, and is left with that burden if the petitioner shows
7 substantial credible evidence of citizenship. 808 F.3d at 419. In *Lung*, the government
8 started out with no burden and had a clear and convincing evidentiary burden after the
9 plaintiff demonstrated his citizenship by a preponderance using the prior determination of
10 citizenship. 261 F.2d at 720.

11 The Court commences the assessment of Petitioner's birthplace by applying the first
12 step of *Mondaca-Vega* framework to determine whether "the government presents
13 evidence of alienage." *Olivas*, 743 F. App'x at 890. Regarding the first step of the
14 framework, "the government must prove alienage by clear, convincing, and unequivocal
15 evidence of foreign birth before the burden shifts to the respondent." *Murphy v.*
16 *Immigration & Naturalization Serv.*, 54 F.3d 605, 608 (9th Cir. 1995) (quotations omitted);
17 *see also Tiznado-Reyna v. Barr*, 753 F. App'x 431, 432 (9th Cir. 2019).⁴ The court in
18 *Murphy* stated,

19 [T]he "foreign born" presumption [i]s a special case where alienage is
20 established by unrebutted direct proof by the alien's own testimony at the
21 hearing or admission in evidence of an authenticated foreign birth certificate.

22 . . .

23 [T]he government here produced no foreign birth certificate for Murphy. Nor
24 did Murphy admit in sworn testimony at the hearing that he was a foreign-
25 born alien. The government merely set out its prima facie case of alienage
26 based on circumstantial evidence. Prima facie evidence is "evidence which, if
unexplained or uncontradicted, is sufficient to sustain a judgment in favor of
the issue which it supports, but which may be contradicted by other evidence."

27 ⁴ The *Mondaca-Vega* court discussed the second and third steps of the framework. 808 F.3d at 417–18.
28 The *Mondaca-Vega* court did not expressly apply the first step; the petitioner had an authentic Mexican
birth certificate and had stated under oath that he was born in Mexico and was a Mexican citizen. *Id.*

1 The presumption established by a prima facie case does not reduce the
2 government's burden of persuasion, but merely requires the opponent to go
3 forward with evidence. . . . The burden of persuasion remains on the
4 government at all times to establish alienage by clear and convincing evidence

.....

5 54 F.3d 605, 609–10 (9th Cir. 1995) (quoting Black's Law Dictionary 1190 (6th ed. 1990));
6 *see also Garcia v. Holder*, 472 F. App'x 467, 468 (9th Cir. 2012).

7 In this case, the evidence in the record does not include a foreign birth certificate or
8 statement by Petitioner that he was born in a country other than the United States. The
9 government relies upon impeachment and circumstantial evidence to carry the burden to
10 prove alienage by clear and convincing evidence and shift the burden to Petitioner. The
11 Court concludes that the government's evidence is not sufficient to create the presumption
12 of alienage in this case. *See Murphy*, 54 F.3d at 608 (requiring “unrebutted direct proof by
13 the alien's own testimony at the hearing or admission in evidence of an authenticated
14 foreign birth certificate”); *see also Mondaca-Vega*, 808 F.3d at 417, 419 (applying burden-
15 shifting framework where undisputed evidence included Mexican birth certificate and the
16 petitioner's prior sworn statements of Mexican birth and citizenship); *Corona-Palomera v.*
17 *Immigration & Naturalization Serv.*, 661 F.2d 814, 818 (9th Cir. 1981) (concluding
18 immigration judge properly applied burden-shifting alienage presumption when
19 uncontested evidence included Mexican birth certificate); *Tiznado-Reyna*, 753 F. App'x at
20 432 (affirming application of burden-shifting alienage presumption when evidence
21 included the undisputed fact of petitioner's foreign birth). The burden of persuasion does
22 not shift to Petitioner at the first step of *Mondaca-Vega*.

23 Respondents have the burden to establish that Petitioner is an alien by clear and
24 convincing evidence. *See Olivas*, 743 F. App'x 890 (“[T]he burden shifts *back* to the
25 government to prove alienage by clear and convincing evidence.”) (emphasis added).
26 Clear and convincing evidence corresponds to “an abiding conviction that the truth of the
27 factual contentions' at issue is ‘highly probable.’” *Mondaca-Vega*, 808 F.3d at 422
28 (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)); *see also Therasense, Inc. v.*

1 *Becton, Dickinson & Co.*, 649 F.3d 1276, 1290 (Fed. Cir. 2011) (stating that clear and
2 convincing evidence of intent to deceive can be established with “indirect and
3 circumstantial evidence” if intent to deceive is “the single most reasonable inference able
4 to be drawn from the evidence” and there are not “multiple reasonable inferences that may
5 be drawn”); *Binion on Behalf of Binion v. Chater*, 108 F.3d 780, 789 (7th Cir. 1997) (“If
6 evidence beyond a reasonable doubt is almost jet black on the black/white scale, clear and
7 convincing evidence . . . requires a dark charcoal shade.”).

8 In this case, Respondents rely upon the following statements to show that Petitioner
9 was not born in the United States: Petitioner’s grandmother stated on her visa application
10 that she was living in Mexico on the date Petitioner was born; and Petitioner stated to
11 immigration authorities that Perez, his mother, had previously claimed that he was born in
12 Mexico. Respondents rely upon the following testimony: Perez’s sister, Hortencia Garcia,
13 testified that she was not pregnant while Perez was pregnant, which is inconsistent with
14 the undisputed fact that Hortencia Garcia was pregnant and living in Los Angeles during
15 Perez’s pregnancy; and Perez’s sister, Anastacia Ontiveros, testified that the midwife who
16 delivered Petitioner lived in Tijuana, which is consistent with Perez stating in the Juarez
17 Statement that Petitioner was born in Tijuana. Respondents rely upon the following
18 evidence related to Petitioner’s birth certificate: the birth certificate states that Petitioner
19 was born at his aunt and uncle’s home, which is inconsistent with Perez’s testimony that
20 Petitioner was born at her parents’ home; and the birth certificate lacks the signature of an
21 attendant other than Petitioner’s mother, which is inconsistent with the undisputed fact that
22 Petitioner’s mother was not the sole attendant of Petitioner’s birth. Respondents rely upon
23 the following evidence related to Petitioner’s baptism: Petitioner’s aunts testified that
24 Petitioner was baptized as an infant, which is consistent with the family custom to baptize
25 children within weeks or months after birth, and inconsistent with the undisputed fact that
26 Petitioner was baptized in the United States at nine years old. Respondents rely upon
27 evidence that Perez registered with the Social Security Administration three months after
28 Petitioner was born and registered Petitioner’s birth five months after Petitioner was born.

1 Respondents rely upon the lack of evidence related to Petitioner’s prenatal care, which is
2 inconsistent with the family custom to obtain prenatal care.

3 The inconsistencies in prior statements and testimony, and the anomalies related to
4 Petitioner’s childhood records, supported the initial conclusion of the Court that Petitioner
5 failed to carry his burden demonstrate his citizenship by a preponderance; however, the
6 facts in the record do not carry the burden imposed upon the government by the Court of
7 Appeals in this case. *See also* ECF No. 249 at 34:6–15 (“THE COURT: [I]f the
8 burden doesn’t shift . . . with respect to your view of the evidence, then what happens? If
9 the burden doesn’t shift back and remains with the government -- MR. BETTWY: [I]f
10 the government does not satisfy the first step -- THE COURT: Yes. MR. BETTWY: -- in
11 the framework, then the government hasn’t met its burden of showing that he is an alien.”).

12 IV. CONCLUSION

13 Petitioner brought a claim for habeas relief pursuant to § 2241 on the grounds that
14 he is “a natural-born U.S. citizen” who was “unlawfully exiled to Mexico” when “CBP
15 officials unlawfully refused to allow him to enter the United States.” (ECF No. 1 ¶¶ 1–2).
16 “Under the Fourteenth Amendment, all people born in the United States are citizens of the
17 United States.” *Rivera v. Ashcroft*, 394 F.3d 1129, 1136–37 (9th Cir. 2005). The Fifth
18 Amendment entitles Petitioner to judicial review of his “non-frivolous claim of citizenship”
19 because the government lacks authority to remove a citizen from the United States. “If, as
20 [Petitioner] plausibly contends, he is a citizen forced to live outside U.S. borders, he is
21 clearly subject to greater restraints than other citizens.” *Rivera*, 394 F.3d at 1136,
22 *superseded by statute on other grounds as stated in Iasu v. Smith*, 511 F.3d 881, 886 (9th
23 Cir. 2007) (“Effective May 11, 2005, the REAL ID Act . . . eliminat[ed] all district court
24 habeas jurisdiction over orders of removal.”). The Court exercises § 2241 subject-matter
25 jurisdiction in this case “[b]ecause [Petitioner] has a colorable citizenship claim” and this
26 case “do[es] not involve” a “final order[] of removal.” *See Flores-Torres*, 548 F.3d at 711
27 (distinguishing *Iasu*). The Court previously concluded that Petitioner was “required to
28 establish his citizenship by a fair preponderance of the evidence,” “the ordinary burden of

1 proof resting on plaintiffs in civil actions.” *See Lung*, 261 F.2d at 720. In this case, the
2 government does not seek to remove a non-citizen or to expatriate a current citizen, *see*
3 *Perez*, 356 U.S. at 47 n. 2; *Lim*, 431 F.2d at 199, and “the habeas petitioner generally bears
4 the burden of proof,” *see Garlotte*, 515 U.S. at 46; *Snook*, 89 F.3d at 605; *Berenyi*, 385
5 U.S. at 670–71.

6 However, the Court of Appeals found that the government negligently failed to
7 commence removal proceedings and directed this Court to apply a case in which the
8 plaintiff “ha[d], over a long period of years, acted in reliance upon a decision . . . admitting
9 him as a citizen of the United States.” *Olivas*, 743 F. App’x at 890–91, 890 n.1 (quoting
10 *Lung*, 261 F.2d at 724). The Court of Appeals concluded that this case is an “alienage
11 determination case[.]” subject to a legal standard that ordinarily governs judicial review of
12 removal proceedings and imposes a burden of proof on the government. *Id.* This Court
13 finds that Respondents have failed to carry the burden of proof that was imposed on the
14 government under the circumstances of this case, as determined by the Court of Appeals.
15 Respondents have failed to overcome Petitioner’s claim that he is entitled to habeas relief
16 on the grounds that excluding him from the United States violates his constitutional rights
17 as a natural-born U.S. citizen.

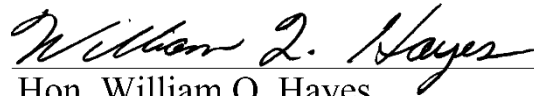
18 The Court has “broad discretion . . . in fashioning the judgment granting relief to a
19 habeas petitioner.” *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987); *see also Preiser v.*
20 *Rodriguez*, 411 U.S. 475, 487 (1973) (“[T]he federal habeas corpus statute does not deny
21 the federal courts power to fashion appropriate relief other than immediate release. Since
22 1874, the habeas corpus statute has directed the courts to determine the facts and dispose
23 of the case summarily, as law and justice require.”) (quotations omitted). Congress has
24 instructed the Court to “summarily hear and determine the facts, and dispose of the matter
25 as law and justice require.” 28 U.S.C. § 2243; *see also Hilton*, 481 U.S. at 775 (“[T]he
26 Court interpreted the predecessor of § 2243 as vesting a federal court ‘with the largest
27 power to control and direct the form of judgment to be entered in cases brought up before
28 it on habeas corpus.’”) (quoting *In re Bonner*, 151 U.S. 242, 327 (1894)).

1 IT IS HEREBY ORDERED that Petitioner is entitled to prevail on his claim for
2 habeas relief on the grounds that excluding him from the United States violates his
3 constitutional rights as a natural-born U.S. citizen. Respondents are not entitled to exclude
4 Petitioner from the United States on the grounds that Petitioner is not a natural-born U.S.
5 citizen.

6 IT IS FURTHER ORDERED that Petitioner's requests for a declaration invalidating
7 orders removing Petitioner from the United States and a declaration of citizenship pursuant
8 to 28 U.S.C. §§ 2201–02, as well as Petitioner's request that the Court enjoin Respondents
9 from prohibiting Petitioner's entry pursuant to Rule 65, are denied as moot.

10 IT IS FURTHER ORDERED that the Motion to Supplement the Record filed by
11 Respondents (ECF No. 235) is DENIED.

12 Dated: August 22, 2019


13 Hon. William Q. Hayes
14 United States District Court
15
16
17
18
19
20
21
22
23
24
25
26
27
28