# DENIS

A Fight Against Removal in Four Parts

# DENIS COMES TO THE US

Denis was born 1/1/1975 in Honduras.

Denis first came to the US in 1993. He was stopped by INS at the border, granted an administrative voluntary departure and was returned to Mexico (Dennis told the agents he was Mexican, not Honduran.)

Denis tried again to enter the US and successfully crossed the border in 1994.

In 1994, Denis met Magda, also born in Honduras, and they began living together but never married. They had a child:

- Wilson, born in Texas on 1/1/1995.

Denis and Magda separated in 2000, but Denis has helped support Wilson financially and saw him regularly. There was never any formal custody or child support arrangement.

# DENIS & JUDITH START A FAMILY

In 2002, Denis met Judith, who was born in Texas, and they moved in together. They had a rocky start to their partnership and Judith was arrested once in 2005 for assault/family violence after a fight where she burned Denis on the neck with a lit cigarette. The couple sought counseling and have remained together.

They have not legally married, but they have 2 children:

- Daniel, born 1/1/2005
- Samantha, born 1/1/2008

In 2015, Denis was arrested for 'theft by check' and was convicted. He got 100 days; probated for 10 months. He completed his sentence and was released from state jail.

# DENIS IS DETAINED BY CBP

On 2/1/2016, Denis was driving to a job site with his boss and another co-worker. The boss, who was driving, was stopped for speeding. The boss had a license and insurance and was allowed to leave the scene with a ticket. The police asked Denis and his coworker for ID; neither man had ID. Both men were arrested and held at the jail until ICE arrived.

Denis was issued an NTA and detained by ICE.

- Judith hires you to represent him.

# REMOVAL PROCEEDINGS IN FOUR PARTS

- Pre-merits Advocacy: Admit Nothing!
- Get Me Out of Here! Bond proceedings before the IJ
- After Bond, Now What? Hearing Preparation and the Merits Hearing
- Post-Order Drama: Work permits, and Records, and Appeals, Oh My!

# GET ME OUT OF HERE!

# BOND PROCEEDINGS BEFORE THE IJ

Iliana Holguin

April 15, 2016

Austin, Texas

# STEP 1: SEEK BOND BEFORE DHS

- A determination regarding bond and bond eligibility is initially made by DHS at time of arrest or transfer to detention facility
- Non-citizen may be released on own recognizance, released on bond, or be held in the custody of DHS pending the outcome of the removal proceeding
- Determination of bond made on Form I-286 and is generally attached to NTA

# STEP 2: SEEK BOND BEFORE IJ

- Non-citizen may request re-determination of DHS bond by an IJ
- Request for re-determination may be made orally or in writing
- Request for re-determination by IJ may be filed even before NTA is filed with the court as long as non-citizen is in custody of DHS—8 CFR §1003.14(a)

# SEEKING BOND BEFORE IJ (CONTINUED)

- Bond proceedings are separate and apart from removal hearings– 8 CFR §1003.19(d)
- However, same IJ can hear both
- IJ may inquire into areas not generally permissible when making determination as to removability, but must be kept separate and apart from removal proceedings

# SEEKING BOND BEFORE IJ (CONTINUED)

- When making bond determination, IJ considers whether non-citizen is a threat to national security, a flight risk or a danger to the community
- In some jurisdictions, IJs require affirmative showing of eligibility for relief from removal as a condition to bond; VD not generally enough

- Fixed address in US
- Length of residence in US
- Family ties and potential relief based on those ties
- Record or appearances in court
- Employment history or lack thereof
- Criminal record
- Pending criminal charges
- History of immigration violations
- Attempts to flee prosecution or authorities
- Manner of entry
- Membership in community organizations
- Immoral acts or participation in subversive activities
- Financial ability to post bond

# *MATTER OF PATEL* FACTORS

# SUCCESSIVE APPLICATIONS FOR BOND

- As long as non-citizen is in the custody of DHS and does not have final administrative order of removal, may continue making successive requests for re-determination of bond
- After initial bond request, however, subsequent determinations may only be requested in writing and upon a showing that circumstances have changed materially since prior re-determination– 8 CFR §1003.19(e)

# SUCCESSIVE APPLICATIONS FOR BOND (CONTINUED)

- DHS may also seek to revoke or re-determine bond if there are changed circumstances even after re-determination by IJ
- Changed circumstances, however, must be demonstrated and DHS cannot revoke or re-determine just because they do not like an IJ's re-determination
- Bond re-determination may even be requested after non-citizen released from custody, but must be done within 7 days of release– 8 CFR §1236.1(d)(1)

# WATCH OUT! SOME NON-CITIZENS INELIGIBLE FOR BOND

- Non-citizens in exclusion proceedings
- Non-citizens, including LPRs, deemed to be arriving aliens
- Non-citizens subject to terrorist or political grounds of deportation
- Non-citizens subject to mandatory detention
- Non-citizens with final administrative orders of removal

# ARRIVING ALIENS

- "Arriving alien" defined in 8 CFR §1001.1(q) as "an applicant for admission coming or attempting to come into the US at a port-of-entry."
- Designation as arriving alien is very important because not eligible for bond
- 8 CFR §1003.19(h)(2)(i)(B) specifically divests IJ of jurisdiction to hear bond requests from arriving aliens
- ICE does, however, retain jurisdiction to parole arriving aliens under INA §212(d)(5)
- As of January 2010, arriving aliens found to have a credible fear are supposed to be automatically considered for parole by ICE
- Parole not limited to successful CFI's

# MANDATORY DETENTION UNDER INA §236(C)

- DHS shall take into custody any non-citizen who:

  1. is inadmissible for having committed any offense covered in INA §212(a)(2)—criminal grounds of inadmissibility

  2. is deportable for having committed any offense covered in INA §237(a)(2)(A)(ii), (A)(iii), (B), (C) or (D)--criminal grounds of deportability

3. is deportable under INA §237(a)(2)(A)(i) for which a non-citizen has been sentenced to a term of imprisonment of at least 1 year —CIMT

4. is inadmissible under INA §212(a)(3)(B)

- Provision states that DHS shall take non-citizens into custody "when the alien is released on parole, supervised release, or probation and without regard to whether or not the alien may be arrested or imprisoned again for the same offense."

# MANDATORY DETENTION (CONTINUED)

# MANDATORY DETENTION (CONTINUED)

- Very limited exceptions – Witness Protection Program
- Enacted by IIRAIRA, but did not become effective until the expiration of the Transitional Period Custody Rules on October 9, 1998
- So, only non-citizens released ***after*** October 9, 1998 are subject to mandatory detention—*Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999)

# MANDATORY DETENTION (CONTINUED)

- Non-citizens released on or before October 9, 1998 remain eligible for bond
- BIA has determined that "when released" language requires release from physical custody—*Matter of West*, I&N Dec. 1405 (BIA 2000)
- However, BIA has also held that timing of release not relevant so long as occurred after October 9, 1998 so non-citizen can still be subject to mandatory detention even if not immediately taken into custody by DHS upon release—*Matter of Rojas*, 231&N Dec. 117 (BIA 201).
- An arrest is enough to satisfy the physical custody requirement even if no sentence was served for the crime

# MANDATORY DETENTION (CONTINUED)

- However, release from criminal custody must be for a conviction that falls within 236(c)
- Although IJs do not have authority to release non-citizens subject to mandatory detention, they do have authority to determine if non-citizen is "properly included" within mandatory detention provision. §1003.19(h)(2)(ii)
- Non-citizen may request a "Joseph" hearing, named after BIA case recognizing this authority—*Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

# MANDATORY DETENTION (CONTINUED)

- Under *Matter of Joseph*, a non-citizen is "properly included" within the scope of the mandatory detention provision unless DHS is "substantially unlikely to prevail" in its charges of removability
- If IJ orders bond, DHS may obtain automatic stay by simply filing notice of intent to appeal bond on Form EOIR-43
- If DHS has not charged a non-citizens with a crime that would result in mandatory detention in the NTA, it must give notice of basis for mandatory detention and provide an opportunity to challenge detention in *Joseph* hearing

# APPEALS FROM BOND RE-DETERMINATIONS

- Appeal of IJ's bond decision must be filed within 30 days
- Even if bond re-determination is on appeal, IJ still has authority to hear subsequent re-determination request
- DHS may seek emergency stay of any bond 8 CFR §1003.19(i)(1)
- DHS may also obtain an *automatic* stay of bond order when original bond was set at over $10,000 or no bond was originally given by DHS by filing Form EOIR-43 within 1 business day of the IJ's bond order; thereafter must file notice of appeal consistent with 8 CFR §1003.38 with BIA within 10 days or the stay will lapse
- Stay lapses if BIA has not acted on the appeal within 90 days
- If BIA rules against DHS, bond order is automatically stayed for 5 days to allow DHS to seek AG review

# NOTABLE CIRCUIT COURT CASES

- *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013): prolonged detention without adequate review generally raises serious constitutional concerns at 6 months; thus, at six months, authority for detention shifts from INA §236(c) to §236(a)
- In contrast, Third and Sixth Circuits have said that mandatory detention can only be for a ***reasonable*** period of time, which will vary on a case-by-case basis: *Leslie v. AG*, 678 F.3d 265 (3rd Cir. 2012); *Ly v. Hansen*, 351 F. 3d 263 (6th Cir. 2003)
- Fourth Circuit found provision unconstitutional where there was "no clearly identifiable deadline" for completion of proceedings; *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002)
- District Court in Massachusetts granted a classwide permanent injunction requiring a bond hearing at 6 months; *Reid v. Donelan*, 22 F.Supp. 3d 84 (D. Mass. 2014)

# ALTERNATIVES TO PHYSICAL DETENTION

- Intensive Supervision Appearance Program (ISAP): private contractors monitoring respondents through telephonic reporting, radio frequency, GPS (ankle bracelets), and home visits
- Enhanced Supervision/Reporting (ESR): private company using same methods as ISAP
- Electronic Monitoring: operated by ICE using same methods

# DETAINERS

- DHS may place a notice with federal, state or local jail or prison officials requesting that the official notify DHS if they intend to release the non-citizen or to hold the non-citizen for DHS
- A detainer is simply a request; local and state officials are not required to hold a non-citizen for DHS
- In practice, most jurisdictions honor the detainer request
- DHS may only place a detainer on a non-citizen amenable to removal 8 CFR §287.7(a)

# After Bond, Now What?

## Hearing Preparation and the Merits Hearing Oh My!

By: Rosemary Vega

TAUSK & VEGA
ATTORNEYS AT LAW

# Hearing Preparation

- What documents do you need?
- Who collects what documents?
- How do you collect the documents or how do you guide the family to collect the documents?


# Identity Documents

- Birth certificate
- Passport
- Identification
- Family documents
  - Parents, spouse, children, sibling birth certificates?
  - Marriage Certificate
  - Death Certificate
  - Divorce Decree

# Physical Presence documents

- School Records
- Tax Returns
- Medical records
- Bank statements/ records
- Bills
- Lease agreements/mortgage statements
- Pay check stubs
- Affidavits and letters from family, friends and community

# Criminal Records

- How to obtain criminal records from different counties in Texas?
- How about out of State Criminal records?
- Do you need the information or indictment?
- Do you need the police records or offense report?

# Rehabilitation

- How do you show rehabilitation?
  - No further criminal convictions
  - Rehabilitation center
  - AA

# Good Moral Character

- Do we need to prove?
- How?
  - Community Service
  - Church
  - AA
  - Affidavits and letters from friends, family, neighbors, employers,

# Counselor Report

- Do you need a counselor report?
- Who goes to the counselor?
- Why is it important? What are the benefits?

# Country Conditions

- Articles

- Expert Reports
  - What are the benefits?
  - How do you find an expert?

# Hardship Documents

- Do we need to show hardship?
  - If there is no requirement, but there is hardship- do you submit?
  - To whom do we need to show hardship?
- What kind of hardship?
  - Extreme?
  - Exceptionally unusual and extreme hardship
  - Medical Reports

# Visual or Audio Aids

- Does the Court allow for a video or audio?
- Is it important to your case?

# Witnesses

# Witnesses

- Respondent
  - Unrepentent Respondent
  - Difficult
  - Mental issues
- Family
  - Estranged family
  - Underage children
  - Undocumented family (spouse)

# Witnesses

- Country Expert
  - Is the report enough?
- Counselor
  - If respondent detained, how get into the detention facility to evaluate?
- Doctor
  - If needs to see respondent who is detained, how do you get him into the detention facility?

# Your preparation

- What do you need to do to prepare for the Merits hearing?
  - Talk to the Assistant Chief Counsel (TA) beforehand?
  - What caselaw do you need to know?
  - Do you know what is pending at the BIA, in the circuit or Supreme Court that may hurt or help your case?
  - Do you prepare a closing statement?

# Courtroom

- Computers in the Courtroom
  - Why is it a benefit or a distraction?
  - Internet access?

# Courtroom

- IJ intimidation
- Angry TA
- IJ not objective
- Is it on the Record?
- Brief  it?

# WIN/LOSE

- IJ decision
- Reserve appeal

# ROSEMARY VEGA

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# Admit Nothing!
# Pre-merits Advocacy Strategies

By Susannah Volpe

Walker Gates • Vela
PLLC • ATTORNEYS at LAW

# Agenda

- Initial considerations
- NTA challenges
- Motions to Suppress
- Defeating the I-213
- Pretrial relief

# Agenda

- **Initial considerations**
- NTA challenges
- Motions to Suppress
- Defeating the I-213
- Pretrial relief

# Initial Considerations: Assessing your Case

Know your legal strategy before:

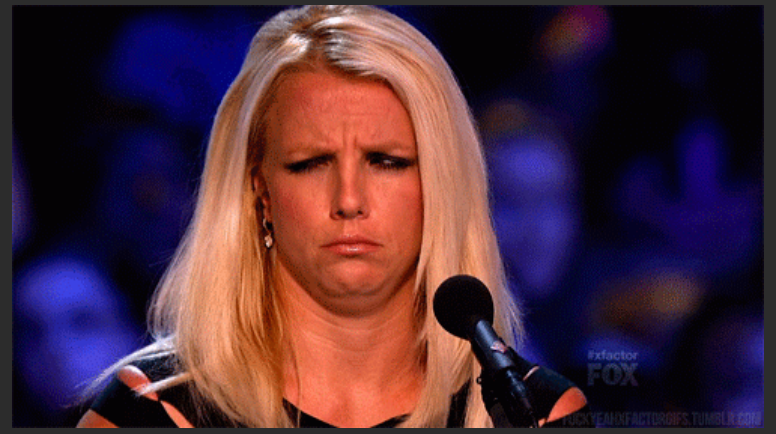
- Entering pleadings on the NTA
- Filing a motion to suppress
- Challenging the I-213
- Requesting pre-trial relief

Walker Gates • Vela
PLLC • ATTORNEYS at LAW

# Initial Considerations: Assessing your Case

Consider:

- Does the client have a strong, straightforward case for relief?
- Is the client a strong candidate for pretrial relief?
- Does the client appear not to qualify for any relief at all?
- Will the client become eligible for relief in the future?

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# Initial Considerations: Burdens of Proof

## Client Charged as INADMISSIBLE, under INA §212

**Client**

**BOP on Applicant** to prove "clearly and beyond doubt" admissible. INA 240 (c)(2)

**BOP on Applicant** to prove by clear and convincing evidence that present pursuant to a lawful admission. 8CFR§1240.8(c)

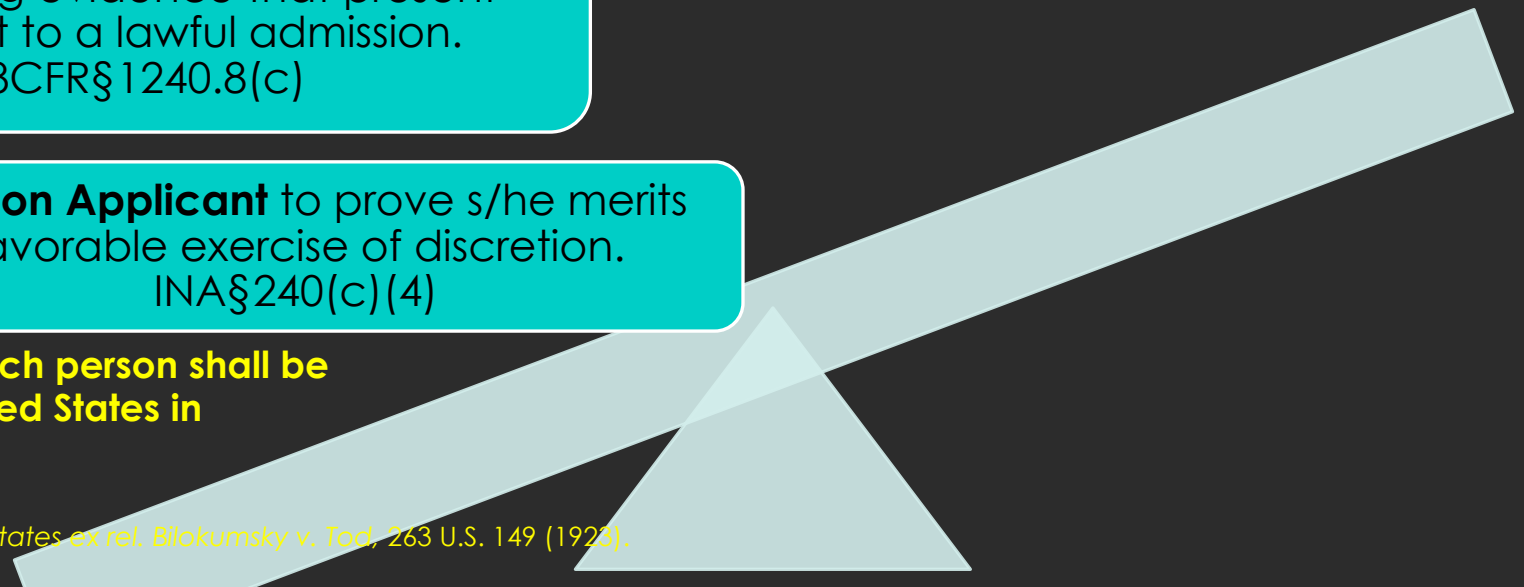
**BOP on Applicant** to prove s/he merits favorable exercise of discretion. INA§240(c)(4)

**If burden "not sustained, such person shall be presumed to be in the United States in violation of law."**

*United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923).

**DHS**

**Burden on gov't** to prove alienage. INA§240(c)(3)(A).



# Initial Considerations: Burdens of Proof

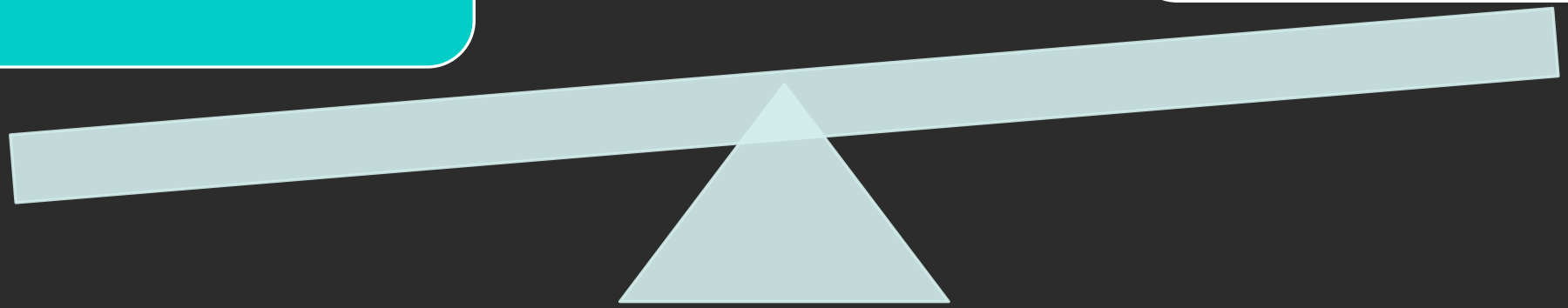
## Client Charged as DEPORTABLE, under INA §237

**Client**

**DHS**

**BOP on Applicant** to prove s/he merits favorable exercise of discretion. INA§240(c)(4)

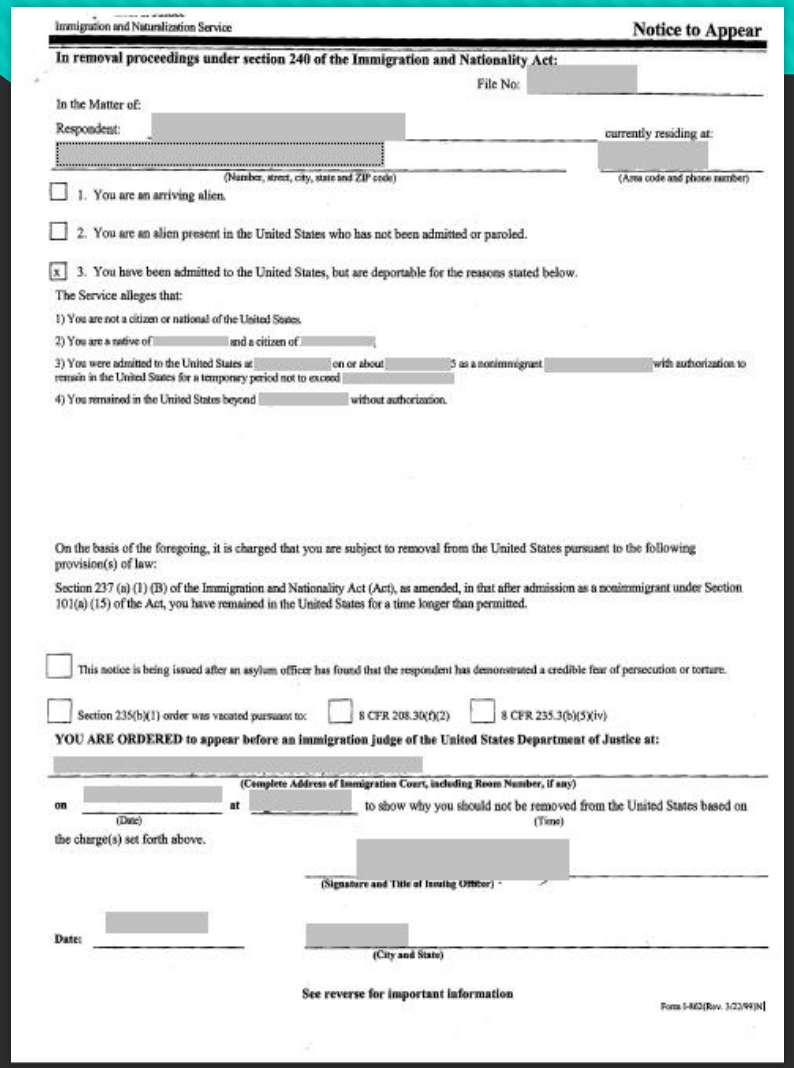
**Burden on gov't** to prove deportable by clear and convincing evidence that is reasonable, substantial and probative. INA§240(c)(3)(A).



# Agenda

- Initial considerations
- **NTA challenges**
- Motions to Suppress
- Defeating the I-213
- Pretrial relief

# NTA Challenges



Immigration and Naturalization Service

**Notice to Appear**

**In removal proceedings under section 240 of the Immigration and Nationality Act:**

File No:

In the Matter of:

Respondent: currently residing at:

(Number, street, city, state and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that:

1) You are not a citizen or national of the United States.

2) You are a native of and a citizen of .

3) You were admitted to the United States at on or about as a nonimmigrant with authorization to remain in the United States for a temporary period not to exceed

4) You remained in the United States beyond without authorization.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237 (a) (1) (B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a) (15) of the Act, you have remained in the United States for a time longer than permitted.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

**YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:**

**(Complete Address of Immigration Court, including Room Number, if any)**

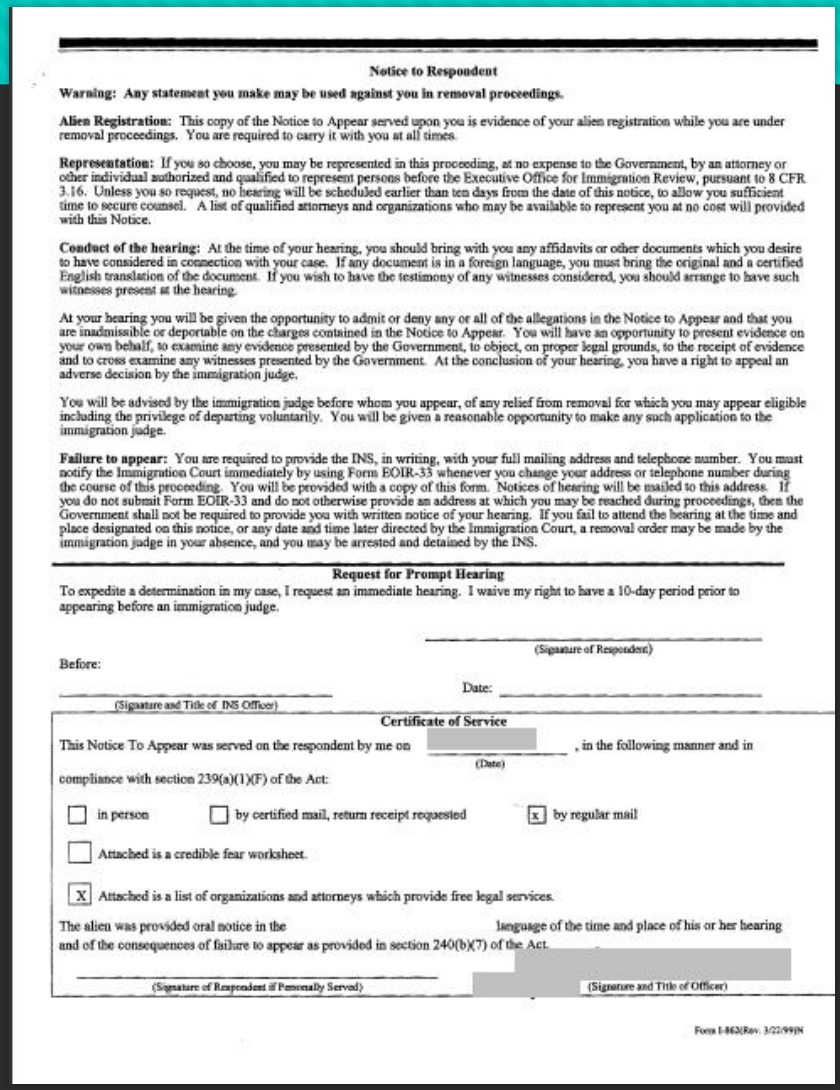
on (Date) at (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

**(Signature and Title of Issuing Officer)**

Date: **(City and State)**

**See reverse for important information**

Form I-862(Rev. 3/22/99)N



**Notice to Respondent**

**Warning: Any statement you make may be used against you in removal proceedings.**

**Alien Registration:** This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

**Representation:** If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will provided with this Notice.

**Conduct of the hearing:** At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

**Failure to appear:** You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

**Request for Prompt Hearing**

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

(Signature of Respondent)

Before:

(Signature and Title of INS Officer) Date:

**Certificate of Service**

This Notice To Appear was served on the respondent by me on (Date), in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☐ in person ☐ by certified mail, return receipt requested ☒ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served) (Signature and Title of Officer)

Form I-862(Rev. 3/22/99)N

# Notice to Appear

**Requirements**:

**(A)**The nature of the proceedings against the alien.

**(B)**The legal authority under which the proceedings are conducted.

**(C)**The acts or conduct alleged to be in violation of law.

**(D)**The charges against the alien and the statutory provisions alleged to have been violated.

…

**(G)(i)**The time and place at which the proceedings will be held.

INA §239

# NTA Challenges

Is the correct person named as the subject?

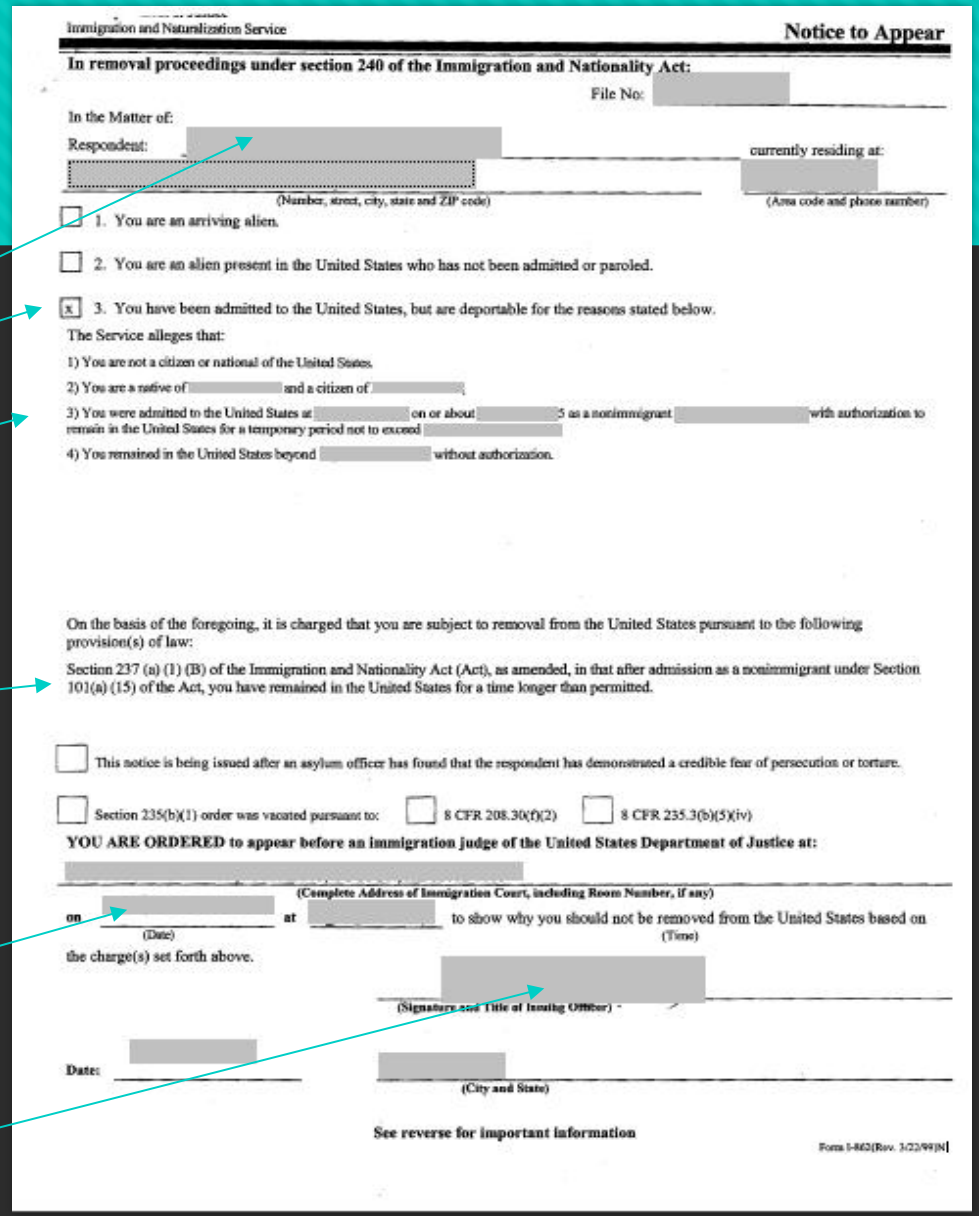
Is the correct box checked?

Are allegations correct?
If proved, do they prove the charge?

Is charge correct?

Is a court location listed?
Is the date and time of next hearing included?

Is this person's title listed in 8 CFR §239.1(a)** ?



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(Date) (Time)

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Date:

(City and State)

**See reverse for important information**

Form I-862(Rev. 3/22/99)N

# Notice to Appear

**5th Circuit:**

"The first issue is whether the NTA was substantively defective… The NTA in this case satisfied these requirements because it specified that Petitioner was an "arriving alien" who was "not a citizen or national of the United States" but rather a "native of Cameroon and a citizen of Cameroon" who was present in the United States without proper documentation in violation of "Section 212(a)(7)(A)(i)(I) of the [INA]" and ordered that Petitioner appear "before an immigration judge of the United States Department of Justice." Accordingly, we agree with the BIA that the NTA was not substantively defective."

But,

> "Our rejection of this argument is buttressed by our conclusion that Petitioner waived any objection to the NTA by appearing at her initial hearing, failing to object to the admission of the NTA, and pleading to the charges contained in the NTA. "

*Chambers v. Mukasey*, 520 F.3d

# NTA Challenges

**Proper Service?**

- **Service in person to respondent or counsel OR by mail, if personal service "is not practicable."**

INA §239(a)(1)

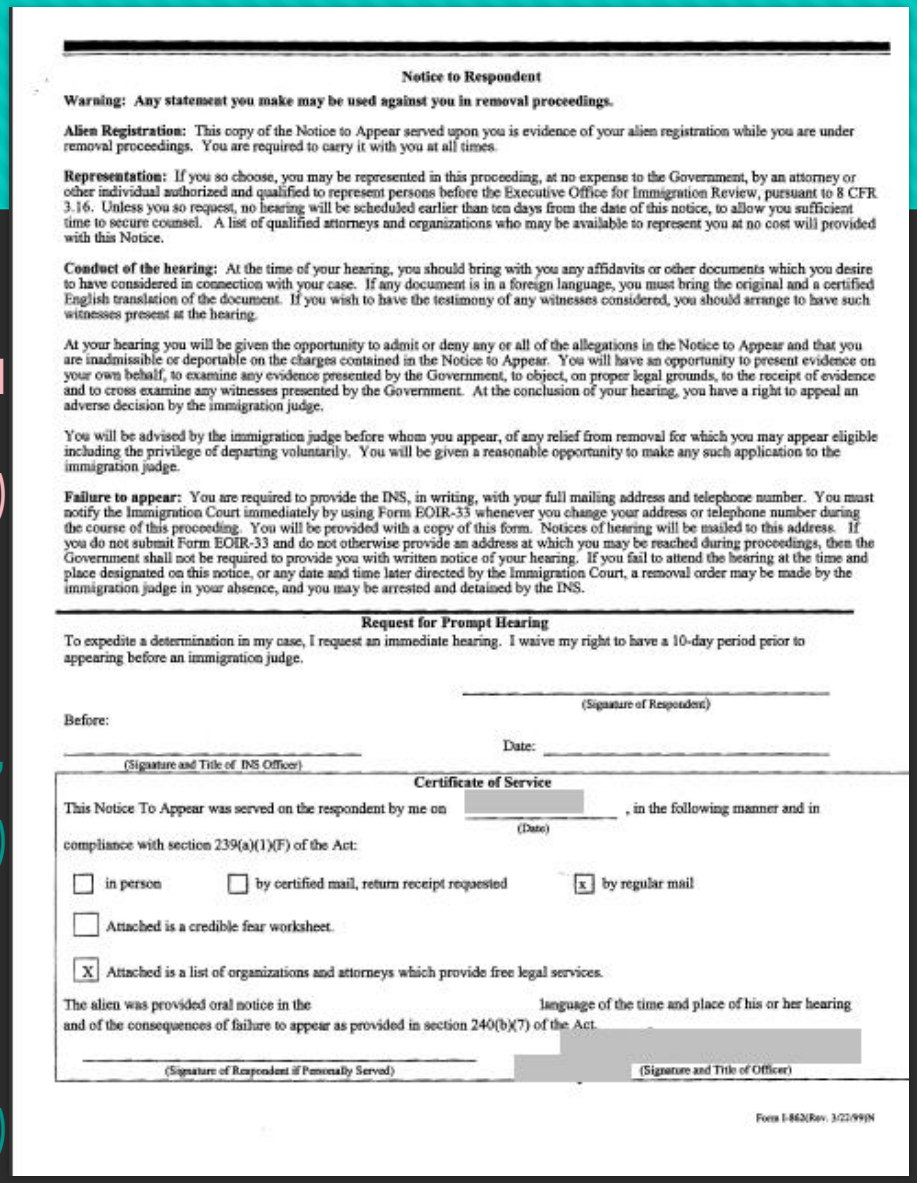
**In absentia orders:**

- **"[A]n in absentia order may only be entered where the alien has received, or can be charged with receiving, a Notice to Appear."**

*Matter of G-Y-R*, 23 I&N Dec. 181 (BIA 2001)

- **"Proof that the notice was sent by certified mail creates a rebuttable presumption of adequate notice…"**

*Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002)



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**Conduct of the hearing:** At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

**Failure to appear:** You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

**Request for Prompt Hearing**

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

(Signature of Respondent)

Before:

Date:

(Signature and Title of INS Officer)

**Certificate of Service**

This Notice To Appear was served on the respondent by me on , in the following manner and in

(Date)

compliance with section 239(a)(1)(F) of the Act:

☐ in person ☐ by certified mail, return receipt requested ☒ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served) (Signature and Title of Officer)

Form I-862(Rev. 3/22/99)N

# NTA Challenges

**Extra Credit :**

- **Detained clients→**
  - Must serve individual (if competent) AND "person in charge of institution"
    - This refers to a penal or mental institution– not DHS custody

- **Clients without legal capacity→**
  - Serve the person with whom client resides
    - *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011)

- **Minors under 14 yrs. old→**
  - Must serve the person with whom minor resides AND "whenever possible , service shall also be made on the near relative, guardian, committee, or friend."

8 CFR §103.5a(c)

"The Immigration Judge found that the Notice to Appear was personally served on the person identified in the Form I-213 as the respondent's uncle. She determined, however, that more should be required in the case of a 7 year-old child than a conclusory statement in a Form I-213 as to the relationship of an adult to the child… Under the circumstances in this case, the Immigration Judge found that the Notice to Appear was not properly served."

*Matter of Mejia-Andino*, 23 I&N Dec. 533 (BIA 2010)

# Notice to Appear

**Good news from the 3rd Circuit!**

"[A]n initial NTA that fails to satisfy §1229(a)(1)'s various requirements will not stop the continuous residency clock until the combination of notices properly served on the alien charged as removable, conveys the *complete* set of information prescribed by §1229(a)(1)…"

*Orozco Velasquez v. AG*, 13-1685 (3rd Cir., March 11, 2106)

Limitations:

Footnote: "We express no opinion as to whether the NTA and/or Notice of Hearing served on Orozco-Velasquez in April 2010 would be effective outside of the context of the 'stop-time' rule."

Walker Gates • Vela
PLLC • ATTORNEYS at LAW

# Agenda

- Initial considerations
- NTA challenges
- **Motions to Suppress**
- Defeating the I-213
- Pretrial relief

# Motion to Suppress

Generally, the 4th Amendment exclusionary rule does not apply to evidence seized in removal proceedings.

*INS v. Lopez-Mendoza*, 468 US 1032 (1984)

However, if the "manner of seizing the evidence is so egregious that to rely on it would offend the fifth amendment's due process requirements of fundamental fairness," it may be suppressed.

*Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Bustos-Torres v. INS*, 898 F.2d 1053 (5th Cir. 1990)

# Motion to Suppress: Burden of Proof

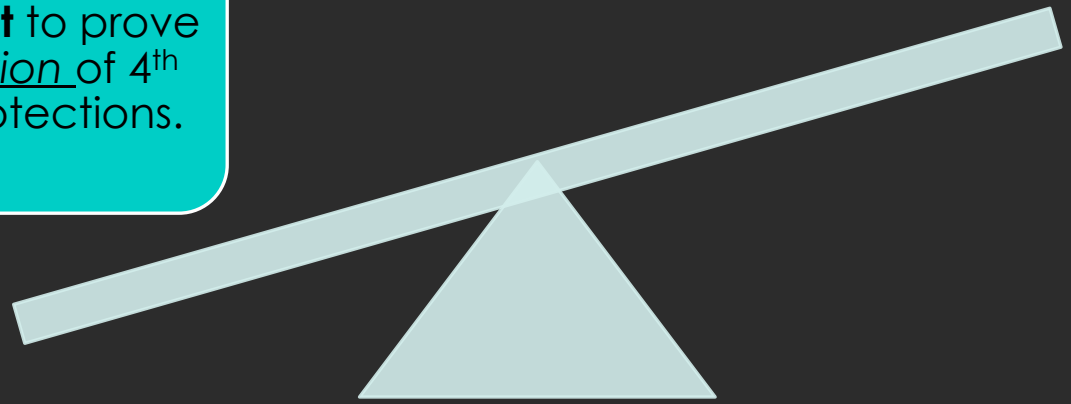
## Suppression of Evidence of Alienage

**Client**

**DHS**

**BOP on Applicant** to prove *egregious violation* of 4th amendment protections.

**Burden on gov't** to justify manner in which evidence of alienage obtained.



# Motion to Suppress

**What standards apply to DHS in warrantless stops?**

- May ask any question, so long as person has freedom to walk away
- May detain if *reasonable suspicion* that person is
  - Illegally in US
  - Engaged in offense against the US

**What is required for an arrest?**

- Reason to believe that person has committed an offense against the US or is illegally in the US
  - MUST obtain warrant- unless reason to believe that person would escape
  - MUST identify self as immigration officer and state the reason for arrest

8 CFR §287.8(b), (c)

"Thus, under the plain language of the regulation, an alien who is arrested without a warrant is not entitled to advisals until he or she is 'placed in formal proceedings' [through the filing of an NTA]"

*Matter of E-R-M-F & A-S-M-*, 25 I&N Dec. 580 (BIA 2011)

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# Motion to Suppress

Prior to stop, officer must have 'objectively reasonable suspicion' that illegal activity- including traffic violation- has or is about to occur.

BUT "an officer's subjective intentions have no impact on analyzing reasonable suspicion or probable cause because both are considered to be based on an objective test."

*US v Lopez-Moreno*, 420 F.3d 420 (5th Cir. 2005)

Objective test:

mere suspicion < **reasonable suspicion** < probable cause

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# Motion to Suppress

Factors that may provoke reasonable suspicion may include:

1) Characteristics of area where encountered
2) Agent's previous experience with criminal activity
3) Proximity to the border
    I. If over 50 miles from border, then no reason to believe vehicle came from border *(US v Rodriguez Rivas*, 151 F.3d 377 (5th. Cir 1998))
4) Usual traffic patterns on road
5) Information about recent trafficking in area
6) Appearance of vehicle
7) Driver's behavior
    I. Failure to make eye contact is NOT sufficient *(US v. Lopez*, 564 F.2d 710 (5th. Cir 1977))
8) Passenger's number, appearance, and behavior

*US V Brignoni-Ponce* 422 US 873 (1975)

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# Motion to Suppress

Filing a motion to Suppress→

1. Specific and detailed; not general, conclusory, or based on conjecture
2. Based on personal knowledge
3. Set forth a prima facie case for suppression
4. Articles to be suppressed must be enumerated

*Matter of Wong*, 13 I&N Dec. 820 (BIA 1971)

On appeal, the reviewing court will review the facts "in the light most favorable to the prevailing party."

*US v Rodriguez-Rivas* (5th. Cir 1998)

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# Motion to Suppress

"Where a person, arrested for deportation… upon being called and sworn as a witness by the government to prove his alienage, stood mute, *held* that admission of alienage, which is not an element of the crime of sedition, would not have tended to incriminate him, ***and that the immigration officers might properly have inferred the fact of alienage from his silence***."

*United States ex rel. Bilokumsky v. Tod*, 263 U.S. 154. (1923)


But, silence alone, without other evidence of alienage, is not sufficient.

*Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990)

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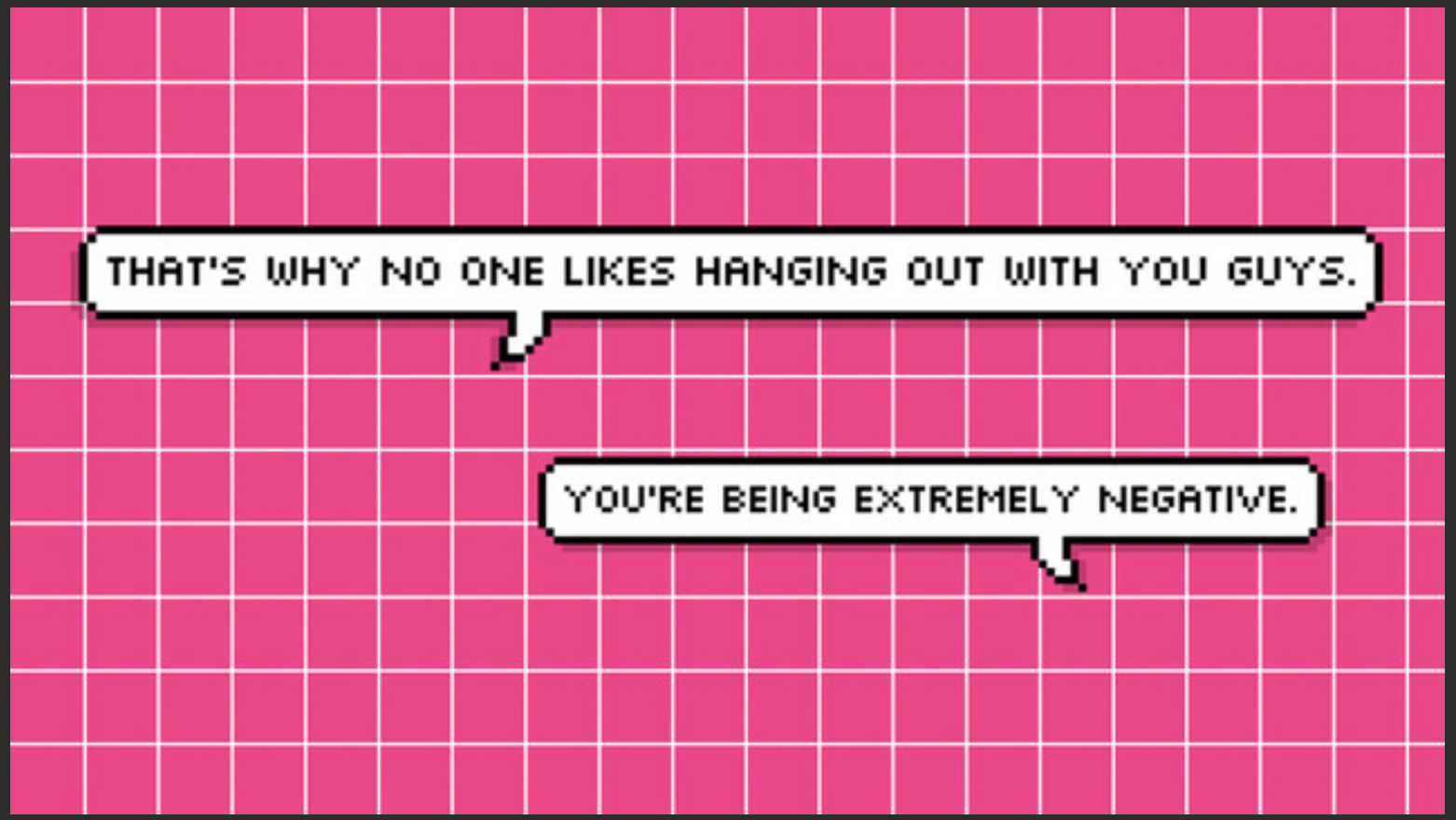
# Motion to Suppress

Special protections for labor disputes:

"[W]here it appears that information may have been provided in order to interfere with or to retaliate against employees for exercising their rights, no action should be taken on this information without the review of the District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol Agent."

Operating Instructions 287.3a, superseded by SAFM 33.14(h)

# Feeling Exhilarated?

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# Agenda

- Initial considerations
- NTA challenges
- Motions to Suppress
- **Defeating the I-213**
- Pretrial relief

# Defeating the I-213

I-213 is presumed correct and inherently trustworthy

- "Absent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy…"

*Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988)

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# Defeating the I-213

**Object!** Do not fear the obvious objection:

- Name
- Date of birth
- Photo

# Defeating the I-213

**Object!** Coercion & duress:

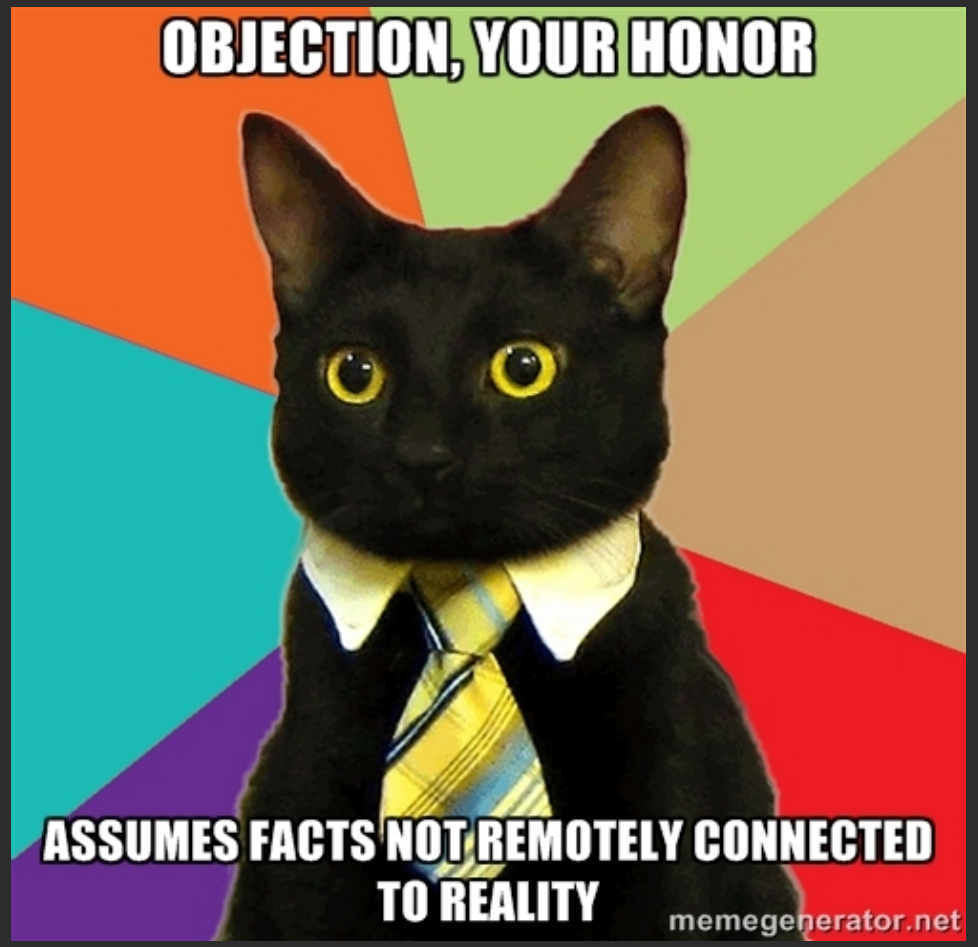
- Unsworn documents
- Did your client sign the I-213?
- Challenge authenticity?
- Subpoena DHS personnel?

# Defeating the I-213

**Object**! No inherent trustworthiness:

- "The cumulative effect of evidence in the public record when matched with the case-specific evidence here and viewed in light of the experience of the AILA-AIC Artesia Pro Bono Project indicates that the presumption of government record reliability took a grievous blow in the summer of 2014."

*Matter of M-R-R*, Amicus Brief,



# Defeating the I-213

**Object**! Duty of Particular Care

- "In the case of an unaccompanied and unrepresented minor under the age of 16 years… an Immigration Judge may not accept such a minor's admission to a charge of deportability because the minor is presumed to be incapable of determining whether a charge applies to him.
- However, 8 C.F.R. § 242.16(b) does not preclude an Immigration Judge from accepting such a minor's admissions to factual allegations."

*Matter of Amaya-Castro,* 21 I&N Dec. 583 (BIA 1996)

# Agenda

- Initial considerations
- NTA challenges
- Motions to Suppress
- Defeating the I-213
- **Pretrial relief**

# Pretrial Relief

- **Prosecutorial Discretion**
  - Evidence of statutory elements
  - Escalate, escalate, escalate
- **Humanitarian Termination**
  - No statutory elements to meet
  - Tell a story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# Pretrial Relief

- **NTA Cancellation:**

Any officer authorized to issue a notice to appear may cancel such notice provided that:

1. the respondent is a national of the USA;
2. the respondent is not deportable or inadmissible;
3. the respondent is deceased;
4. the respondent is not in the USA;
5. the respondent will file a petition under 216(c)
6. ***the notice to appear was improvidently issued***, or
7. ***circumstances of the case have changed to such an extent that continuation is no longer in the best interest of the government***.

8 CFR §239.2

Must be cancelled *before* jurisdiction vests with Immigration Court.

"We conclude that a Service motion to terminate proceedings must be adjudicated on the record and pursuant to the regulations, as would any other motion presented to the Immigration Judge or this Board."

*Matter of GNC*, 22 I&N Dec. 281 (BIA 1998)

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# Pretrial Relief

- **Admin closure**

"We now find that it is improper to afford absolute deference to a party's objection, and we hold that an Immigration Judge or the Board has the authority to administratively close a case, even if a party opposes, if it is otherwise appropriate under the circumstances."

*Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012)

Admin closure: *FACTORS*

(1) the reason administrative closure is sought;

(2) the basis for any opposition to administrative closure;

(3) the likelihood the respondent will succeed on any relief outside of removal proceedings;

(4) the anticipated duration of the closure;

(5) the responsibility of either party in contributing to any delay;

(6) the ultimate outcome of removal proceedings.

# Resources

- Legal Action Center; American Immigration Council
  - http://www.legalactioncenter.org/
- National Immigration Project of the National Lawyers Guild
  - http://www.nationalimmigrationproject.org/
- Immigrant Legal Resource Center
  - http://www.ilrc.org/
- US DOJ; BIA Precedent Chart
  - http://www.justice.gov/eoir/bia-precedent-chart
- Immigrant & Refugee Appellate Center
  - http://www.irac.net/unpublished/
- US DOJ; BIA Precedent Chart
  - http://www.justice.gov/eoir/bia-precedent-chart

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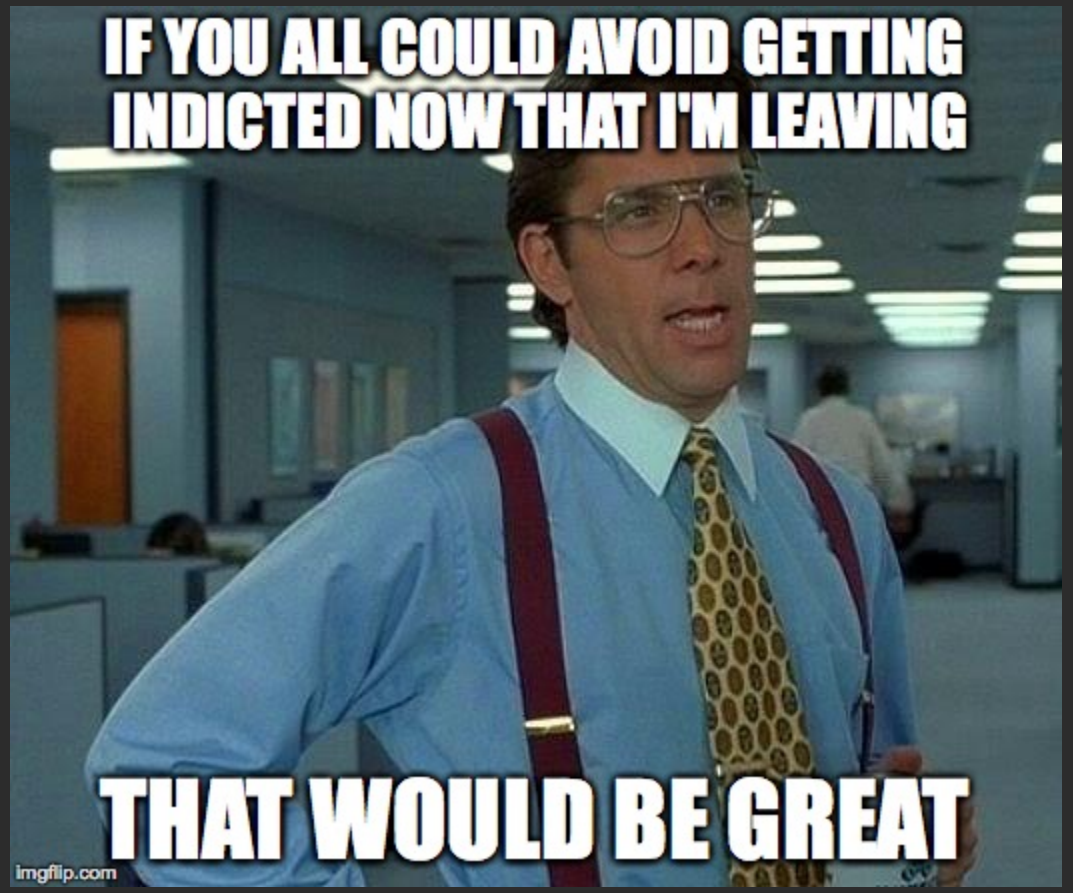
# Questions

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505 E. Huntland Dr., Suite 300 Austin, TX • 78752

Susannah Volpe: 512-270-2916
susannah.v@walkergatesvela.com

# POST-ORDER DRAMA: WORK PERMITS, RECORDS, AND APPEALS, OH MY!

APPEALS TO THE BIA:

- Throughout the removal proceedings, preserving the record is essential to a successful appeal.
- Respondent must preserve appeal at the conclusion of the hearing.
- Waiver of appeal, however, must be done knowingly and intelligently . *Mater of Patino*, 23 I&N Dec. 74 (BIA 2001)

# POST-ORDER DRAMA: WORK PERMITS, RECORDS, AND APPEALS, OH MY!

Is a Motion to Reopen Appropriate?:

- An administratively final decision must exist before a motion to reopen is proper. 8 CFR § 1003.2(a) (BIA); 8 CFR § 1003.23
- A MTR can be filed at the Board or with the Immigration Judge
- Must be filed with the body (i.e., the BIA or the Immigration Court) that last had jurisdiction of the matter before the decision became final. 8 CFR § 1003.23(b)(1) .

# POST-ORDER DRAMA: WORK PERMITS, RECORDS, AND APPEALS, OH MY!

Is a Motion to Reopen Appropriate?: The INA provides strict requirements for motions to reopen:

- Only one motion to reopen proceedings may be filed, subject to specified exceptions for battered spouses, children, and parents.
- The motion must state new facts to be proven at a hearing if the motion is granted, and must be supported by affidavits or other evidentiary material. The motion must show that the new evidence is material and was unavailable at the time of the original hearing. Additionally, the motion must demonstrate that the new evidence could not have been discovered or presented at the original hearing.
- The motion must be filed within 90 days of the date of entry of a final administrative removal order, subject to very limited exceptions.

# POST-ORDER DRAMA: WORK PERMITS, RECORDS, AND APPEALS, OH MY!

Is a Motion to Reopen Appropriate?: *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988)

- A removal order may be reopened due to ineffective assistance of counsel
- Ineffective assistance of counsel also may be grounds for equitably tolling a filing deadline
- Establishing a viable *Lozada*-based, ineffective-assistance-of-counsel claim requires three things:

1) an affidavit from a respondent setting forth prior counsel's obligations and the alleged violations of those obligations;
2) evidence that counsel was informed of the alleged violations and given an opportunity to respond; and
3) evidence that a complaint was filed with the proper disciplinary authorities, or an explanation of why a bar complaint was not filed.

# POST-ORDER DRAMA: WORK PERMITS, RECORDS, AND APPEALS, OH MY!

Is a Motion to Reopen Appropriate?: *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988)

- While some circuits apply the *Lozada* requirements flexibly, the 5th Circuit apply the requirements strictly. *Rodriguez-Manzano v. Holder*, 666 F.3d 948, 953 (5th Cir. 2012)

# POST-ORDER DRAMA: WORK PERMITS, RECORDS, AND APPEALS, OH MY!

The Order of Supervision:

- Often times, in lieu of physically removing an individual, ICE will put him or her on an Order of Supervision.
- The Order of Supervision can be challenging because it requires the individual to report frequently and to provide notice of any travel outside of the state.
- However, the Order of Supervision is also beneficial because one can apply for and receive a work permit when on an Order of Supervision.

# Pre-trial Issues

U.S. Department of Homeland Security

# Notice to Appear

**In removal proceedings under section 240 of the Immigration and Nationality Act:**

Subject ID: 353752089 FINS: 13152574 File No: [redacted]

DOB: 11/02/1969 Event No: AUS1509000077

In the Matter of:

Respondent: [redacted] currently residing at:

SOUTH TEXAS DETENTION CENTER 566 VETERANS DRIVE PEARSALL, TEXAS, 78061 (830) 334-2939

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☒ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;

2. You are a native of MEXICO and a citizen of MEXICO;

3. You arrived in the United States at or near an unknown place, on or about unknown date;

4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

800 DOLOROSA STREET-SUITE 300 San Antonio TX 78207. EOIR San Antonio, TX

*(Complete Address of Immigration Court, Including Room Number, if any)*

on To be set. (Date) at To be set. (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

M-1868 SHAFFER SDDO

*(Signature and Title of Issuing Officer)*

Date: September 14, 2015 AUSTIN, TEXAS

*(City and State)*

**See reverse for important information**

Form I-862 (Rev. 08/01/07)

## Notice to Respondent

**Warning: Any statement you make may be used against you in removal proceedings.**

**Alien Registration:** This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

**Representation:** If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

**Conduct of the hearing:** At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

**Failure to appear:** You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

**Mandatory Duty to Surrender for Removal:** If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

## Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before: _____

*(Signature of Respondent)*

_____ Date: _____

*(Signature and Title of Immigration Officer)*

## Certificate of Service

This Notice To Appear was served on the respondent by me on September 14, 2015, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

☒ in person ☐ by certified mail, returned receipt requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the SPANISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

REFUSED TO SIGN

_____

(Signature of Respondent if Personally Served)

L 7462 WILSON-LEON IMMIGRATION ENFORCEMENT AGENT

(Signature and Title of officer)

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

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**MATTER OF M- R- R-**

**AXXX-XXX-584**

**CHILD**

**AXXX-XXX-XXX**

**CHILD**

**AXXX-XXX-XXX**

*Respondents*

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In Removal Proceedings

Appeal of a Decision of an Immigration Judge

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# BRIEF OF AMICUS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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**AMERICAN IMMIGRATION**

**LAWYERS ASSOCIATION**

1331 G STREET NW, SUITE 300

WASHINGTON DC 20005

*Counsel listed on following page*

---

**Counsel for Amicus**

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IMMIGRANT LAW GROUP PC
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Portland OR 97204
503.241.0035

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1333 H Street, NW
Suite 900 West
Washington DC 20005
202.644.8600

Last summer, at a United States Border Patrol station along the U.S.-Mexico border, a parade of Border Patrol agents interviewed Y-F-.[1] Addressing Y-F- directly in Spanish, a government agent told Y-F- that "I am an officer of the United States Department of Homeland Security." He informed Y-F- that "I want to take your sworn statement" and warned Y-F- that "[t]his may be your only opportunity to present information to me and the Department of Homeland Security to make a decision." Under oath, the agent interrogated Y-F-. "Do you understand what I've said to you? Yes. Do you have any questions? No." On and on the interrogation went. Near the end of the interrogation, the agent asked Y-F- "Why did you leave your home country or country of last residence?" Y-F- responded, "To look for work." The interrogation was memorialized in a writing – on the official government Forms I-867A/B Record of Sworn Statement (and the continuation sheet, Form I-831) to

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[1] *See* AILA-AIC Artesia Pro Bono Project Case No. 20140086 (on file with authors). The AILA-AIC Artesia Pro Bono Project maintained a meticulous database of client data and government practices. *See* Stephen Manning, *Ending Artesia* at Chap. II (Jan. 25, 2015) available at https://innovationlawlab.org/the-artesia-report (explaining that the report "is based on a review of data collected from June 2014 through December 2014 by volunteers with the project. The scope of the data is unique in its granularity and its breadth.").

be exact. The testimony was written in a first-person, question-and-answer format which gives it the appearance that it is a verbatim transcription of the interrogation. The writings were sworn to by the government agent who administered the oath and they were even witnessed and counter-signed by yet another agent who attested to having witnessed the entire interrogation. On its face, it all seemed so official, so precise, and so full of due process and normal procedure. *See, e.g., Espinoza v. INS*, 45 F.3d 308, 310 (CA9 1995) (describing immigration record rule of reliability).

It was the experience of the AILA-AIC Artesia Pro Bono Project that documents like the one in Y-F-'s case would be used by the Department of Homeland Security's lawyers as impeachment evidence.[2] The assumptions behind their use as impeachment evidence were that different statements made at different times would indicate that

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[2] The AILA-AIC Artesia Pro Bono Project, like the CARA Family Detention Pro Bono Project, operates a sophisticated client management system that captures each government interaction, numerous demographic datapoints as well as critical case-related information. *See* Decl. of Allegra M. McLeod (filed as Exhibit 5, Memorandum for a Preliminary Injunction in *R.I.L.R. v. Johnson*, 15-CV-00011-JEB) (01/08/2015) (available at: https://www.aclu.org/sites/default/files/field_document/2015.01.08_009_amended_pi_motion_with_exhibits.pdf).

something is amiss and that because this is a government record created by sworn officers in their normal course of duty, it is inherently reliable. *See Espinoza*, 45 F.3d at 310. Because, why not? Isn't that the essence of impeachment evidence that where statements contradict, one cannot be true?

Here's why not: Y-F-'s interview, so painstakingly transcribed, sworn, signed and counter-signed, almost certainly never happened in the format in which it was memorialized. The impossibility of the interview, in spite of the DHS officers' affirmations of veracity and the rule of government regularity is plain on the face of the writings themselves: Y-F- was three years old at the time he was interrogated.

A lot happened in the summer of 2014 along the U.S.-Mexico border. Approximately 1200 children and women, like the Respondents here, were arrested, interrogated, and detained in several temporary facilities until they arrived at the detention center in Artesia, New Mexico. *See* Stephen W Manning, *Ending Artesia* at Chaps. IV & XI. In this case, like others defended by the AILA-AIC Artesia Pro Bono Project, the Department of Homeland Security introduced statements made at border interviews and during credible fear interviews and

reasonable fear interviews mostly for impeachment purposes. *See Ending Artesia* at Chap. IX (describing substantial deviations from typical bond hearings common in the Artesia docket). The Secretary of Homeland Security along with numerous officials in his chain of command – all officials with command control over the officers conducting interrogations like that in Y-F-'s case, publicly pronounced over and over again that the children and women seeking asylum that summer did not, in fact, qualify.[3] Over and over, these same officials

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[3] *See, e.g.*, Vice President Joseph Biden, *Remarks to the Press and Question and Answer at the Residence of the U.S. Ambassador, Guatemala City, Guatemala* (June 20, 2014) available at http://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice- president-joe-biden-guatemala; *Hearing on the Review of the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters*, Before the S. Comm. on Appropriations (July 10, 2014) (statement of Jeh Johnson, Sec'y of Homeland Sec. of the United States), available at http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson- senate-committee-appropriations; Juan Carlos Llorca, *DHS Secretary Visits Artesia, N.M, Facility; Warns Immigrants 'We Will Send You Back,'* EL PASO TIMES, July 11, 2014, available at http://www.elpasotimes.com/latestnews/ci_26128803/dhs-secretary-visit-artesia-nm-migrant-detention-center; Interview with Secretary of Homeland Security Jeh Johnson, NBC News, Meet the Press, July 6, 2014 (video); Press Release, Department of Justice, *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing Into the U.S.* (July 9, 2014), available at http://www.justice.gov/opa/pr/2014/July/14-dag-711.html; *Background*

repeated that speedy removals were expected and intended.

And it was not just the U.S. Border Patrol caught up in the frenzy of fast removals. The USCIS Asylum Division designed a credible fear and reasonable fear process that was designed to inhibit accurate interviewing and memorialization. Interviews were scheduled without notice and children were required to be present among other systemic defects.[4] *See infra* at § 2 (describing asylum fear screening defects in

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*Briefing from the Senior U.S. Department of State Official on Secretary Kerry's Trip to Panama* (July 1, 2014), available at http://m.state.gov/md228646.htm; *Officials: NM Detention Center Will Be Focused On Deporting Illegal Immigrants Within 15 Days*, CBS DC, (June 27, 2014 6:48 AM), available at http://washington.cbslocal.com/2014/06/27/officials-nm-detention-center-will-be-focused-on-deporting-illegal-immigrants-within-15-days/; *Hearing on Dangerous Passage: The Growing Problem of Unaccompanied Children Crossing the Border*, Before H. Comm. on Homeland Sec. (June 24, 2014) (statement of Jeh Johnson, Sec'y of Homeland Sec. of the United States); *Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Border*, Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs (July 9, 2014), available at http://www.hsgac.senate.gov/hearings/challenges-at-the-border-examining-the-causes-consequences-and-responses-to-the-rise-in-apprehensions-at-the-southern-border (statements of Thomas S. Winkowski, Principal Deputy Assistant Sec'y of U.S. Immigration and Customs Enforcement).

[4] *See, e.g.*, Transcript of Remarks by Deputy Secretary of Homeland Security Alejandro Mayorkas on the Central American Migrant Crisis,

detail). These defects in the design of the fear screening process distorted the accuracy of the interviews.

The cumulative effect of evidence in the public record when matched with the case-specific evidence here and viewed in light of the experience of the AILA-AIC Artesia Pro Bono Project indicates that the presumption of government record reliability took a grievous blow in the summer of 2014. When the head of an agency speaks so plainly and so frequently with disdain about the Central American children and women applying for asylum and when the government practices on the ground organize around that sentiment with the goal of deporting rapidly, the presumption of fairness that judges give to border records produced in the course of duty by CBP, particularly the I-867A/B, and the asylum records created in the course of duty by the USCIS Asylum Division, particularly the I-870 Record of Determination/Credible Fear Worksheet and the I-899 Record of Determination/Reasonable Fear Worksheet, merits reexamination. *See Matter of S-S-*, 21 I&N Dec. at

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NDN, National Press Club, Sept. 16, 2014, *available at* http://ndn.org/blog/2014/09/transcript-deputy-secretary-homeland security-mayorkas-ndn-event (acknowledging the asylum division's screening process was defective).

123-24 (requiring a reliable process for taking statements used as impeachment).

Amicus, the American Immigration Lawyers Association, submits this brief to provide context to the BIA in understanding how things actually play out on the ground. We describe the irregularities in the border screening process, the coercive nature of the detention center, and the systemic defects in the implementation of the credible and reasonable fear interviews. The *design* of the process used by DHS infects every adjudication.

As illustrated here, the Government's systemic failures form the fulcrum around which DHS seeks reversal. While we take no position on the merits of the Respondent's claim, AILA explains that the presumption that has historically applied — that the Department of Homeland Security regularly discharges its duties in a lawful manner — cannot apply here because of the system-bias against all the women and children detained in Artesia and the other family detention centers. The government records created as part of the family detention program in the summer of 2014 are designed to deport as many children

and women as possible in a short period of time. While all of those documents carry an air of reliability, few of them were created in conditions that deserve such a presumption.

Instead, the BIA should adopt a uniform rule that when an I-867A/B, an I-870, or an I-899 are introduced for impeachment purposes, DHS bears the burden of producing the maker and demonstrating in fact the document's reliability. *See Matter of S-S-*, 21 I&N Dec. 121, 123-24 (BIA 1995). The BIA and the immigration judge "need[ ] to know what transpired in the proceedings before the asylum officer before [they] can evaluate questions with respect to credibility arising from the interview." *Id.* at 124. If DHS fails to produce the maker or fails to meet its burden, the BIA should adopt a rule that precludes an Immigration Judge from making an adverse credibility finding based on any purported inconsistency. What happened at the border and in Artesia in 2014 was unfair and, regretably, cannot be undone; this rule, though, provides a measured response to address the system-bias and ensure fair adjudications in the immigration courts.

## Interest of Amicus

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals, as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

## Argument

### 1. System-bias in the border screenings.

The written memorializations of border screenings conducted by U.S. Customs and Border Protection and recorded on Forms I-867A/B are not inherently reliable because they often contain fake responses, do

not accurately reflect testimony presented, and were almost always created under coercive conditions.

The presumption that the I-867A/B are inherently reliable indicators of what was said by a respondent during a border screening stems from the idea that the forms are completed by sworn public officers in the course of carrying out their duty to the public. These forms "are presumed inherently reliable if authenticated, and are presumed to contain information from the respondent unless the respondent presents evidence to the contrary." *Espizona*, 45 F.3d at 309. "This rule is premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports." *Id.* at 310.

The public record as reflected in the experience of the AILA-AIC Artesia Pro Bono Project demonstrates that both prongs of the presumption are false. The CBP has a duty both to fairly identify inadmissible noncitizens who express fear and to accurately record their interactions on the government forms I-867A/B. The public record

shows that the government was motivated by a bias against the Central American children and women seeking asylum.

The CBP has a history of faking responses to the I-867A/B and the AILA-AIC Artesia Pro Bono Project's experience confirms this is so. Since the expedited removal program was first promulgated, the border screenings have been marked by systemic errors that, over nearly twenty years, have gone absolutely unchecked and unacknowledged by DHS (and the former INS). There is no public record that would suggest that any attention was given to reforming or improving the CBP processes used by the CBP officers to bring them into line with their duty. Indeed, the public record speaks otherwise about CBP's practices in general and CBP's practices in particular during the summer of 2014.

By statute, the government has a duty to identify inadmissible noncitizens in the expedited removal program who express a fear of harm. INA § 235(b). By regulation, this duty belongs largely to CBP (and in some instances rests with ICE). *See* 8 C.F.R. § 235.3(b). The duty has two components: creating an accurate record of proceedings

and, when the record of proceedings reveals an indication of fear, referring the noncitizen for a credible fear interview.[5]

The duty to create an *accurate* record of proceedings is microscopically described in the regulations so that there ought to be no room for manipulation of the system. *See* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 Va. J. Int'l L. 673, 681 (2000).[6] The examining immigration officers are supposed to elicit relevant information, record it, and if they hear an indication of fear, a "beep" sounds and the credible fear screening starts. *Id.* The regulations provide that "[i]n *every* case in which the expedited removal provisions will be applied...the examining immigration officer shall

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[5] The reasonable fear process is substantially similar. *See* 8 C.F.R. § 208.31. Only if the distinction matters in this brief do we refer to the reasonable fear process separately. Importantly, AILA has taken the position that the entire reasonable fear process violates the plain language of the asylum statute and that it is plainly illegal. *See, e.g.,* Brief of Amicus Curiae American Immigration Lawyers Association, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, and National Immigrant Justice Center, filed in *Perez-Guzman v. Holder*, 13-70579 (CA9 Apr. 2, 2014) available at: http://www.aila.org/infonet/amicus-brief-perez-guzman-v-holder

[6] Mr. Martin, a former general counsel for the then-INS, and part of the team that helped shape the expedited removal process, 40 Va. J. Int'l L. at 678, provided a series of recommendations for improving the expedited removal process including transparency and monitoring of the inspection process. *Id.* at 695-701.

create a record of the facts of the case and statements made by the alien." *See* 8 C.F.R. § 235.3(b)(2)(i). The regulations prescribe that "[t]his shall be accomplished by means of a sworn statement using form I-867A/B, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act." *Id.*

The interaction of the examining immigration officer with the noncitizen is painstakingly described in the regulation. *Id.* The examining officer "shall read (or have read) to the alien all information contained on Form I-867A." *Id.* The examining immigration officer "shall record the alien's responses to the questions contained on Form I-867B[,]" and the examining immigration officer is required to read back to the noncitizen the whole statement and then obtain a signature and, on each page, an initial. *Id.* The regulations describe a professional, regular, unbiased duty – the kind envisioned by the inherent reliability presumption.

The agency policy manual captures this professionalized view of the examining immigration officer's public duty. When performing the duty described in 8 C.F.R. § 235.3, the examining immigration officer

"must be absolutely certain that all required procedures have been adhered to and that the alien has understood the proceedings against him or her." *See* U.S. Customs and Border Protection Inspector's Field Manual, Chap. 17.15(b). The duty, as described in the agency policy, goes on to emphasize that it "is important that a complete, accurate record of removal be created[.]" *Id.* The examining immigration officer has a duty to "[b]e sure to obtain responses from the alien regarding the mandatory closing questions contained on the form [I-867B]." *Id.* And finally, the agency manual reminds the examining immigration officer to "have the alien read the [sworn] statement, or have it read to him or her in a language the alien understands" before signing and initialing. *Id.* That's the duty as publicly described. And that's how it is supposed to work.

Clearly, this written description of the duty of the government in the preparation of the forms I-867A/B gives great support to the inherent reliability presumption that immigration judges, the BIA, and the judicial courts afford to such forms. The publicly expressed duty gives the impression that the I-867A/B, in both form and substance, is a

transcription of what happened at a border holding center where no one else normally appearing in immigration court is regularly present to observe. The public assumes that its sworn officers follow the law – that is the heart and soul of the presumption of inherent reliability. In the rare case where that is not so, the presumption is just a presumption, after all, and it can be rebutted.

The burden, though, is placed on the respondent to rebut the reliability which is a difficult task and intentionally so. What if it were the case, though, that in some or many instances, the duty was not followed and the reports contained inaccuracies? The confidence that judges have in the presumption would certainly be tested. What if it were the case that in most of the instances, the duty was disregarded and, in fact, the I-867A/B's contained blatantly false information? The presumption would have to automatically fail.

The reality on the ground is that the CBP adheres to its sworn duty so irregularly that the premise of inherent reliability is fatally undermined. The public record has consistently documented the deficiencies of CBP's adherence to its duty to provide accurate and fair

reports on the forms I-867A/B and has documented falsification of reports. *See* U.S. Gen. Accounting Office, *Opportunities Exist to Improve the Expedited Removal Process* (Sept. 2000); U.S. Comm. on International Religious Freedom, *Study on Asylum Seekers In Expedited Removal: Evaluation of Credible Fear Referral in Expedited Removal At Ports of Entry in the United States* (Feb. 2005) (USCIRF Report); Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immigr. L. J. 167 (2006); American Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context* (May 2014) (AIC Report). The persistence of the irregularities over a large span of time cannot be ignored by the BIA by continuing to adhere to a presumption of reliability.

In 2005, the United States Commission on International Religious Freedom released its findings of its independent review of CBP's practices in expedited removal. The USCIRF Report used direct observation of CBP's practices. Its findings are notable. The USCIRF Report explains plainly that CBP officers faked responses to the I-867B.

*See* USCIRF Report at 15, 13-19. "However, despite the observation of a number of cases in which the I-867B fear questions were not asked, official documents prepared during these interviews (A-files) indicated that questions were asked and answered in most of the cases in which our research team did not observe any such questioning[.]" *Id.* at 15. With regard to the I-867B fear question "Why did you leave your home country or country of last residence?" the USCIRF researchers concluded that in nearly 87% of the cases, "the A-file incorrectly indicated that the question had been asked and answered." *Id.*

The USCIRF researchers determined that "[m]ore than a quarter of all aliens referred for a Credible Fear interview were not asked to confirm their statements, despite the potential use of these statements in subsequent asylum proceedings." *Id.* at 18. Importantly, the researchers explained that in "only 28.2 percent of cases, aliens were observed to read their statements or had their statemente read to them before signing the confirmation." *Id.* at 18-19.

Obviously, faking answers and forcing signatures are not part of the duty to which the examining immigration officers swear. In spite of

the blatant evidence that such practices were occuring in a "large proportion" of cases, USCIRF Report at 30, the public response from CBP after publication of the USCIRF Report was silence. There is no mention in the public record that CBP took any corrective action to realign its actual, largely unobserved practices, with the duty so entrusted. Indeed, "[m]any of those same flaws still plague the expedited removal system." *See* AIC Report at 10. These flaws included completing interviews "without confidentiality," "without properly interpreting interviews or translating documents back to applicants," using "identical boilerplate statements in officers' reports" and "fail[ing] to record asylum seekers' statements[.]" *Id.* at 10.

In the case of Y-F-, the examining immigration officer swore that he asked a three-year old child why he left his home country and he swore that a three-year old responded "to look for work". The implausibility of that interaction is obvious. The fact that other officers signed on further discredits the regularity of the border screening officer's adherence to his or her duty.

Nearly twenty years into the credible and reasonable fear screening process, there has not been a single publicly reported initiative wherein CBP has sought to overcome these deficiencies. As the case of Y-F- suggests, the presumption that the CBP screening officers are actually fulfilling their duty is not well-founded.

The presumption that the CBP officers are performing their duty with an impartial motive is belied by the public record. As explained above, the head of the agency pre-judged the cases of these claimants. The border screenings were conducted at inhospitable government-controlled holding centers that were not designed to ensure reliability during the interviews or in the memorialization of the interviews. The inhospitable conditions inject skepticism that data collected therein is an accurate reflection of what was actually said during an interview.[7]

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[7] In a disturbing recent echo, volunteers with the CARA Family Detention Pro Bono Project at the Dilley detention center report that clients of the project reported experiencing intimidation and humilation by CBP officers such as being gathered en masse and told by CBP officers that "you are bad mothers". *Cf.* USCIRF Report at 23 (describing CBP officer telling a Central American asylum applicant that she would be "in trouble" and that "she would not see her family for a long time if she made a fear claim.").

The public record of CBP's practices in 2014 speaks of a disregard for the noncitizens in their custody that create coercive conditions ill-designed for accurate screening. First, the use of frigid temperature controls in holding areas was widely reported. *See* Molly Redden, *Why Are Immigration Detention Facilities So Cold?*, Mother Jones (Jul. 16, 2014); Rachael Bale, *Detained border crossers may find themselves sent to 'the freezers'*, Ctr. for Investigative Reporting (Nov. 18, 2013); Nat'l Immigrant Justice Center, et al, *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (June 11, 2014) *but see* Office of Inspector General, Memorandum to Jeh Johnson on the Oversight of Unaccompanied Alien Children (Aug. 28, 2014).[8]

A consortium of organizations has collected numerous reports of border holding centers that indicate conditions are ill-suited to the

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[8] The OIG response is available at: https://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf. While the Office of Inspector General failed to sustain many of the complaints, it acknowledged the temperature problems. It provided different plausible explanations, in lieu of an intentional manipulation of temperature controls, to explain the existence of cold conditions. There can be no serious dispute that the interrogation of children and women in icy-cold holding-centers is not a best practice in interrogation design and does not correlate to an intention to elicit accurate historical information.

professional duty outlined in the statute, regulations, and policy manual. The ACLU of San Diego and Imperial Counties, the American Immigration Council, the National Immigration Project of the National Lawyers Guild and the Northwest Immigrant Rights Project have assembled representative samples of CBP disregard of its duty that include use of fake statements, use of icy conditions, use of degrading conditions, use of intimidation, and other unprofessional conduct. *See* Resources and Reports at http://HoldCBPAccountable.org (last visited May 24, 2015).

**2. System-Bias in Credible Fear Interviews**

Shortly after DHS opened the Artesia detention center in Artesia, New Mexico, D-R- was interviewed by the USCIS Asylum Office.[9] The Asylum Office found that she had no credible fear, and the immigration judge affirmed. D-R- was subsequently gathered one night with other women and herded to an airplane to constitute another "wave" of removal.

[9] *See* AILA-AIC Artesia Pro Bono Project Case No. 20140099 (on file with authors).

The record, though, created by the Asylum Office as it was required to do, *see* 8 C.F.R. §§ 208.30(d)(6), (e)(1), was defective by design. Dangling around her neck was her son. In Artesia, the conditions of detention and the conditions of the credible fear interviews were such that for several weeks, all the women were interviewed in the presence of their young children. D-R- was no exception. This made sense in a way because the women and children were supposed to be removed as quickly as possible. In D-R-'s case that could have proved fatal.

D-R- explained that "[d]uring my credible fear interview, my son was with me. I was afraid and ashamed to speak of [the violence that I experienced]." Importantly, she did not want her son to know that his father tried to kill her and force her to abort him. *See also*, Manning, *Ending Artesia* at Chap. X (explaining the AILA-AIC project's emphasis on filing motions to reconsider negative fear findings). No one reading her I-870 later would have known about this because the I-870 would never have reflected the systemic bias.

The conditions of the interviews were designed to prevent women from openly discussing their past experiences and the experiences of

their children. The interviews did not at first routinely elicit information related to domestic violence. None of the interviews purported to be exhaustive in nature. Accordingly, the record of the interviews, Form I-870, cannot on their own form a basis for impeachment when testimony later develops that contains additional information.

The Asylum Office's credible fear screenings were not designed to achieve accuracy or completeness because of the presence of children. Like the case at hand, this system bias was present in all the credible fear interviews in Artesia. *See, e.g.,* Dara Lind, *9 ways detaining immigrant families is turning into a 's***show'*, Vox (Aug. 6, 2014) (quoting AILA-AIC Pro Bono Project volunteer, Laura Lichter); Women's Refugee Commission & Luthern Immigration and Refugee Services, *Locking Up Family Values, Again: A Report on the Renewed Practice of Family Immigration Detention* at (Oct. 2014) (LIRS Report). For example, the asylum office found no credible fear in the case of a lesbian woman from El Salvador in part because the presence of her child during the interview distorted the questioning. *Id.* (describing the

asylum office's denial of a lesbian Salvadoran woman's credible fear claim).[10] Researchers from LIRS and the Women's Refugee Commission reported that "the Artesia facility lacked any childcare and had no school for children for months after opening[.]" *See* LIRS Report at 12. They found that "mothers had no options for childcare if they wished to sleep, needed a break, and, critically, when sharing their traumatic histories in making their cases for protection in the United States." *Id.* at 9; *see id.* ("several children detained at Artesia were the result of rape – something the mothers refused to disclose in front of these children, but which was crucial to their case histories.").[11]

For several weeks, asylum officers were not routinely seeking information about domestic violence during the credible fear interviews.

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[10] This client, almost removed because of the systematic failures in the expedited removal process, was later granted asylum. *See* Manning, *Ending Artesia* at Chap. XIV (describing the case of "Rosslyn").

[11] *See also* Detention Watch Network, Expose & Close: Artesia Family Residential Center, New Mexico (2014) at 6-7 (explaining that "[m]any women did not disclose rape or other critical details to asylum officers or immigration judges because they were unaware that the proceedings were confidential"); *also id.* ("Women have also been forced to participate in credible fear interviews and immigration hearings with their children due to requirements by ICE and the Executive Office for Immigration Review[.]"). The report is available at: http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose_close_-_artesia_family_residential_center_nm_2014.pdf.

The records of the AILA-AIC Pro Bono Project indicate that through mid-August 2014, the asylum office did not ask about family or intimate relation harm. *See* AILA-AIC Pro Bono Project's Big Table Report for Aug. 6, 2014 (describing liaison activity with asylum office relating to encouraging officers to engage in questioning about family violence) (on file with authors). This was so even though the DHS had long taken the position that a woman who was unable to leave a domestic relationship or was viewed as property by virtue of that relationship could set forth a cognizable claim for asylum. *See* Brief of U.S. Dep't Homeland Security, *Matter of L-R-* at 14-15, available at http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf.

Notably, every I-870 issued by the USCIS Asylum Office and logged into the AILA-AIC Pro Bono Project's database included a disclaimer stating that it was not an exhaustive account of all possible bases for fear. Section III of every I-870 contained the following language in all capital letters: THE FOLLOWING NOTES ARE NOT A VERBATIM TRANSCRIPT OF THIS INTERVIEW. THESE NOTES ARE

RECORDED TO ASSIST THE INDIVIDUAL OFFICER IN MAKING A CREDIBLE FEAR DETERMINATION AND THE SUPERVISORY ASYLUM OFFICER IN REVIEWING THE DETERMINATION. THERE MAY BE AREAS OF THE INDIVIDUAL'S CLAIM THAT WERE NOT EXPLORED OR DOCUMENTED FOR PURPOSES OF THIS THRESHOLD SCREENING. Indeed, this disclaimer appears to be commonly placed on the form I-870. The experience of the AILA-AIC Pro Bono Project is that it should be taken at its word and considered by judges in the adjudication process because, in spite of the appearance of a verbatim transcript, the I-870 is no such thing.

Though the federal courts have not expressed a granular understanding of what is involved in an "airport interview" versus a "credible fear interview," they have consistently expressed skeptisim about using the government-created records of credible fear determinations as a basis for an adverse credibility finding. For example, the Tenth Circuit has explained that adjudicators must "be sensitive to the pressure bearing on persons seeking to escape persecution and make allowances for omissions of detail in their early

accounts of what befell them." *Ismaiel v. Mukasey*, 516 F.3d 1198, /PIN (CA10. 2008). In *Zhang v. Holder*, 585 F.3d 715, 724 (CA2 2009), the Second Circuit held that credible fear interviews are "more similar to airport interviews than asylum interviews and therefore warrant close examination." The Second Circuit stated that adjudicators should consider the fact that respondents had been detained, did not have the benefit of counsel, and were "likely to be more unprepared, more vulnerable and more wary of government officials." *Id.*

These systematic failures in the design of the credible fear interviews make it absurd for any judge to make a negative credibility finding based on discrepancies between the I-870 and later testimony. The I-870 does not have the inherently reliability, in the absence of the maker's testimony, to form the basis for an adverse credibility finding. The Third Circuit has found that credible fear interviews in a detained setting present troubling reliability concerns. *See Fiadjoe v. AG*, 411 F.3d 135 at 159 (CA3 2005) ("The Asylum Officer's interview of Ms. Fiadjoe was not conducted at the airport shortly after her arrival; it was conducted on March 30, 2002, approximately nineteen days later, at the

York County Prison. Yet conditions similar to, and in many ways worse than, those at an airport interview prevailed.")[12] The Seventh Circuit has also instructed the BIA to consider the circumstances surrounding the credible fear interview. *See Balogun v. Ashcroft*, 374 F.3d 492 at 504-505 (CA7 2004) ("Reliability concerns not only the accuracy and validity of the documents on which airport interviews are recorded, but also the applicant's frame of mind and ability to answer the interviewer's questions.").

The circumstances of the instant case demonstrate the practical consequences of this flawed credible fear process. The Department of Homeland Security has appealed to the BIA the Immigration Judge's grant of asylum and has asked the BIA to review alleged inconsistencies and omissions between testimony given by the Respondent to an asylum officer in a credible fear interview and the testimony given by

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[12] Although the courts of appeals refer to "airport interviews," it is not clear if the asylum office has ever regularly conducted credible fear or reasonable fear interviews at an actual United States airport. The rules would seemingly preclude such an interview because no fear interview should took place until at least 48 hours have elapsed from the time of CBP's referral. It might be that the courts of appeals, like others, have confused the I-867A/B CBP interview with the asylum office's I-870 record of credible fear.

the Respondent in her hearing before the Immigration Judge. The Respondent explained to the Immigration Judge that she was not free to divulge the details of her claim in full during the credible fear interview because of the presence of her children in the interview. The Immigration Judge rejected the allegation of any inconsistency and accepted this explanation for the Respondent's failure to raise certain issues at her credible fear interview.

On appeal, the DHS seeks to establish that the Respondent was not credible because she did not raise the subject of threats against her children in a credible fear interview where her children were present. See Gov't Brief at 10. The DHS brief discounts her explanation that she did not want her children to know of the threats against them:

> Given that during her initial Asylum Officer interview the respondent disclosed, in the presence of her children, that their father was killed, and she was afraid that they would be harmed because of their father's death, it makes no sense why she would not also be willing to disclose the threats that were the basis of her fear.

Gov't Brief at 12-13.

At the time of these interviews, the children were four years old.

The Board should not sanction the DHS' creation of a credible fear process which is designed to inhibit the revelation of information and the DHS' challenge of a mother's very reasonable explanation, accepted by the judge, that the circumstances of the interview, specifically, the presence of her young children, inhibited the full disclosure of information.

The Respondent's case is perfectly emblematic of the fatal flaws described throughout this brief.

## Conclusion

Twenty years ago, in the BIA laid down a very simple rule: when the credibility of an applicant for asylum or withholding is placed in issue because of alleged statements made earlier, the record of the interview must contain a meaningful, clear, and reliable summary of the statements made by the respondent. *Matter of S-S-*, 21 I&N Dec. at 124. The I-867A/B, I-870, and I-899 are not reliable and should not be relied on as a matter of course. Instead, the DHS must bear a burden to demonstrate their reliability each time one of these documents is used for impeachment purposes.

Respectfully submitted on June 2, 2015,

---

ANDRES BENACH
STEPHEN W MANNING

## CERTIFICATE OF SERVICE

I, Andres Benach, certify that I caused to be served by first class mail a copy of this brief on the parties below on June 2, 2015.

Sandra A Grossman
Grossman Law LLC
110 N Washington Street #350
Rockville MD 20850

Corina E Almeida
Kathleen L Torres
P Michael Truman
US Immigration & Customs Enforcement
US Department of Homeland Security
12445 East Caley Avenue
Centennial CO 80111-6432

_____

ANDRES BENACH

# Bond Hearing

ILIANA HOLGUIN
ATTORNEY AT LAW
Dunbar, Armendariz, Hegeman & Holguin, PLLC
501 E. Nevada
El Paso, Texas 79902
EOIR#OV851389

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
EL PASO, TEXAS

IN THE MATTER OF:

[redacted]

IN REMOVAL PROCEEDINGS

FILE NO.: [redacted]

IMMIGRATION JUDGE:

Unknown

NEXT HEARING:

None Yet Scheduled

**APPLICATION FOR REDETERMINATION OF CUSTODY STATUS PURSUANT TO *MATTER OF JOSEPH***

ILIANA HOLGUIN
ATTORNEY AT LAW
Dunbar, Armendariz, Hegeman & Holguin, PLLC
501 E. Nevada
El Paso, Texas 79902

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
EL PASO, TEXAS

IN THE MATTER OF:

[redacted]

IN REMOVAL PROCEEDINGS

FILE NO.: [redacted]

TO THE HONORABLE JUDGE OF SAID COURT:

Applicant hereby applies to the Immigration Judge, pursuant to 8 CFR 236.1 (d) (1), for a redetermination of the conditions of release from custody and would show the court the following:

I.

The Applicant's full, true and correct name is [redacted]. Applicant was born on December 6, 1968, and is presently 46 years of age. Respondent became a lawful permanent resident of the United States on July 6, 2006.

II.

The Department of Homeland Security (hereafter "DHS") has charged Respondent as removable for having been convicted of an aggravated felony as defined in INA §§101(a)(43)(D) and

101(a)(43)(U). While a conviction for an aggravated felony as defined in INA §101(a)(43) renders a lawful permanent resident subject to the mandatory detention provision of INA §236(c), and an Immigration Judge does not have the authority to release a non-citizen subject to such provision, an Immigration Judge retains jurisdiction to determine whether a non-citizen is "properly included" within the mandatory detention provision. 8 C.F.R. §1003.19(h)(2)(ii). Pursuant to *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), a non-citizen is properly included within the mandatory detention provision unless DHS is "substantially unlikely to prevail" on its charges that the non-citizen is removable on one of the grounds designated in INA §236(c). If it is determined that a non-citizen is not properly included within such provision, an Immigration Judge may release the non-citizen on an appropriate bond.

In the instant case, DHS is charging Respondent as having been convicted of an aggravated felony as enumerated in INA §§101(a)(43)(D) and 101(a)(43)(U). INA §101(a)(43)(D) defines an aggravated felony as "an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000. In the instant case, Respondent was not convicted under either one of the statutes specifically enumerated in INA §101(a)(43)(D). Instead, Respondent was convicted of a completely different federal statute, namely, 18 U.S.C. §371, Conspiracy to Evade Reporting Requirements, in violation of 31 U.S.C. §5324 (a)(3) and (b)(1). The offenses described in 31 U.S.C. §5324 do not constitute money laundering or engaging in monetary transactions in property derived from specific unlawful activity, but rather simply state that no person shall "structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions" and that no person shall "cause or attempt to cause a nonfinancial trade or business to fail to file a report required under section 5331 or

any regulation prescribed under such section." The elements of the federal statutes enumerated within the definition of aggravated felony and the elements of the statute under which Respondent were convicted are distinctly and radically different, and so a violation of 31 U.S.C. §5324 cannot be held to constitute an offense described in either 18 U.S.C. §1956 or §1957 as required by the aggravated felony definition.

Conspiracy is only an aggravated felony if the underlying offense is an aggravated felony pursuant to INA §101(a)(43)(U). Because Respondent was not convicted of an offense described in INA §101(a)(43)(D) relating to money laundering or monetary transactions derived from specific unlawful activities, Respondent is not removable as an aggravated felon pursuant to either INA §101(a)(43)(D) or (U). In comparing the aggravated felony definition and the statute under which Respondent was convicted, it becomes clear that DHS is substantially unlikely to prevail on its charge of removability by clear and convincing evidence, and thus, that Respondent is not properly included within the mandatory detention provision of INA §236(c).

III.

Applicant has substantial family ties in the United States, including his LPR spouse, [redacted] and two LPR daughters. If released on bond, Applicant will reside with his family at [redacted] Diamond Bar, CA 91765. Applicant's family will ensure that he appears for all future court hearings and/or appointments with Department of Homeland Security officials. Applicant has an established family support system and a fixed residence, and thus does not pose a flight risk. Further, Applicant has never been convicted of a violent or dangerous crime, and is therefore not a danger to the community.

Applicant thus respectfully requests that this Court order his release on bond during the pendency of these proceedings.

Respectfully submitted,

ILIANA HOLGUIN
Attorney for Respondent
State Bar No. 24027556
501 E. Nevada
El Paso, Texas 79902
(915) 542-1071
(915) 542-1079 Fax

[redacted] ) FILE NO.: [redacted]

# Proof of Service

On May 4, 2015, I, Iliana Holguin, Attorney at Law, served a copy of this Application for Redetermination of Custody Status Pursuant to *Matter of Joseph* and any attached pages on the Office of the Chief Counsel, Department of Homeland Security, at 1545 Hawkins Blvd, El Paso, TX 79925 via electronic mail.

ILIANA HOLGUIN
Attorney at Law

ILIANA HOLGUIN
ATTORNEY AT LAW
Dunbar, Armendariz, Hegeman, & Holguin, PLLC
501 E. Nevada
El Paso, Texas 79902
EOIR#OV851389

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
EL PASO, TEXAS

IN THE MATTER OF:

[redacted]

IN REMOVAL PROCEEDINGS

[redacted]

IMMIGRATION JUDGE:

Hon. Guadalupe Gonzalez

NEXT HEARING:

May 11, 2015 at 1:00 P.M.

**DOCUMENTS IN SUPPORT OF REQUEST FOR RELEASE FROM CUSTODY**

ILIANA HOLGUIN
ATTORNEY AT LAW
Dunbar, Armendariz, Hegeman & Holguin, PLLC
501 E. Nevada
El Paso, Texas 79902

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
EL PASO, TEXAS

IN THE MATTER OF:

[redacted] A#099-056-860

IN REMOVAL PROCEEDINGS

| TAB | DESCRIPTION | PAGE |
|---|---|---|
| A | Documents Demonstrating Family Ties | |
| | Copy of LPR Card Respondent's spouse, [redacted] | 1 |
| | Copy of marriage certificate, with translation, of Respondent and spouse | 2 |
| | Copy of birth certificate of Respondent's son, [redacted] with translation | 5 |
| | Copy of LPR Card of Respondent's daughter, [redacted] | 7 |
| | Copy of birth certificate of Respondent's daughter, [redacted], with translation | 8 |
| B | Documents Demonstrating Fixed Residence | |
| | Copy of Grant Deed for Respondent's Residence | 10 |
| | Annual Property Tax Bill for Respondent's Residence | 13 |
| | Annual Tax and Interest Statement for Respondent's Residence | 14 |

C Documents Demonstrating Ties to the Community



D Documents Demonstrating Financial Solvency

[redacted] ) [redacted]

# Proof of Service

On May 11, 2015, I, Iliana Holguin, Attorney at Law, served a copy of this Respondent's Documents in Support of Request for Release from Custody on the Office of the Chief Counsel, Department of Homeland Security, at 1545 Hawkins Blvd., El Paso, Texas 79925 via hand delivery in open court.

_____

ILIANA HOLGUIN
Attorney at Law

0059R
01/06/98

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
800 DOLOROSA STREET, SUITE 300
SAN ANTONIO, TEXAS 78207

FILE:

IN THE MATTER OF:

IN REMOVAL PROCEEDINGS

**APPLICATION FOR REDETERMINATION OF CUSTODY STATUS**

I hereby request a redetermination of my custody status. My current bond amount is $0. I am seeking release on my own recognizance or a new bond in the amount of $_____.

A. BACKGROUND AND RESIDENCE

1. My full, true and correct name is _____.
2. I was arrested on _____ in _____.
3. I was born in _____.
   My date of birth is _____.
4. I entered the U.S. without inspection (EWI) at or near _____ on or about _____.
   The expiration date of my authorized stay is: N/A.
5. Country of which I am a citizen, subject, or national: _____ .
6. I am presently being detained at: _____.
7. The places in the United States where I have lived during the last five years are as follows:

Complete address (include apt. no.) From MO/YR - To MO/YR ___

_____

_____

_____

8. Upon release I will be residing with my sponsor at the following address: 4295 A Dacy Lane, Buda, Texas 78610.

B. FAMILY

1. I am ( )single ( x)married ( )divorced ( )widowed ( )separated ( )unknown at this time.
2. The name of my spouse is: Elizabeth Martinez.
3. My spouse was born on April 6, 1973 at Galeana, Nuevo Leon, Mexico.
4. I have three (3) living children, as follows:

| Name | Relation | Date of Birth, Country of Birth | Citizen Of: | Current Address |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |

C. EMPLOYMENT DURING THE PAST 5 YEARS

1. During the past 5 years I have been employed as follows:

| From | To | Employer's Name | Address | Business |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |

D. FINANCIAL RESOURCES

1. My assets are as follows: Cash $_____
   Stocks and Bonds $_____ Real Estate $_____
   Vehicle(s) $_____ Other$_____
2. Sources of income other than employment are as follows:_____
   _____

E. CRIMINAL RECORD

I ( ) have **( )have not** been arrested, convicted, or confined in a prison. If you have been, explain:

From - To - Where (Citv) (State) (Countrv)- Nature of offense - Outcome

_____

_____

F. IMMIGRATION RECORD

1. I first entered the United States at _____on or about _____.
2. Since the date of my first entry I departed from and returned to the United States at the following places and on the following dates: (If you have never departed from the United States since your original date of entry, circle no departures

| DEPARTED | | RETURNED | | INSPECTED AND ADMITTED YES/NO |
|---|---|---|---|---|
| PORT | DATE MONTH-DAY-YEAR | PORT | DATE MONTH-DAY-YEAR | |
| | | | | |
| | | | | |
| | | | | |

3. I ( )have **( )have never** been deported or required to depart voluntarily from the United States. If answer is in the affirmative, indicate the date and port of departure: I took a voluntary departure on May of 2011.

G. RECORD OF APPEARANCE

I ( ) have **( )have never** been released on bail, or other conditions, pending deportation proceedings, criminal trial or appeal. If answer is in the affirmative, explain when and where:_____
_____
_____

H. IDENTIFYING DOCUMENTS

I have the following identifying documents:___

I. MEMBERSHIP IN ORGANIZATIONS

List below all organizations, societies, clubs, and associations, past or present, in which you have held membership in the United States or a foreign country, and the periods and places of such membership. (If you have never been a member of any organization, state -None.")_____ _____

_____

J. OTHER INFORMATION

In addition to the information set forth above I wish to add the following:

Date:
Place:

_____
SIGNATURE - RESPONDENT/COUNSEL

# U.S. Department of Justice

**Executive Office for Immigration Review**
***Immigration Court***
***1100 Commerce Street, Suite 4B41***
***Dallas, Texas 75242***

---

**FILE NO.: A**

**IN THE MATTER OF:**

**APPLICATION FOR REDETERMINATION OF CUSTODY STATUS**

I hereby request a redetermination of my custody status. My current bond amount is _____ I am seeking a new bond in the amount of _____

**A. Background and Residence:**

1. My full, true and correct name is _____
2. I was born in _____ (city or town) _____ (country)
3. My date of birth is _____
4. I am presently being detained at: _____
5. The places in the United States where I have lived during the last 5 years are as follows:

_____

**Complete Address - Including Apt. NO. FROM MO/YR TO MO/YR**

_____

_____

_____

_____

_____

6. Upon release, I will be residing with _____
at the following address: _____

_____

**B. FAMILY:**

1. I am [ ] single [ ] married [ ] divorced [ ] separated _____
2. The name of my spouse is _____
3. We were married on _____ (M/D/Y) at _____ (City)
4. My spouse was born on _____ at _____
5. My spouse resides at _____
6. My spouse's immigration status is ____ U.S. ____ Legal Resident ____ Other

7. I have _____ living children, as follows: _____

Name Relations Date and Country of Birth Citizen of Present Address

_____

_____

_____

_____

_____

**C. EMPLOYMENT DURING THE PAST 5 YEARS:**

**FROM TO EMPLOYER'S NAME ADDRESS BUSINESS**

_____

_____

_____

_____

_____

**D. FINANCIAL RESOURCES:**

1. My assets are as follows:

(A) Cash, Household Goods, Vehicle, etc. _____ (B) Real Estate _____

(C) Other _____

2. Sources of income other than employment are as follows: _____

_____

**E. CRIMINAL RECORD:**

I [ ] have [ ] have not been arrested, convicted or confined in a prison. If you have been, explain:

When Where (City) (State) (Country) Nature of Offense Outcome

_____

_____

_____

**F. IMMIGRATION RECORD:**

1. I first entered the United States at _____ on or about _____

2. Since the date of my first entry I departed from and returned to the United States at the following places and on the following dates.

| **DEPARTED** | | **RETURNED** | | **INSPECTED AND ADMITTED** |
|---|---|---|---|---|
| **PORT** | **DATE (M/D/Y)** | **PORT** | **DATE (M/D/Y)** | **YES/NO** |
| | | | | |
| | | | | |
| | | | | |

3. I [ ] have [ ] have never been deported/removed or required to depart voluntarily from the United States. If yes, state the date and port of departure. _____

**G. RECORD OF APPEARANCE:**

I [ ] have [ ] have never been released on bail, or other conditions, pending deportation/removal proceedings, criminal trial or appeal. If yes, explain when and where _____

_____

**H. IDENTIFYING DOCUMENTS:**

I have the following identifying documents with me _____

_____

**J. RELIEF AVAILABLE:**

_____

_____

**K. OTHER INFORMATION:**

In addition to the information set forth above, I wish to add the following: _____

_____

**Date:** _____ _____

**Place:** _____ **Signature**

**CERTIFICATE OF SERVICE**

**THIS DOCUMENT WAS SERVED BY: ___ MAIL ___ PERSONAL _____ DATE**
**TO: [ ] ALIEN [ ] ALIEN c/o CUSTODIAL OFFICER [ ] ALIEN'S ATTY/REP [ ] INS**

_____

**SIGNATURE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**EL PASO, TEXAS**

IN THE MATTER OF: FILE NO.:

## CUSTODY QUESTIONNAIRE

AGE/NATIONALITY:

CURRENT BOND STATUS:

CUSTODY REQUEST:

LPR/VISA HOLDER(?):

SPOUSE/CHILDREN:

PARENT(S):

U.S. EMPLOYMENT:

PROPERTY IN U.S.:

LAST U.S. RESIDENCE:

WILL RESIDE AT/WITH:

ARRESTS/CONVICTIONS:

DOMESTIC VIOLENCE:

METHOD OF ARRIVAL:

POSSIBLE WAIVERS:

OTHER DATA:

Date: Signature: _____

**BOND WORKSHEET**

Alien's name: _____ Alien number: A

Attorney's name:_____Phone number: _____

Interpreter requested: ; Language: __ _____

Initial bond set: $_____ Bond requested: ____OR_____

**EQUITIES**

Age: ____ Marital Status: _

Spouse's status: _____ Children: Number of Children: _____

List children's names, dates of birth, and places of birth (attach copies of birth certificates):

_____, _____

_____, _____, _____

Use additional sheets if necessary

Birthplace of mother: ____ ____ Birthplace of father: __ _____

Status of mother: __ _____ Status of father: _____

Will respondent make any claims to citizenship to the United States?

Will the claim be by birth (in U.S.), naturalization, acquisition or derivation? __ _____

Does respondent have any brothers / sisters in the Unites States?

List sibling's names, dates of birth, and status(es) in the United States:

_____, _____, _____

_____, _____, _____

_____, _____, _____

_____, _____, _____

Use additional sheets if necessary

First date respondent entered United States: __ current status: _____

Years resided in U.S.: _____ __ Date received permanent residence:

_____

Education received (both in U.S. and elsewhere): _____

Use additional sheets to list schools attended, graduation dates, etc.

Has respondent been employed in the United States? (yes / no)

Does respondent have authorization to work in the United States? no

Has respondent ever used illegal documentation to work in the United States? (yes / no)

List last three places of employment, dates of employment, and last salary received:

_____, _____, _____

_____, _____, _____

_____, _____, _____

Where will the respondent reside if released? _____

With whom will respondent reside? _____

List all convictions, dates of convictions, sentences received, and time served by respondent

_ _____, _____

_____, _____, _____

_____, _____, _____

Date respondent came into custody of the Immigration Service: _____

How did respondent come into Immigration Service custody? _____ _____

Is respondent subject to mandatory custody provisions of section 236(c) of the Act? no

List all forms of relief which respondent will seek: __

_____

_____

Other considerations: _____

_____

# Merits Hearing

Declaration of Dr. Richard D. Anderson, Jr.
November 3, 2015

1. I am Professor of Political Science at the University of California, Los Angeles, where I joined the faculty in July 1989. I hold the degrees of Ph. D from the University of California, Berkeley, in political science and Master's in Public Affairs from Princeton University. Both my doctoral and my master's studies concentrated on the politics and society of the then Soviet Union. Since the dismemberment of the Soviet Union at the end of 1991, my research and teaching have concentrated mainly on the politics of Russia and secondarily on other post-Soviet states. My research depends heavily on knowledge of the Russian language. I have published and lectured about post-Soviet politics both in the United States and abroad. I am the author or co-author of three scholarly books, of numerous articles in journals or chapters in collective volumes reporting research, and of reviews of books by other scholars. Scholarly journals regularly ask me to submit preliminary peer reviews of scholarship in various fields pertaining to my specialty. After obtaining my master's degree but before obtaining my doctorate, I worked for the Central Intelligence Agency and as a contractor for the Office of the Secretary of Defense researching Soviet military affairs, and I made frequent use of my expertise on the Soviet Union in the four years I spent working for the then House Permanent Select Committee on Intelligence or for the House Budget Committee. I have traveled to parts of the former Soviet Union approximately thirty times since 1990 and spent a total of perhaps two and a half years living in Russia mainly for purposes of ethnographic research. Among the specific topics addressed in my publications are conflicts among ethnic groups and the activities of Russian extremists such as those now rebelling in eastern Ukraine. I have recently taught a seminar devoted specifically to that conflict and have been invited to lecture about it on November 4 at California State University Northridge. I have testified as an expert witness on conditions in various former Soviet states in numerous immigration hearings (including several cases concerning anti-Semitism) and in two federal criminal trials, as well as having given an expert deposition in a third criminal case, which I was told settled in advance of trial, and having submitted an expert affidavit to a federal civil case.

2. I have read the affidavits in English of and of her father and have also reviewed parts of the Russian original of his affidavit.

3. If is Jewish, she is in severe danger from the Russian separatist rebels who, with military backing from Russia, have seized power in her home city of and the surrounding territory. The separatists are part of a larger transnational movement widespread inside Russia and particularly active in the now independent states whose territories were until 1991 component republics of the Union of Soviet Socialist Republics and before 1917 were possessions of the Russian empire. This chauvinist movement generally blames Jews for the dismemberment of the Soviet Union; I have heard a senior member of the movement tell me explicitly that an international Jewish conspiracy was responsible. The dissolution of the Soviet Union was, in these extremists' distorted reasoning, responsible for the alleged (and sometimes real) maltreatment of Russians who found themselves subject to the Soviet Union's successor states and the disorders and economic and demographic decline that Russia itself experienced during the 1990s. In Russia itself, the state has kept Russian extremists in check to some degree, because they are allied with holdover Communists who tried to overthrow former President Boris Yeltsin and still want to replace his chosen successor Vladimir Putin, but even despite state officials' counteraction, extremists frequently commit violence against Jews, Africans and persons whose ethnicity ties them to one of the newly independent states. In

Ukraine the separatist rebels in the eastern provinces have been joined by actual volunteers from various Russian extremist movements, as well as alleged "volunteers" from units of the regular Russian military, and the rebels are themselves Russian extremists.

2. danger is even worse because her passport has a US entry stamp. The separatists in power in have joined official Russian allegations that the United States was behind the demonstrations in the *Maidan* (Independence Square in the Ukrainian capital Kyiv), and United States policy is described as an arm of that international Jewish conspiracy responsible for the decline of Russia. The rebels' knowledge that both claims are false actually places in more danger, since if she returns to , the rebels' need for public confirmation of their falsehoods makes them even more likely to seize her on false charges of espionage on behalf of the United States, torture her until she confesses, and parade the confession as proof that the United States has been behind both the overthrow of the former president Yanukovych (who championed Russian-speaking eastern Ukraine against the Ukrainization sought by western Ukrainians) and the Ukrainian government's later offensive against the separatist rebels. Since passport ties her to the United States, it will bolster their case that she is a foreign spy. As she is a woman, they probably will also take the opportunity to discredit her by accusing her of voluntarily being trafficked for purposes of prostitution. As her father's affidavit suggests, they may also use the occasion to extort a large bribe from her or him. Her father's affidavit also reveals a political motive for the separatists to persecute her. He incautiously revealed his opposition to the separatist referendum declaring the independence of from Ukraine, and I have seen previous instances in which Russians have retaliated against political dissent by menacing the dissenter's children. Because the separatists drove out the Ukrainian police and civil administrators when they seized government buildings in , no one is available there to protect her or her father even if his acquaintances might again try to intervene on his or her behalf.

3. While the Russian extremists pose a danger to her only if she is returned to or neighboring , in the rest of Ukraine she is not much safer. As she comments, her speech immediately identifies her origins in eastern Ukraine, and she does not even speak Ukrainian or the mixture of Ukrainian and Russian often used in Ukrainian conversations. At a time when many Ukrainians are terrified and enraged by the dismemberment of their country, anyone identifiable as an east Ukrainian in the rest of Ukraine is a target for violent retaliation, with which Ukrainian police mindful of their colleagues' fate at the hands of the separatists are likely to sympathize rather than protecting the victim. Moreover, as she rightly claims, some of the most active combatants in the partly violent resistance against the east Ukrainian former President Yanukovych are overtly anti-Jewish west Ukrainians who identify with the Ukrainian nationalist cause that motivated their predecessors to join units of the Nazi SS during World War II and to participate in the extermination of Ukrainian Jews. Again the Ukrainian police are unlikely to protect against violence on the part of Ukrainian extremists motivated by anti-Semitism.

4. I very much doubt that can return to Ukraine with any expectation of safety.

Signed,

Richard D. Anderson, Jr.
November 3, 2015