Forms I-213 – the Government's elixir of choice.

The point of writing this paper is to, in question and answer format:

- suggest practical ways to challenge I-213s in actual immigration court litigation; and
- explain the issues that arise when doing so

Many immigration judges are becoming *conditioned*, as if suffering from Stockholm syndrome,[1] to accept into the record any documentary evidence submitted by the government as truthful of whatever hearsay allegations that evidence purports to allege. The rules have been partially written to grease the path for them[2] and the IJs' time-sensitive case completion quotas and various "Do you want to keep your job?" requirements[3] put tremendous pressure on IJs to blow past any pesky evidentiary challenges brought by "dirty immigration lawyers."[4] And all too many immigration lawyers raise no evidentiary challenges. Many presume that none can be successfully made. Bad habits on both sides of the bench are quickly becoming inveterate and they are poison in the due process well.

To nothing is the false notion of "obviously admissible/obviously truthful" more tenaciously attached than with the Form I-213. ICE counsel erupts in ever so pseudo-holy indignation[5] at the mere suggestion that an I-213 should be excluded. ICE counsel's reflexive position is that an I-213 is *always* admissible. This is most certainly not the case. More egregiously, however, is the position ICE takes that, *by virtue of its admissibility*, a Form I-213 is also always *inherently reliable*. As legal argument, this is, as Lincoln said (albeit in a different context) "as thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had starved to death."

Even if a document, whether an I-213 or anything else, is admitted, whether the statements contained therein should be taken by the IJ as truthful is an additional and separate inquiry – a legal point you learned in the first semester of your first-year law-

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[1] https://www.history.com/news/stockholm-syndrome

[2] *E.g.*, 8 C.F.R. §§ 1240.7(a) and 1240.46(b): an Immigration Judge "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."

[3] See generally, *Report, The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, June, 12, 2019, Innovation Law Lab and the Southern Poverty Law Center. AILA Doc. No. 19061281.

[4] This appellation brought to you by a former attorney general of the U.S. *See* https://www.washingtonpost.com/news/fact-checker/wp/2017/10/26/sessionss-claim-that-dirty-immigration-lawyers-encourage-clients-to-cite-credible-fear/.

[5] https://www.youtube.com/watch?v=qmywwiZth5E

school evidence class.[6] The Board has acknowledged this basic evidentiary distinction[7] but oh so many IJs do not.

If you remember nothing else from this paper and accompanying presentation, remember this:

> **If you fail to make the IJ understand the distinct and separate analyses into**
> - **the admissibility of a document,**
> - **the reliability of that document,**
> - **and whether the document should be excluded, even if admissible and reliable, on account of the circumstances by which the content was obtained (i.e., "fairness" concerns),[8] your evidentiary challenge will likely go down ingloriously in 🔥.**

What is a Form I-213?

It is many things and you should read it from top to bottom. It usually contains information regarding biographic and family data; date, place, time, and manner of entry; immigration history including past apprehensions; criminal history; sometimes health information; and sometimes even what looks like a transcription of an actual interview with the person.

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[6] *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004) ("Of course, once the documents were admitted, a separate hearsay objection remained insofar as their relevance depended on the truth of statements made in the documents: 'authentic' means the document is 'real,' not that its contents are necessarily 'true.'"). I love the way the Circuit Court begins w/ "Of course…" because, of course…. *See also United States v. Meienberg*, 263 F.3d 1177, 1181 (10th Cir. 2001) ("Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility.") (quoting *United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988)).

[7] *See Matter of Velasquez* 25 I. & N. Dec. 680, 683 (BIA 2012) ("Sections 240(c)(3)(B) and (C) and 8 C.F.R.§ 1003.41, by their explicit terms, deal only with the question of admissibility of documentary evidence to prove a conviction's existence, not with the sufficiency of such evidence. Therefore this case only addresses the authentication of documents as it relates to their admissibility, not with their overall probativeness or sufficiency to meet a burden of proof.").

[8] I previously wrote at length about the many inherent difficulties in litigating suppression cases and the issues remain the same. *See generally*, David Antón Armendáriz, On the Border Patrol and Its Use of Illegal Roving Patrol Stops, 14 SCHOLAR 553, 554 (2012) (copy available if you wish to be the third person to read it at https://www.dropbox.com/s/kuu0pzmpux0otn4/final.version.Armendariz.st.marys.paper.re.roving.patrols.pdf?dl=0 A good general practice advisory is *Challenges and Strategies Beyond Relief*, Dree K. Collopy, Melissa Crow, and Rebecca Sharpless, AILA InfoNet Doc. 11120750b, copy at https://www.aila.org/File/Related/11120750b.pdf

According to the Fifth Circuit, "[t]he Form I-213 is essentially a recorded recollection of a conversation with the alien…." *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (citations omitted). In this respect, it is clearly hearsay, *to wit*, an out-of-court statement introduced to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). But "[h]earsay is admissible in administrative proceedings, so long as the admission of evidence meets the tests of fundamental fairness and probity." *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (citations omitted).

***** I have denied alienage but the DHS submitted an I-213 and the IJ asked me to state all my objections right then and there. What do I do?***

Consider the following fairly accurate transcription and amalgamation of many a post-pleadings master hearing moment in which I have been involved:

IJ: What objections do you have to the I-213 that has just been handed to you?

Me: DHS can take that I-213 that's just been given to me and [redacted] The DHS is submitting the I-213 *today* obviously to "request[] a ruling" at this hearing. This is in plain violation of this Court's rules regarding both the timing of filing (Imm. Court Prac. Man. § 3(b)(i)(A))[10] and manner of service.[11] This is a late filing; it has not been served in a manner "calculated to allow the other party sufficient opportunity to act upon or respond to [the] served material."[12] The Court should not accept it. The choice to file it today, in conjunction with this Court's insistence that I present my objections today, renders it impossible for Respondent to be afforded his

[9] Redacted upon the advice of counsel.

[10] *See* Imm. Court Prac. Man. (https://www.justice.gov/eoir/file/1205666/download), § 3(b)(i)(A): Non-detained aliens. — For master calendar hearings involving non-detained aliens, filings *must* be submitted at least fifteen (15) days in advance of the hearing *if requesting a ruling at or prior to the hearing*. *Otherwise*, filings may be made either in advance of the hearing or in open court during the hearing. (emphasis added). Note that the word "otherwise" here indicates that "filings may be made either in advance of the hearing or in open court during the hearing" only if the party is *not* "requesting a ruling at or prior to the hearing."

[11] *See* Imm. Court Prac. Man. § 3.2(d): Timing of service. — …. Service must be calculated to allow the other party sufficient opportunity to act upon or respond to served material. (emphasis added).

[12] *See id.*

constitutional due process right, as codified at INA 240(b)(4)[13] and 8 C.F.R. § 1240.10(a)(4)[14] to examine the evidence against him.

IJ: Are you saying you want a continuance? It's just a few pages. What's there to review? These are inherently reliable. It obviously relates to your client. That's his name on it, right? Take 15 minutes and go talk to your client and come back and present whatever objections you have.

Me: No.

IJ: What?

Me: No. As in N, the letter after M, followed by O, the letter before P. As in N to the O. N….O….. We aren't coming back in fifteen minutes. Believe it or not, I-213s are neither inherently *admissible* nor inherently *reliable regardless of content and regardless of the circumstances* under which the information was taken and it was created.[15] There are many, many factors to consider,[16] which can only be analyzed in a lengthy consultation with my client. So I can't possibly conduct a full and complete analysis of this evidence in fifteen minutes. The Court's rules, statutory, regulatory and local, are written for a reason – namely so that the respondent's due process right to a reasonable opportunity to examine the evidence against him have some actual meaning.

IJ: I'll give you to the end of the docket. Come back when you are ready.

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[13] This statute reads: "[T]he alien shall have a reasonable opportunity to examine the evidence against the alien."; *see also Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903) (holding that deportation statute must be read in light of the Due Process clause to provide an opportunity to be heard).

[14] This regulation reads: The immigration judge shall "advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her."

[15] In *Matter of Gomez-Gomez*, the Board went out of its way to note that it had *not* held elsewhere (in *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999)) that "any allegation of alienage in a Form I-213, however conclusory, is sufficient to meet the Service's burden of proof." 23 I&N Dec. 522, 526, n. 5 (BIA 2002).

[16] *See e.g., Pouhova v. Holder*, wherein it reads:

> In a specific case though, a particular Form I-213 may not be inherently reliable. For example, it may contain information that is known to be incorrect, it may have been obtained by coercion or duress, it may have been drafted carelessly or maliciously, it may mischaracterize or misstate material information or seem suspicious, or the evidence may have been obtained from someone other than the alien who is the subject of the form. *See Barradas*, 582 F.3d at 763-64 (listing reasons I-213 may not be inherently reliable); *Rosendo-Ramirez*, 32 F.3d at 1088 ("Since the I-213 is supposed to be a record of a conversation with an alien, courts have evaluated its probative value by considering whether there is evidence that the form is inaccurate or that the information recorded in it was obtained by someone other than the alien himself.").

726 F.3d 1006, 1013 (7th Cir. 2013).

Me: No. We aren't coming back later today. I have other things to do this morning. This hearing was set for a specific time. We showed up on time. We were prepared to proceed based on the record of all filings timely filed in advance of today's hearing. If there is any delay in this process, it is due to the government's failure to comply with this Court's rules. We aren't going to be forced into abandoning our due process rights just because the DHS couldn't be bothered to timely file their evidence in advance.

IJ: Well how could they have filed it in advance? You had not even pleaded to the allegations yet?[17]

Me: The DHS's strategic choice to wait until after pleadings is just that: its own strategic choice.[18] The rules are there for a reason and the DHS's choice to violate this Court's rules is by no means an excuse to strip the respondent of his constitutional and statutory right to have a reasonable opportunity to examine the evidence against him.

IJ: So what do you want?

Me: I want the fifteen-days notice for which this Court's rules provide.

IJ: Well, okay then, *Mr.* Armendariz. I'll give you your fifteen days and we will reconvene on _____ so I can …...

***** So I have my continuance, what is the starting point of my legal analysis of the I-213?***

You must first understand the evidentiary prism through which all evidence in removal cases is (supposed to be) examined. While it is indubitable that "the Federal Rules of Evidence are not *binding*," *Matter of D--R--,* 25 I. & N. Dec. 445, 458 (BIA 2011) (emphasis added), that does mean that they do not *apply*, *i.e.*, "have application to" these proceedings, as often claimed in straw man[19] fashion by DHS, because it is also indisputable that the Board and federal courts routinely look to the FRE for *applicable*

[17] It is on account of this point made by an IJ, a "former" trial attorney, on April 15, 2019, that I have begun the practice of filing my pleadings in advance which often consist of nothing more than: "Respondent denies service of any notice to appear and denies the allegations, both factual and legal, of any such notice to appear."

[18] "[O]ur adversarial system holds litigants to their tactical choices, because it presumes that 'the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.'" *Davis v. District of Columbia*, 925 F.3d 1240, 1263 (D.C. Cir. 2019) (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (quotation marks omitted)).

[19] Or is it strawman? I can't decide.

guidance. *See i.d., e.g.* (looking to FRE for means of authentication); *Fei Yan Zhu v. AG United States*, 744 F.3d 268, 273 (3d Cir. 2014) (holding that "proponents [of evidence in immigration proceedings] may "turn to the Federal Rules of Evidence" to show "significant indicia of reliability" "even though [such rules] are not binding."). Indeed, there may be circumstances when the federal "judicial rules of evidence" *do* need to apply, *to wit*, where "deviation [therefrom] would make the proceeding manifestly unfair." *Matter of Lam*, 14 I. & N. Dec. 168, 172 (BIA 1972).

This brings us to this oft-written aphorism: Evidence in proceedings must be relevant[20] and its use fundamentally fair. The Board's diction varies: "The tests for the admissibility of documentary evidence in deportation proceedings is that evidence be probative and its use fundamentally fair." *Matter of Toro*, 17 I. & N. Dec. 340 (BIA 1980). Or, "[t]o be admissible in deportation proceedings, evidence must be relevant and probative and its use must not be fundamentally unfair."[21] *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 505 (BIA 1980).[22] Or, blending it all into one potpourri: the use of evidence must be "fundamentally fair so as not to deprive the alien of due process." *Matter of Ponce-Hernandez* , 22 I. & N. Dec. 784, 785 (BIA May 28, 1999).

The key point to glean from the legal word-stew that I just threw at you is: There is *a distinction*, arising yet, like Lazarus[23] from the "I'm not dead yet" constitutional low-point to which immigration law has sunk, between:

(i) the admissibility of evidence;
(ii) the reliability and trustworthiness of that evidence; and
(iii) the "fairness" of the use of that evidence.[24]

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[20] Evidence is relevant if it is probative of a material fact, *i.e.*, tends to prove a point or fact at issue (*i.e.,* it matters) in the case at hand. *United States v. Jones*, 664 F.3d 966, 975 (5th Cir. 2011) (referencing Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:2 and also Fed. R. Evid. 401).

[21] Avoid double negatives like this in your writing. And all relevant evidence is probative, so the Board's choice of words is redundant.

[22] But the bar for relevance is set pretty low. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Materiality is a concept subsumed within the subject of relevance. As explained by one federal court:

> The Note of Advisory Committee on Proposed Rules appended to Rule 401 [of the Federal Rules of Evidence] criticizes the word "material" as "loosely used and ambiguous." 28 U.S.C.A., Federal Rules of Evidence (1975) at 85. The word "material" does not appear in the federal rules and appears to be subsumed into the language of Rule 401, "any fact that is of consequence to the determination of the action." Since the promissory notes related to the central issues in the case they should not have been excluded on grounds of materiality.

United States v. Carriger, 592 F.2d 312, 315 (6th Cir. 1979).

[23] *John* 11:1–44.

[24] The Supreme Court has recognized that courts should suppress evidence in the case of "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); *Matter of Cervantes*, 21 I&N Dec. 351, 353 (BIA

These are separate ideas. Go two paragraphs back and reread the various formulations I quoted. They mostly reflect the separation of these ideas. Thus, *e.g.*, it may be that a document is

- putatively[25] admissible but that its reliability is bunk and so is properly excluded; or
- it is admitted yet afforded no evidentiary weight; or
- the same document may be both admissible and reliable (as to veracity of content) but because its use would be nevertheless unfair, as measured by due process, on account of the circumstances under which the information was taken, it is nevertheless excluded;[26] or
- finally, it may be that no foundation whatsoever has been laid by its proponent and so it is properly excluded without any consideration of its reliability (truthfulness).

The practical point restated for those not previously paying attention: To have any real chance at success with either the outright exclusion of evidence or the diminution of its evidentiary weight, you should (generally in this order):

a) challenge its **admissibility** via any weaknesses in foundation;
b) simultaneously undermine its **reliability** and **trustworthiness** by attacking facial accuracy, source problems, *etc*. and, if all else fails,
c) show the **unfairness of its use** by proving, *inter alia*, that the information was taken involuntarily[27] or through egregious or illegal conduct.

You will often read:

1996) ("[W]e agree with the respondent that the exclusionary rule would exclude any evidence resulting from his egregious arrest.").

[25] From the Latin, putō, putāre… which doesn't mean at all what you think it means.

[26] *See Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980) ("The circumstances surrounding an arrest and interrogation, however, may in some cases render evidence inadmissible under the due process clause of the fifth amendment." (citing *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980)). In *Garcia*, the respondent's statements were excluded on fundamental fairness grounds where his attempts to communicate with his lawyer were thwarted because "after his arrest, he was led to believe that his return to Mexico was inevitable, that he had no rights whatsoever, that he could not communicate with his attorney (his attempts to do so being actively interfered with), and that he could be detained without explanation of why he was in custody." 17 I&N Dec. at 321.

[27] *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031 (BIA 1999); *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009) (finding a statement involuntarily given when the officer threatened him with jail and the respondent broke down crying); *see also Navia-Duran v. INS*, 568 F.2d 803, 805 (1st Cir. 1977) (finding a signed statement inadmissible in part because the respondent felt "she had no choice but to cooperate" with the agents).

> Absent any evidence that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage or deportability. *See Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988).

The worst thing about this so-called evidentiary rule is that it immediately absolves the government of any responsibility to lay any foundation for its evidence and throws the burden to you to disprove the authenticity and reliability of the government's evidence. Think about that for a second.

More on this terribly misleading claim to legal principle below but let us jump into some particulars pertaining to a), b) and c) outlined above.

***** If a document is admissible and admitted, does that mean that the contents are necessarily truthful and accurate?***

If you can't answer this question, you need to go back and read the citations to the *Yongo* case and *Matter of Velasquez* in the footnotes, *supra*.

***** Should an I-213 be authenticated as a condition of admissibility? In other words, must DHS lay some evidentiary foundation for it to be admitted?***

> **Short answer/summary**:
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> **The DHS says no[28] but the better answer is Yes**. Nevertheless, look ahead to the very real possibility that the government won't[29] authenticate it and that the IJ will admit it nonetheless.[30] If seeking to exclude an I-213, always argue not only the *inadmissibility* of the form due to the lack of any foundation/authentication but also argue (more emphatically) that that lack of foundation undermines the

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[28] Or rather, "Of course not."

[29] Outside the Ninth Circuit. *See Iran v. INS*, 656 F.2d 469, 472 (9th Cir. 1981) ("Authentication of documents in the government's possession is required in deportation proceedings in order to satisfy due process.").

[30] This is what they are taught. From "Admissibility & Reliability of Evidence, July 1, 2018," self-described as "a companion to the New Immigration Judge Training provided by the Executive Office for Immigration Review," which I found somewhere on-line:

> III. **Weight & Reliability of Evidence**
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> Because the rules of evidence are relaxed in immigration proceedings, the pertinent question regarding most evidence in this context is not whether evidence submitted by either party is admissible, but what weight the IJ should accord it in adjudicating the issues before the Court.

Copy: https://www.dropbox.com/s/0n0gyjxjjfqj3y0/Admissibility__Reliability_of_Evidence_Outline.pdf?dl=0. Note that there is no citation for this claim.

reliability of the form and thus, even if admitted, the IJ should give it little if any evidentiary weight.

Authentication has been defined as "the act of proving that something (as a document) is true or genuine, esp[ecially] so that it may be admitted as evidence." Black's Law Dictionary 157 (10th ed. 2014). It is the process by which a proponent lays an evidentiary foundation to demonstrate that evidence is what the proponent claims it to be.[31]

Even if an I-213 is otherwise not subject to challenge (*i.e.*, its use would not contravene fundamental fairness and there is no self-evident reason to challenge its contents), common sense,[32] *unpublished* authority,[33] the historical understanding of due process requirements, as memorialized in the case law,[34] the rationale behind the federal rules of evidence,[35] and comparisons to other areas of the law[36] teach us that it still must be properly authenticated like anything else, that some foundation must be laid as a

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[31] *See* FRE 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."); *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004) ("[A]uthentication requires nothing more than proof that a document or thing is what it purports to be….).

[32] Authentication of a matter prior to its admission "is not an[] artificial principle of evidence, but an inherent logical necessity," (7 J. Wigmore, Evidence § 2129 (Chadbourn Rev. 1978)), and is essential to the establishment of relevancy. *See* 2 McCormick on Evidence § 221 (7th ed. 2013) ("The proponent's assertion as to why the writing is relevant determines what the proponent claims the writing is, typically that it has some specific connection to a person or organization, whether through authorship or some other relation. It is this connection that must be proved to authenticate the writing.").

[33] *See In Re Miguel Angel Reyes*, A206 551 626 (BIA Jan. 26, 2018) (unpublished) (vacates finding of removability upon finding DHS trial attorneys not authorized to authenticate Form I-213) Copy: https://www.dropbox.com/s/5eabqy7d3lnavf1/2018.1.26.M.Angel.REYES.re.TAs.cant.authenticate.pdf?dl=0
And *In Re Rogelio Robles Hernandez*, A014-142-383 (BIA Jul. 10, 2009) (unpublished) (following the *Iran* case to deny a DHS appeal from a termination where "the DHS did not provide the original 1-213 or certify that a true and correct copy had been produced.") Copy:
https://www.dropbox.com/s/w11pyk7m6lj24cy/In%20Re%20Rogelio%20Robles%20Hernandez%20re%20i213.pdf?dl=0

[34] *E.g.*, *Matter of Lam*, 14 I. & N. Dec. 168, 172 (BIA 1972) (evidence admissible where apprehending officer testified; said officer identified the documentary evidence, its relevance and identified the respondent as the source of statements therein.) In *Lam*, respondent's counsel complained that the "the special inquiry officer" (i.e., the IJ) showed bias because he questioned the government's witness about the foundation of the government's evidence, none of which would have been necessary if no foundation was necessary. 14 I. & N. Dec. at 170.

[35] Fed. R. Evid. 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a).

[36] *E.g.,* extradition hearings. *See Tanci Issa Balzan v. United States*, 702 F.3d 220, 223 (5th Cir. 2012) (Evidentiary rules that govern "ordinary civil and criminal trials do not control what may be admitted in an extradition hearing. [Thus, u]nder 18 U.S.C. § 3190, a *properly authenticated* document is admissible at such a hearing and may serve as competent evidence in support of a magistrate's determination.")

condition precedent to any consideration of even admissibility, much less reliability and the fairness of its use.[37]

I have represented many clients who were run through Paul Esquivel's[38] infamous asylum mill. In one such case completed this year, the IJ terminated proceedings after excluding, *inter alia*, the Forms I-213 for, *inter alia*,[39] lack of authentication. From his order:

> When the authenticity of a document is questioned, the Court may require the party submitting the document to provide some form of authentication to render the document admissible. *See Mu Ying Wu v. U.S. Atty. Gen.*, 745 F.3d 1140, 1154 (11th Cir. 2014) (finding that the immigration judge and the Board of Immigration Appeals ("BIA") did not err in giving little or no weight to a document that had not been authenticated by any means); *Xiu Ling Chen v. Holder*, 751 F.3d 876, 879-80 (8th Cir. 2014) (upholding the BIA's denial of a motion to reopen where it found that respondent's documents were not sufficiently authenticated in any manner). "Documents may be authenticated in immigration proceedings through any recognized procedure." *Qui Yun Chen*, 715 F.3d 207, 211 (7th Cir. 2013) (quoting *Georgis v. Ashcroft*, 328 F.3d 962, 969 (7th Cir. 2003)) (internal quotations omitted). "In substance, authentication requires nothing more than proof that a document or thing is what it purports to be," *Yongo v. INS*, 355 F.3d 27, 30 (1st Cir. 2004), or that the document is a true and correct copy.
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> The Court recognizes that "[a]bsent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability." *Barcenas*, 19 I&N Dec. at 611. While the Court recognizes that a properly authenticated copy of a Form I-213 is presumptively reliable, no such presumption can apply to an *improperly* authenticated Form I-213, for the simple

[37] *See United States v. Olguin*, 643 F.3d 384, 392 (5th Cir. 2011) (holding that the federal rules prescribe "identification," i.e., "authentication" as a "condition precedent" to admission). *Olguin* cited to FRE 901(a) as it read in 2011: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule was amended in 2012 to read: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." But the Notes of Advisory Committee on the 2011 amendments make clear that the change was merely stylistic: "The language of Rule 901 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility."

[38] Esquivel's machinations are outlined in the civil lawsuit brought by the State of Texas against him. See copy of complaint at: https://www.dropbox.com/s/sfdlkbu918z8irx/2015.9.21.TX.state.DTPA.paul-esquivel-lawsuit.pdf?dl=0

[39] That's twice the Latin for you. If you would like to discuss the Latin grammar, please don't hesitate to ask. It is much more interesting than the topic of this panel.

> reason that the lack of proper authentication precludes the DHS from establishing that the document is what it purports to be. Stated another way, the inherent reliability of the Form I-213, as recognized by the *Barcenas* decision, *depends* upon the form's proper authentication.
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> In this case, to authenticate the I-213s, DHS could have provided an official publication of the forms. *See* 8 C.F.R. § 1287.6(a). DHS could have also presented the testimony of the custodian of Respondents' "A files" who could confirm that the forms came from those files. *See* Fed. R. Civ. P. 44(a)(1)(B) (stating that "a copy attested by the officer with legal custody of the record . . . accompanied by a certificate that the officer has custody" is a means of proving an official domestic record); *see also* 8 C.F.R. § 1287.6(a). Similarly, DHS could have presented testimony from someone who had knowledge of the I-213s and could testify that the documents are what they are claimed to be. *See* Fed. R. Evid. 901(b)(1). For example, DHS could have presented the testimony of the asylum officer who prepared the I-213s and easily authenticated the forms through that manner. *See Barcenas*, 19 I&N Dec. at 610-11 (noting that the Form I-213 was properly authenticated by the testimony of the U.S. Border Patrol officer who prepared the form from answers provided by the respondent). Nevertheless, DHS did not perform any of these actions. Given DHS's failure to authenticate the Respondents' I-213s in any manner, the Court will exclude these documents from the evidentiary record.

The DHS did not appeal from this order. This type of order is the exception, however. I don't pretend otherwise. Within immigration "law," it is shamefully yet putatively[40] true as a practical matter, as the DHS argues like  , that an I-213 is always and everywhere admissible, regardless of circumstances. But one of the main points of this paper is that this is more bad habit than sound law; neither legal reasoning nor the case law supports this view.

Let us consider the most often cited I-213 cases. The DOJ has, on its website, what purports to be a summary of foundational I-213 cases,[41] *to wit*, *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976), *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988), *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999), *Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002), and *Matter of Rosa Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002).[42] Another case to review is *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).

First, look at a case not on that list: *Matter of Velasquez*:

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[40] That word again.

[41] https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/form-I-213-summary-cases.pdf

[42] *Rosa Mejia-Andino* is a juvenile case and is relevant to that category of cases. But the DOJ website's "Form I-213 - Summary of Cases" claims that the "[c]oncurring opinion [in *Rosa Mejia-Andino*] reache[d] the issue of I-213 authentication … [to wit, b]ecause the respondent was only seven years old when apprehended, special care should be taken to explain the source and reliability of the information in the I-213[, the] source [was] not clear where the information came from [and the case is] distinguish[ed from] *Ponce-Hernandez* and *Gomez-Gomez*." *See* pg. 2 to https://www.justice.gov/eoir/page/file/988046/download.. I point this out because none of these sub-points relate to the subject of "I-213 authentication."

> So long as an alien's due process right to a fair hearing is protected, "any [authentication] procedure that comports with common law rules of evidence constitutes an acceptable level of proof." *Iran v. INS*, 656 F.2d 469, 472 n.8 (9th Cir. 1981). "The guiding principle is that proper authentication requires some sort of proof that the document is what it purports to be." *Sinotes-Cruz v. Gonzales*, 468 F.3d [1190,] 1196 [(9th Cir. 2006)].

25 I&N Dec. 680, 684 (BIA 2012). *Velasquez* concerned the authentication of conviction records, not an I-213. But it's worth a review because it cites to the *Iran*, which concerned whether the government needed to authenticate a Form I-506, "Application for Change of Nonimmigrant Status." The *Iran* Court wrote:

> The INS' contention that authentication is not required in a deportation hearing is erroneous. While there is some doubt as to which methods of proof are acceptable in such proceedings, there is no question that authentication is necessary. *Chung Young Chew v. [Boyd] INS*, 309 F.2d 857, 866-67 (9th Cir. 1962). Whatever confusion exists concerning the authentication requirement may arise because we have not attempted to set forth all of the approved methods for authenticating writings in deportation hearings. It is clear, however, that whatever method is used must, at a minimum, satisfy due process. *Cf. Trias-Hernandez v. INS*, 528 F.2d 366, 370 (9th Cir. 1975); *Longoria-Castenada v. INS*, 548 F.2d 233, 236 (8th Cir. 1977).

656 F.2d at 472; *see also Lopez-Chavez v. INS*, 259 F.3d 1176, 1181 (9th Cir. 2001) ("We hold that *if a proper foundation is laid*, a certified WR-424 form is admissible to prove its contents to the same extent as a Form I-213") (emphasis added).

Next, consider *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). An EOIR Evidence Guide, part of an "IJ Benchbook," a cheat-sheet of sorts,[43] reads:

> Absent proof that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability or inadmissibility. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976).

But this is a *spectacularly* inadequate summary of the *Barcenas* decision and invites oversimplification and, therefore, misuse. The aforementioned pithy summary mentions nothing about authentication or foundation.[44] Yet the Board in *Barcenas* specifically

[43] See https://www.justice.gov/eoir/page/file/988046/download

[44] As support for this pithy statement, the *Barcenas* Board cites to *Matter of Davila*, 16 I. & N. Dec. 781 (BIA 1976) but *Davila* is poor legal soil. In *Davila*, the respondent's counsel vaguely challenged the government's evidence as the result of an unlawful arrest but counsel himself admitted that his client entered as a visitor and it isn't even clear that any objection was made at the IJ level to the government's

found (in the conclusion of the relevant section no less) that "the Form I-213 was properly authenticated and admitted into evidence" because, *inter alia*, the officer who both arrested the respondent and prepared the I-213[45] actually appeared in court, testified concerning its contents, and affirmed that it was completed based on admissions made by the respondent. 19 I&N Dec. 610 – 611. In other words, the context of *Barcenas* was essential and a condition precedent to its holding. The document was admissible *because* a proper foundation was laid. It does not support the DHS' inane position that no foundation (authentication) is needed whatsoever, ever.[46]

Statements in *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976), taken out of context, could certainly support the DHS' view, *to wit*, *Formum I-213um verbum sanctum est*, *ergo* no authentication is necessary. But remember what authentication is: proof that a document is what it claims to be. In *Mejia*, the INS proved that its document was what it claimed it to be because (a) the arresting officer testified to the respondent's admission of alienage; (b) a supervising officer testified to the circumstances of the respondent's subsequent interview by INS officers; and (c) the report bore the actual signature of the actual interviewer. Actually read, *Mejia* does not support the view that the DHS need not ever authenticate or otherwise lay any foundation for an I-213. Rather, a foundation was laid in *Mejia*.

In *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990), the Fifth Circuit upheld the admission of an I-213 because the contents went entirely unchallenged and the

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documents. What is clear is that the Board took the government's documentary evidence at face value from which it deduced that the respondent had been warned of her rights, that she understood them, that she waived them, etc. It is also clear that no challenge to the accuracy (i.e., the *reliability*) of the documents was made. It should not be surprising then, since no challenge to the absence of a foundation was made nor was made any other challenge to reliability, that the Board did not address the matters. The *Barcenas* Board also cited to *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980), but the officer who prepared the I-213 in *Tejeda-Mata* testified, thereby laying a foundation for it. 626 F.2d at 724.

[45] On this point – that the arresting officer and the officer and the interviewing officer were the same – as food for thought, *see Matter of Ponce-Hernandez*:

> The dissent would find that an apparent regulatory violation occurred because the Form I-213 seems to indicate that the same Service officer who located or apprehended the alien also questioned him. While in some instances this could be shown to be a violation of 8 C.F.R. § 287.3 (1995), the regulations explicitly permit an arresting officer to interview an alien when "no other qualified officer is readily available and the taking of an alien before another officer would entail unnecessary delay." Since we do not know whether another officer was available, we cannot find that there has been a violation of 8 C.F.R. § 287.3(a), and we do not reach any issues associated with such a possible regulatory violation.

22 I&N Dec. 784, n. 2 (BIA 1999).

[46] *See Ponce-Hernandez*, 22 I&N Dec., at 794 ("In … *Barcenas*, we adopted as generally acceptable the presumption of accuracy of the information on a Form I-213, when that document has been entered into evidence without objection from the respondent. There, not only was the respondent an adult, but the submission of the Form I-213 was buttressed by the in-person testimony of a Service officer.").

"authenticity" of the form was established via an affidavit[47] submitted by the officer who drafted the I-213:

> The affidavit of the examining officer shows that the information in the Form I-213 is based upon statements of the petitioner, and the petitioner does not contest their validity. In *Tejeda-Mata v. INS*, 626 F.2d 721, 724 (9th Cir. 1980), the court held that the authenticity of a Form I-213 was sufficiently established by the testimony of the examining officer, who identified it as the form prepared by him when he questioned the alien. Here there was no such testimony by the examining officer, but his affidavit to that effect was introduced into evidence. Because the rules of evidence do not apply in deportation hearings, the admission of this affidavit was not error, for it is probative, and not fundamentally unfair.

898 F.2d at 1056. The Fifth Circuit does not issue advisory opinions, nor does it discuss at length irrelevant issues. The focus here in *Bustos-Torres* on the authenticity of the I-213 is support for the view that DHS must lay a foundation for its own evidence, even for I-213s.[48] If the Fifth Circuit cited to *Tejeda-Mata*, then we can too.

In *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980), the Board did not hold that no foundation for an I-213 is needed. Rather, it just ignored counsel's oblique attack on the I-213's lack of foundation,[49] preferring to focus only on counsel's more prominent "illegal conduct = no fundamental fairness" argument, a frequent occurrence.[50]

Regulatory authority (let's not forget about that!) also dictates that authentication – proving a document is what the proponent claims it to be – is required. The immigration

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[47] The use of an affidavit in lieu of actual testimony was justified, according to the Fifth, because "there [was] no contradiction of the officer's affidavit, and the government ha[d] given a reason for the absence of the witness." 898 F.2d at 1056, n. 2.

[48] Later in *Olabanji v. INS*, 973 F.2d 1232, 1234 n.1 (5th Cir. 1992), the Fifth made clear that, in *Bustos-Torres*, it allowed the officer's hearsay statement despite the respondent's inability to cross-examine the officer, precisely because the respondent did not contest the content of that statement. It was precisely because "Olabanji contested both the findings in INS' forensic document analysis and the assertions in the [ex-wife's] affidavit" that the INS's use of those documents without allowing the affiants to be cross-examined ran afoul of the "the constitutional test of fundamental fairness," at least where the INS made no efforts to make them available for cross-examination.

[49] It was oblique because, at least according to the Board decision, counsel did not argue directly that the I-213 should be excluded or deemed of no evidentiary weight for lack of foundation. Rather he argued that he should be allowed to cross-examine the agents so as to "provide a foundation for the admission of the Form 1-213." 17 I&N Dec. at 341. But he didn't need to provide a foundation; the INS needed to do so. The IJ put the burden of disproving a proper foundation on the respondent's counsel and that guy failed to turn that around.

[50] (It's called over litigating your case. I do it all the time.)

regulations, which may not be ignored,[51] set out in detail a specific procedure for authentication, but litigants may also rely on other established methods, [52] such as those laid out in the Federal Rules of Evidence[53] and of Civil Procedure[54] or even testimony.[55] The regulation (8 C.F.R. § 1287.6) essentially provides that a document is self-authenticating if offered as ''an official publication'' or is adequately authenticated if offered as a copy certified by the official custodian or her ''authorized deputy.''[56]

***** Well, about that "authorized deputy" stuff? Can't a TA just authenticate it him or herself?***

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[51] *See Matter of L-M-P-*, 27 I&N Dec. 265, 267 (BIA 2018) (affirming that neither the Immigration Judges nor the Board may "disregard the regulations, which have the force and effect of law").

[52] *See Matter of H-L-H- & Z-Y-Z-,* 25 I. & N. Dec. 209, 215 n.5 (BIA 2010) (''The regulation governing the authentication of official records and public documents in immigration proceedings at 8 C.F.R. § 1287.6 (2010) does not provide the exclusive means for authenticating documents in immigration proceedings.'').

[53] *See* Fed. R. Evid. 902(3).

[54] *See* Fed. R. Civ. P. 44.

[55] *See Yongo v. INS*, 355 F.3d 27, 30–32 (1st Cir. 2004) (Foreign documents may be authenticated by testimony of immigration officer who attests to how and where he obtained them and that he is familiar with the type of record).

[56] 8 C.F.R. §§ 287.6(a), 1287.6(a). *E.g.*: § 1287.6 Proof of official records:

> (a) Domestic. In any proceeding under this chapter, an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy.

A useful summary is provided by *Demirchyan v. Gonzales*, No. CV 08-3452 SVW (MANx), 2010 U.S. Dist. LEXIS 93090, at *8, 2010 WL 3521784, at *4 (C.D. Cal. Sep. 8, 2010), wherein it reads:

> With respect to self-authentication by foreign government officials, the Business and Commercial Litigation in Federal Courts treatise contains a useful summary of the relevant requirements. See 2 Robert L. Haig, Bus. and Comm. Litig., § 18:106 (2d ed. 2005). The author explains that foreign official records may be self-authenticated in one of five ways (with the potentially relevant rules for this case in bold): (1) an official copy of a record "that purports to have been printed by authority of the foreign government"; (2) "a copy that is attested to by a person authorized to make the attestation and is accompanied by a certification as to the genuineness of the signature and official position of the attesting person"; such "attesting person" may include a United States diplomatic official; (3) the record may be accompanied by a chain of certifications in which a high-level foreign official attests to the authority of the lower-level foreign officials who created the document, and a United States diplomatic official attests to the authority of the high-level foreign official; (4) under the Hague Public Documents Convention, the foreign document is accompanied by a "model apostille" that "certifies the signature, official position, and seal of the attesting officer"; and (5) "where reasonable opportunity has been given for the parties to investigate a record's authenticity and accuracy, the record may be authenticated by submitting an attested copy without final certification or an attested summary of the record upon a showing of good cause." *Id*. (emphasis added).

Prosecutor: "*Uhhh, take my word for it Judge. Our evidence is bonahhh fide!*"
Judge: "*Uhhh, ok.*"

Uhhh, no. In what judicial forum of any sort is a party allowed to certify its own evidence with nothing more than a "Trust me. Take my word for it! I'm an officer of the Court!"? The question answers itself. Every judicial forum requires the proponent of evidence to prove that it is what he or she claims it is.[57]

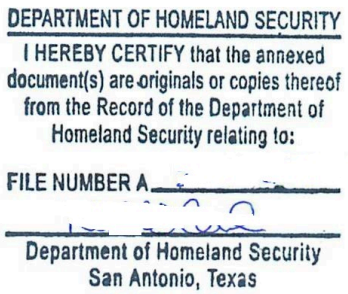
From a recent unpublished BIA case[58]:

> The I-213 is accompanied by a "certification" page signed by the DHS trial attorney, but the respondent argues that this certification is improper because it does not comply with the authentication requirement of 8 C.F.R. § 1287.6(a), which states that copies of official records shall be "attested by the official having legal custody of the [original] record or by an authorized deputy." The Immigration Judge overruled this objection, indicating that,
>
> > [e]ven if [the Assistant Chief Counsel] is not an individual specifically mentioned within either the INA or the regulations as an individual having the authority to certify copies of documents from the A-file, the court believes that the I-213 itself does appear to be inherently reliable and respondent has failed to indicate that there are any factual inaccuracies set forth within it . . . .
>
> (IJ at 2). Further, the Immigration Judge recalled that when he was employed by the legacy Immigration and Naturalization Service ("INS") during the 1990s, INS trial attorneys had authority to certify the authenticity of I-213 forms (IJ at 2).
>
> We respectfully disagree with the Immigration Judge's analysis regarding the I-213 form. Although a properly authenticated copy of an I-213 form is presumptively reliable in removal proceedings despite its hearsay character, *see Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996), no such presumption can apply to an *improperly* authenticated I-213 form, for the simple reason that the lack of proper authentication precludes the DHS from establishing that the document is what it purports to be. The inherent reliability of an I-213 form *depends* upon its proper authentication.
>
> Further, even if INS trial attorneys once had authority to authenticate I-213 forms, that fact alone cannot carry the DHS's burden here. If the Secretary of Homeland Security has delegated such authority to trial attorneys—as she clearly may pursuant to 8 C.F.R. § 2.1—then it is reasonable to expect the DHS to provide evidence of that delegation in order to rebut the respondent's objection. Yet no such evidence has been provided.

I routinely see things like this:

[57] If you are thinking, but "the Business Records Exception!," more on that later.

[58] *See In Re Miguel Angel Reyes*, A206 551 626 (BIA Jan. 26, 2018) (unpublished) (vacates finding of removability as DHS trial attorneys are not authorized to authenticate Form I-213); Copy: https://www.dropbox.com/s/5eabqy7d3lnavfl/2018.1.26.M.Angel.REYES.re.TAs.cant.authenticate.pdf?dl=0


DEPARTMENT OF HOMELAND SECURITY
I HEREBY CERTIFY that the annexed document(s) are originals or copies thereof from the Record of the Department of Homeland Security relating to:

FILE NUMBER A

Department of Homeland Security
San Antonio, Texas

The most elaborate TA self-certification came recently in a case in which I was litigating alienage. See below. Read it. It's hilarious.

DEPARTMENT OF HOMELAND SECURITY CERTIFICATION

I, [redacted], hereby certify and attest in my official capacity that the annexed documents are true and correct copies of the original records of the Department of Homeland Security, or its predecessor the Immigration and Naturalization Service, of which the Secretary of the Department of Homeland Security is the Legal custodian under Sections 103 and 290 of the Immigration and Nationality Act, kept or recorded in the regular course of business or activity, relating to the person whose name appears as the subject of the documents and whose A-number appears therein, and that, in executing my official duties under Section 252(c) of Title 6 of the United States Code, and Sections 1240.2 and 1240.32(c) of Title 8 of the Code of Federal Regulations, I have lawful physical custody of the original records of which the annexed documents are true and correct copies produced in the regular course of business or activity by an accurate process of reproduction.

Fun facts: He cites to 1240.32(c) but that provision relates to proceedings commenced prior to April 1, 1997 (which was not my case) and neither § 1240.2 nor § 1240.32(c) has anything to say about the custodian of the A-file.

In my motion to exclude, responsive to that filing, I insisted upon the right to cross-examine *the TA*. I wrote:

> Mr. [redacted], counsel for the government, has asserted himself as a witness in this proceeding, on account of his claim to be the legal custodian of the proffered records. As such, consistent with my client's right "to cross-examine witnesses presented by the Government, see 8 U.S.C. § 1229a(b)(4), the undersigned insists upon the opportunity to cross-examine Mr. [redacted] for the purpose of demonstrating the falsity of his evidentiary allegations, including those made in the aforementioned putative certificates of the custodian. His baseless statements to the contrary notwithstanding, Mr. [redacted] has no legal authority to certify what is or is not part of the alien file nor is he the authorized deputy[59] of any

[59] See 8 CFR § 2.1 Authority of the Secretary of Homeland Security.

> such actual legal custodian, as those terms are used in 8 C.F.R. § 1287.6(a) and 103.7(f)[60].
>
> The issue is not whether he has the file; the issue is whether he has the *legal authority* to certify what is and is not officially part of the file. *That*, he does not. He also claims no personal knowledge of his allegations (*e.g.*, that they were kept or recorded in the regular course of business, *etc*.) nor has he even identified the evidentiary basis for his claims. He cannot identify an evidentiary basis for his claims despite his obligation to have conducted a "reasonable inquiry" into the matter. Imm. Court Prac. Manual, Ch. 3.3(b) (citing 8 C.F.R. § 1003.102(j)(1)).[61] And he does not have an evidentiary basis for his claims because he is, in fact, not the actual legal custodian of records as those terms are used in 8 C.F.R. § 1287.6(a) and 103.7(f). The undersigned insists upon the opportunity to cross-examine Mr. [redacted].

Did the Court allow me to cross-examine that TA when I raised the issue again at the hearing? Of course not. But I was trying to highlight the absurdity of ICE TAs certifying their own records and to preserve the matter for appeal and I think I did both.

Afterwards, I found this 5th Circuit gem which you can whip out the next time the TA tries to claim he or she can authenticate something supposedly in the A file:

> All authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security, including delegation through successive redelegation, or to any employee of the United States to the extent authorized by law. Such delegation may be made by regulation, directive, memorandum, or other means as deemed appropriate by the Secretary in the exercise of the Secretary's discretion. A delegation of authority or function may in the Secretary's discretion be published in the Federal Register, but such publication is not required.

[60] 8 CFR § 103.7(f), entitled, "Authority to certify records" reads: "The Director of USCIS, or such officials as he or she may designate, may certify records when authorized under 5 U.S.C. 552 or any other law to provide such records."

[61] The Court's rules provide that:

> A signature represents a certification by the signer that: he or she has read the document; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is grounded in fact; the document is submitted in good faith; and the document has not been filed for any improper purpose.

Imm. Court Prac. Manual, Ch. 3.3(b) (*citing* 8 C.F.R. § 1003.102(j)(1)). If an absurdity must be highlighted, then it has become normalized. And if it has become normalized, then…

> 1 However, the Board was wrong to rule, apparently in the alternative, that the immigration judge properly admitted the Southland letter under the business record exception to hearsay, Fed.R.Evid. 803(b). Specifically, the immigration judge was wrong to put on the stand the counsel for the immigration service, and to accept him as a trustworthy and qualified "custodian" for the document. It is clear from the transcript that the immigration lawyer had no personal knowledge that the letter was prepared, received or kept in the ordinary course of Southland or INS business. It is also clear that the letter was in his custody for the limited and temporary purpose of submitting it in evidence against the petitioner. In addition, we can not overlook the profound, though entirely proper, adversary bias of an attorney in such a situation.

Tashnizi v. Immigration & Naturalization Service, 585 F.2d 781, n. 1 (5th Cir. 1978).[62] *Tashnizi* concerned a corporate document, from within the A file, that the INS lawyer was trying to introduce and certify himself (or herself). It is not that *Tashnizi* supports my claim that a I-213 must be authenticated. Rather, *Tashnizi* supports my claim that DHS lawyers can't authenticate their own evidence, whatever it is. The Court's point was that the government lawyer was in no position to certify anything because of (i) the lack of proof of personal knowledge of the factual matters to which an actual custodian would attest and (ii) his obvious "profound" conflict of interest.[63]

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[62] *See also De Jesus Flores v. Sessions*:

> [The BIA erred in admitting records purportedly authenticated by Supervisory Detention and Deportation Officer because] "there is no evidence, aside from [his] own statements, however, that the Secretary [of Homeland Security] conferred [that officer] with the duty to certify documents on [the Secretary's] behalf.…)…. It is worth noting that in addition to failing to provide support that [the officer] is a certifying designee of the Secretary, this purported certification suffers from multiple defects that belie its trustworthiness: (1) the document is not on official ICE/DHS letterhead, (2) it bears no seal or stamp of DHS, (3) it contains no language that [the officer]'s statements were given under penalty of perjury or that he, at a minimum, swore to its contents, and (4) it contains no statement that he is the legal custodian—temporary or otherwise—of A-files, or Flores's A-file in particular.

684 F. App'x 603, 604 and 604, n. 2 (9th Cir. 2017) (unpublished)

[63] *See also* (albeit in a non-immigration context) *Bell v. City of Topeka*, 496 F. Supp. 2d 1182 (D. Kan. 2007), *aff'd*, 279 Fed. Appx. 689 (10th Cir. 2008) (Personal affidavit submitted by plaintiff's counsel concerning documents was insufficient to provide authentication, pursuant to Fed. R. Civ. P. 56(e), when counsel was not author of documents and had no personal knowledge of facts contained in documents).

But, just to be killjoy because after all, this is immigration law*, see Diarra v. Lynch*:

> [T]he Government attorney explained, on the record, that she searched a Department of Homeland Security ("DHS") database for the visa and passport number on which Diarra claimed to have entered, and that the US-Visit document was the result. The Government attorney thus had 'legal custody' of the document by virtue of her access to the DHS database, and the IJ had the discretion to find that her description of how she retrieved the document authenticated it. 8 C.F.R. § 1240.1(c)(HN6 "The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.").

646 F. App'x 62, 65 (2d Cir. 2016) (unpublished). Let's just say this case is unpublished for a reason.

***** But DHS muttered something about the Business Records Exception and how that law means the I-213 comes in no matter what. What about that?***

The Federal Business Records Act, 28 U.S.C. § 1732, is not a means by which DHS can escape the need to prove that its own evidence is what it claims it to be. The 5th Circuit has held that law to be relevant only where authentication has already been established. If anything, § 1732 makes the DHS' burden greater:

> Liberal as we are to the fullest use of 28 U.S.C.A. § 1732, there are two prerequisites both of which are to be demonstrated to permit admission of business records. First, the Federal Business Records Act states that the offeror must establish that the records were kept in the regular course of business. [citations omitted] Secondly, testimony must be given by a custodian adequately authenticating the record's accuracy and explaining the efforts employed to ensure this accuracy.

United States v. Blake, 488 F.2d 101, 105 (5th Cir. 1973). This will *not* stop the DHS from arguing in circular fashion: "We don't need to prove that this record is a government record kept in the regular course of business because it is a government record (take my word for it) and therefore, obviously, kept in the regular course of business."[64]

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[64] *See e.g.*, from a recent DHS filing:

> and Nationality Act."). Notwithstanding the respondent's contention about the alleged requirement to authenticate in accordance with 8 C.F.R. § 287.6 or 1287.6, the copies of evidence originating from within the A-file and/or from federal government sources are independently admissible under the Federal Business Records Act. As such, contrary to the respondent's proposition, there is no independent requirement for authentication for the evidence filed in this case.

This same ICE "attorney" (do they really practice law?) argued that the

> Fifth Circuit has likewise agreed that "documents in a defendant's immigration file are analogous to nontestimonial business records." *See Valdez-Maltos*, 443 F.3d at 911.

U.S. v. Valdez-Maltos, 443 F.3d 910 (5th Cir, 2006) was a criminal reentry case. ICE counsel failed to point out in his argument that *Valdez-Maltos* relied expressly on *United States v. Quezada*, 754 F.2d 1190, 1194-95 (5th Cir. 1985) and *U.S. v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005), neither of which supports the idea that *no authentication or foundation of immigration records is required* in that or any other context. *Rueda-Rivera* involved a certified document (supposedly certifying the non-existence of certain records) actually certified by the very person authorized by regulation to certify that specific document. *Valdez-Maltos* did not involve a document at all but whether testimony as to the non-existence of records was admissible; therein an immigration official testified to the non-existence of records and, at

There is a separate exception to the rule against hearsay for business records under Federal Rule of Evidence 803(6) but, there as well, the proponent must satisfy the foundational requirements of the exception, namely, "[f]or admission, a record of a regularly conducted business activity must be proven by 'testimony of the custodian or another qualified witness, or by a certification that complies" with FRE 902(11) and, moreover, "neither the source of information nor the circumstances in which the record is prepared can indicate a lack of trustworthiness." FRE 803(6)(D). And there is no special exception to these foundational requirements under 803(6)(D) for documents submitted by the DHS. *See Tashnizi*, *supra*.

There is a separate *separate* exception to the rule against hearsay for "public records" under Federal Rule of Evidence 803(8)[65] and there is authority that I-213s fall within this category[66] but remember to **keep your issues straight**. The question isn't whether I-213s get around the hearsay problem. We know that, at least generally, they do.[67] The question is whether the DHS must lay a foundation for its evidence. Rule 803(8) is not an end-run

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least according to the Court, the record supported the trial court's decision to rely on that testimony because "the [agent's] testimony and the relevant circumstances reflected [that] an adequate search" for the documents had been performed and, therefore, the hearsay objection was properly overruled.

[65] FRE §803(8) Public records. A record or statement of a public office if:

(A) it sets out: (i) the offices activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

[66] *See Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996) ("The Form I-213 and DMV Application are records made by public officials in the ordinary course of their duties, and accordingly evidence strong indicia of reliability… because public officials are presumed to perform their duties properly and generally lack a motive to falsify information.") (internal citation omitted); *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976) ("In the absence of any proof that the Form I-213 contains information which is incorrect or which was obtained by coercion or force, we find that this form is inherently trustworthy and would be admissible even in court as an exception to the hearsay rule as a public record and report [under] Fed. Rules of Evid., Rule 803(8)."); *Matter of Davila*, 15 I&N Dec. 781, 782 (BIA 1976).

[67] *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976). But this doesn't mean that there are no hearsay objections to be made. Documents containing triple or more hearsay have been found for obvious reasons to be inherently unreliable. *See e.g., Olivas-Motta v. Holder*, --- F.3d ---- (9th Cir. 2013) (available at 2013 WL 8180377) (noting police reports are unreliable because they suffer from "defects of hearsay, double hearsay, and triple hearsay… [and] people may speak to the police despite lack of personal knowledge and lack of adequate observation, may be misunderstood, and what they say may be misreported…."); *Silva v. Gonzales*, 463 F.3d 68 (1st Cir. 2006) (affirming IJ decision rejecting triple hearsay evidence as unreliable); *Turcios-Montufar v. Reno*, 5 Fed. Appx. 692 (9th Cir. 2001) (unpublished) (affirming IJ decision rejecting triple hearsay evidence as unreliable); *Rodriguez-Quiroz v. Lynch*, 835 F.3d 809, 821 (8th Cir. 2016) (rejecting the reliability of a Form I-213 where it failed to attribute claims of illegal entry to the respondent).

around that requirement. If it were, other federal rules of evidence, *to wit* 901[68] and 902,[69] would be irrelevant. Records introduced under Rule 803(8) must still satisfy the authentication requirements of Rules 901 or 902. If the government is going to cite to the FRE or FRCP as an argument that document X should be admitted, then all such rules within each respective set must be taken into account – including the rules that obligate authentication – because no single rule exists in isolation. The FRE and FRCP are systems complete in and of themselves.

***** But Mr. Armendariz: how is your claim that some foundation must be made by DHS squared with the Board's holding – just thrown in my face by the IJ – that "[o]ne who raises the claim must come forward with proof establishing a prima facie case before the Service will be called upon to assume the burden of justifying the manner in which it obtained its evidence." Matter of Tang, 13 I&N Dec. 691, 692 (BIA April 22, 1971)?***

> **The short answer is**: Assertion of that principle as a defense against the claim that a foundation via authentication is necessary is dependent upon a confusion of two different issues. **One must actually read the relevant cases on evidence**, which reading no ICE counsel has ever accomplished in the history of that agency or its predecessor, to understand this point. The aforementioned principle of law applies in the context of an attack upon evidence on the basis of the alleged impropriety of its acquisition but such an attack is most certainly *not* coterminous with a challenge to the putative admissibility of the document for lack of foundation. Otherwise stated, the aforementioned principle becomes relevant only *after* evidence has been introduced and shown by its proponent to actually be what he or she claims it to be.[70]

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[68] Rule 901(a) reads: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

[69] Rule 902, entitled, "Evidence That Is Self-Authenticating" provides for authentication of "Domestic Public Records," and "Certified Copies" thereof, by means of various written certifications.

[70] In *Espinoza v. INS*, and unpublished case, *e.g.*, the Ninth Circuit Court applying this principle, wrote:

> The burden of establishing a basis for exclusion of evidence from a government record falls on the opponent of the evidence, who must come forward with enough negative factors to persuade the court not to admit it. *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir. 1992). 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." *Keith v. Volpe*, 858 F.2d 467, 481 (9th Cir. 1988), cert. denied, 493 U.S. 813, 110 S. Ct. 61, 107 L. Ed. 2d 28 (1989). Another consideration is "the great inconvenience that would be caused to public business if public officers had to be called to court to verify in person every fact they certify." *U.S. v. Aikins*, 946 F.2d 608, 614 (9th Cir. 1990).
>
> We agree with the BIA that information on an *authenticated* immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the alien. This position closely tracks the Federal Rules of Evidence, which exempt public records containing factual findings

Consider *Tang*. Mr. Tang had already admitted alienage but was complaining that the government was using evidence (apparently original records which would have been self-authenticating) that had been "taken … in violation of his constitutional rights." 13 I&N Dec. at 691. So, he was challenging the fairness of the use of the government's evidence against him. This challenge is distinct from a challenge for lack of foundation. The question of whether any authentication or evidentiary foundation was necessary to establish the admissibility of the evidence in *Tang* was wholly skipped over. Look at how the *Tang* Board explained its view of the case – what it called "[t]he reason for our rule" – in support of its holding:

> The reason for our rule -- one similar to that which prevails in criminal matters -- is well stated in [*United States v. Garcia*, 272 F. Supp. 286 (S.D. N.Y., 1967)]. There the court said:
>
> > . . . Experience shows that *unless such serious charges are initiated upon the sworn statement of persons having personal knowledge of the facts*, a great deal of time of the parties and the Court is frequently wasted upon unnecessary, expensive and protracted suppression hearings, all for the reason that the attorney demanding suppression merely upon his own say-so often discovers only at the hearing that he has been misled by unsworn representations of his clients, which they would be unwilling to swear to in an affidavit, particularly if they were questioned closely by their counsel and warned of the consequences of perjury.

This excerpt makes it clear that the Board in *Tang* analogizes to a case in which the evidence at issue consisted of "the sworn statement[s] of persons having personal knowledge of the facts." Otherwise stated, the *Tang* Board *presumed* that a foundation of sorts had been laid for the government's evidence and that its own analysis was taking place further downstream and concerned a different issue (namely the fairness of the use of that evidence on account of a challenge to the manner in which it was obtained).

If the aforementioned principle of law (*to wit*, "[o]ne who raises the claim must come forward with proof *yadda yadda yadda*) is raised as a challenge to your claim that the DHS needs to establish a foundation for its own evidence, tell the IJ:

> The DHS' muttering is inapposite and reflects a misunderstanding of the issues. They are trying to muddy the waters. The need to make a *prima facie* case that

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> from an official investigation from the prohibition on hearsay "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8)(c). Thus, we hold that Cruz Espinoza's Form I-213 was admissible.

No. 94-70094, 1995 U.S. App. LEXIS 7699, at *7 (9th Cir. 1995) (unpublished) (emphasis added). *Espinoza* makes clear that the government had already laid a foundation by authentication for its evidence and therefore it had demonstrated that its evidence was putatively admissible. Having done so, the burden shifted to respondent to show some reason why, *despite its putative admissibility*, it should be excluded anyways or afforded no evidentiary weight. *Espinoza* does not support the claim that the government need lay no foundation for its evidence nor that the initial burden falls to the respondent to show why the evidence should be excluded.

> evidence was obtained in some illegal or inappropriate manner becomes relevant only *after* the evidence is deemed putatively admissible, a point which isn't reached until *after* the DHS has laid a foundation for its evidence. Some kind of foundation is necessary from the actual and lawfully authorized custodian before the DHS can meet its burden of showing the putative admissibility of its evidence. If they do that, then the burden would shift to the respondent to make a prima facie case that, *despite* the evidence's putative admissibility, its use would either still be fundamentally unfair or it is deserving of no evidentiary weight because its contents are false.

The DHS wants to steer your argument into the back alley of "egregious" Fourth Amendment violations because they know that that is a dead-end with most IJs. They don't want the focus to be on their initial *sine quo non* need to prove that their evidence is what they claim it to be before any further analysis into reliability (veracity) or fairness is even undertaken.

Consider *Tang*'s companion case, *Matter of Wong*, 13 I. & N. Dec. 820 (BIA 1971), often cited for the same proposition as in, *e.g.*, *Matter of Burgos*, 15 I. & N. Dec. 278, 279 (BIA April 25, 1975). *Wong* involved original records,[71] which are self-authenticating even under the current regulation previously addressed which is probably why, as in *Tang*, the question of whether any authentication or evidentiary foundation was necessary to establish the reliability of the evidence was not raised at all.

Finally, consider *Burgos* which cites to both *Tang* and *Wong*. The respondents in *Burgos admitted alienage* during the removal case and it was on that basis that removability was upheld.[72] Moreover, their counsel didn't actually challenge *any* particular evidence. In fact, counsel simply attacked, via an unspecified motion to "suppress" the Court's *in personam* jurisdiction[73] over his clients on the basis of an unspecified attack on the

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[71] *Wang*, 13 I. & N. Dec. at 822:

> To limit the issues, we shall rely upon evidence which was in the Service's possession before respondent was arrested -- the identity card and identification book. We shall also rely on respondent's admission at the deportation proceeding that he does not have permission to remain in the United States. The documents are in the nature of passports. They must be surrendered to the custody of the master of the vessel before the crewman can be given landing privileges. The master must submit these documents to the Service when a seaman has failed to comply with the conditions of his admission. Such documents are competent evidence in deportation proceedings to establish alienage and deportability. These documents establish respondent is an alien.

[72] *Burgos*, 15 I. & N. Dec. at 279 ("On the basis of the respondents' admissions, the immigration judge found the respondents deportable….")

[73] *In personam* jurisdiction cannot be suppressed. This subject usually arises when the DHS seeks to introduce copies of identification documents illegally obtained. The DHS argues that, regardless of the manner of arrest, biographical data is part of that person's "identity" and "identity" cannot be suppressed, as if this suffices to satisfy any and all concerns about the origin of whatever documents are at issue and whether they relate to the respondent. This position misrepresents the case law and confuses the relevant issues. In *Lopez-Mendoza*, the Supreme Court, considered two consolidated cases involving two unrelated

constitutionality of the manner of arrest.[74] *Burgos*, which involved nothing but in-court admissions, has even less than both *Tang* and *Wong* to teach us about the government's need to lay a foundation for its evidence.

***** What if the IJ admits it into the record and asserts that the lack of authentication merely goes to weight? After all, what about 8 C.F.R. §§ 1240.7(a) and 1240.46(b)[75]?***

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but similarly situated aliens - Respondents Lopez-Mendoza and Sandoval-Sanchez. The Court, affirming prior law, held that the "body" or "identity" of a defendant in a criminal or civil proceeding is never itself suppressible as the fruit of an unlawful arrest, whether or not an unlawful arrest occurred. 468 U.S. at 1039. The problem was that "[a]t his deportation hearing, [Respondent] Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him." Id. Just as a criminal defendant cannot escape a criminal court's jurisdiction on account of an illegal arrest (although such a person could avail himself of the exclusionary rule), an alien's illegal arrest has no bearing on whether a subsequent deportation hearing can be brought against that person. See id. In other words, the illegal arrest does not affect the immigration court's *in personam* jurisdiction over the respondent. *See e.g., Huerta-Cabrera v. INS*, 466 F.2d 759 (7th Cir. 1972) ("Even if the arrest were illegal, the mere fact that the authorities got the 'body' of Huerta-Cabrera illegally does not make the proceeding prosecuting him or deporting him the fruit of the poisoned tree…"). By contrast, Respondent Sandoval-Sanchez had "a more substantial claim [because h]e objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." *Lopez-Mendoza*, 468 U.S. at 1040. When DHS counsel argues that a respondent cannot refuse to identify his date or place of birth or that a respondent cannot object to the government using biographical data taken at the time of the illegal arrest to obtain other evidence of alienage because "identity cannot be suppressed," they are conflating and confusing a challenge to the court's *in personam* jurisdiction, which the Supreme Court in *Lopez-Mendoza* stated in not permissible, with a challenge to illegally obtained evidence, which the *Lopez-Mendoza* Court did not foreclose, even in removal proceedings. A respondent in proceedings bringing a motion to exclude illegally obtained evidence is not objecting to his being compelled to come forth and defend himself against the government's charge of alienage; he is simply objecting to the government's use of illegally obtained evidence. They are two separate objections entirely. One is proper; one is not. The 8th and 10th Circuit Courts have affirmed this reading of *Lopez-Mendoza* on this issue. *See e.g., U.S. v. Olivares-Rangel*, 458 F.3d 1104, 1112 (10 Cir. 2006) ("The 'identity' language in *Lopez-Mendoza* refers only to jurisdiction over a defendant and it does not apply to evidentiary issues pertaining to the admissibility of evidence obtained as a result of an illegal arrest and challenged in a criminal proceeding."); *see also U.S. v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001) ("[T]he [Lopez-Mendoza] Court's reference to the suppression of identity appears to be tied only to a jurisdictional issue, not to an evidentiary issue.").

[74] *Burgos*, 15 I. & N. Dec. at 280 ("The record in this case does not disclose any evidence used against the respondents to establish deportability which was obtained as a result of any search or through arrest. Instead, the respondents argue, in effect, that their physical presence is the evidence to be suppressed as that presence was obtained illegally.")

[75] 1240.46(b): an Immigration Judge "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."

Firstly – and for what should be obvious reasons – one cannot reasonably interpret a regulation in a manner that necessarily renders another regulation a nullity.[76] But that will not stop the Board and IJ's from doing exactly that.

Recently an IJ excluded an I-213 due to DHS' thorough, unexplained, and unexcused failure to make any attempt to authenticate it:

> As previously discussed herein, there are multiple ways that a party can authenticate a document. In this case, to authenticate the Form I-213, DHS could have provided an official publication of the form. *See* 8 C.F.R. § 1287.6(a); Fed. R. Civ. P. 44(a)(1)(A). DHS could have also presented the testimony of the custodian of Respondent's "A file" who could confirm that the form came from that file. *See* Fed. R. Civ. P. 44(a)(1)(B) (stating that "a copy attested by the officer with legal custody of the record . . . accompanied by a certificate that that the officer has custody" is a means of proving an official domestic record). Similarly, DHS could have presented testimony from someone who had knowledge of the Form I-213 and could testify that the document is what it is claimed to be. *See* Fed. R. Evid. 901(b)(1). For example, DHS could have presented the testimony of the immigration officer who prepared the Form I-213 and had the form authenticated through that manner. *See Barcenas*, 19 I&N Dec. at 610-11 (noting that the Form I-213 was properly authenticated by the testimony of the U.S. Border Patrol officer who prepared the form from answers provided by the respondent). Nonetheless, DHS did not perform any of these actions. Given DHS's failure to authenticate the Form I-213 in any manner, the Court will exclude this document from the evidence of record.

From the Board decision that resulted from the DHS' appeal from that decision:

> The respondent's arguments concerning compliance with authentication rules for the Form I-213 evidence offered in support of the charge in this matter are without merit (Respondent's Br. (unpaginated)). While documents submitted before the Immigration Court are generally subject to the requirement that they be authenticated, the fact that they are not formally authenticated under 8 C.F.R. § 1287.6 does not mandate that the evidence be rejected or suppressed. *See Matter of Velasquez*, 25 I&N Dec. 680, 683 (BIA 2012); *Matter of D-R-*, 25 I&N Dec. 445, 458-459 (BIA 2011); *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986) ("[D]ocumentary evidence in deportation proceedings need not comport with the strict judicial rules of evidence; rather, in order to be admissible, such evidence need only be probative and its use fundamentally fair, so as not to deprive an alien of due process of law.").
>
> Even if a Form I-213 is not properly authenticated, an Immigration Judge may allow even unreliable evidence to be submitted and determine what weight, if any, to give to the unauthenticated or uncertified documents. *See* 8 C.F.R. § 1240.7(a) (stating that an Immigration Judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person).

Do you see the sleight of hand? No one had argued, and the IJ certainly did not hold, that she was *mandated* to exclude the I-213. And the fact that an IJ *may* admit the document and then consider its weight does not mean that she *must* admit it. The IJ had ruled that the DHS had multiple ways to prove the authenticity of its evidence and made no effort in

[76] *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotations omitted)); *Markham v. Cabell*, 326 U.S. 404, 409 (1945) (stating that a law will not be strictly read if such reading "results in the emasculation or deletion of a provision which a less literal reading would preserve.")

any direction so she was going to exclude it because the DHS hadn't even met its own burden to show the *bona fides* of its records. This was not just any I-213. The Respondent was claiming to be a U.S. citizen. The reliability of the I-213 was very important and the first step in *any* evidentiary analysis is whether the proponent has proven that its evidence is what he or she claims it to be it.

In any case, the Board concluded its flawed analysis with "Finally and most…

> importantly, the Immigration Judge did not exclude the Form I-213 because of any indices of unreliability, but instead simply because it had not been authenticated (IJ at 5).

This leads us to the real moral of the story: you need to argue specifically (and get the IJ to rule) that the lack of authentication impacts *reliability* as much if not more than *admissibility*,[77] meaning the IJ, on account of the lack of authentication, whether the document is admissible or not, shouldn't give it any meaningful evidentiary weight to the statements contained therein, most certainly not enough to satisfy a "clear, convincing and unequivocal"[78] standard. Your argument attacking foundation issues should slide seamlessly into your argument attacking evidentiary weight.

If you hang your hat on an attack on admissibility, most IJs – for sheer lack of mental energy, to put it charitably – will blow past your objections, admit the document and then assume, *by virtue of its having been admitted*, that it is therefore also necessarily *reliable* – an utterly unjustified and erroneous leap in logic that a first-year law student can see through.[79] That the evidentiary weight or reliability of a document should be tied to its

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[77] *See Yan v. Gonzales*, 438 F.3d 1249, 1256 n.7 (10th Cir. 2007); *see also Xiu Xia Zheng*, 2013 U.S. App. LEXIS 2865, at *8 (''[W]hen the BIA considers a motion to reopen proceedings, it has the discretion to afford less evidentiary weight to unauthenticated government documents from China'').

[78] The DHS's burden is to demonstrate alienage by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276, 281, 284-85 (1966). Let not your familiarity with this standard breed your contempt: it's supposed to be difficult for the government to prove. *Woodby* is worth reading in full but in lieu thereof:

> This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of "the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years. . . ." *Rowoldt v. Perfetto*, 355 U. S. 115 [1957]. In denaturalization cases, the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence. *The same burden has been imposed in expatriation cases*. That standard of proof is no stranger to the civil law. *No less a burden of proof is appropriate in deportation proceedings*.

385 U. S. at 285 – 286 (emphasis added, citations omitted).

[79] The problem has been described as the tendency, "when a corporal object is produced as proving something, to assume, on sight of the object, all else that is implied in the case about it." 7 J. Wigmore, Evidence § 2129 (Chadbourn Rev. 1978). This is exactly what happened on remand in the case I just mentioned. The IJ, adequately chastened, didn't bother even considering my reliability arguments.

authentication is a matter of common sense and due process as demonstrated by decisions both in the immigration context[80] and outside of it.[81]

****** Well, isn't a Form I-213 always inherently reliable, regardless of lack of foundation? Isn't your complaint about the lack of foundation much ado about nothing.[82]***

No. *See Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002) ("We emphasize that … not every Form I-213 that alleges alienage must be ultimately so found."). Even a cursory reading of the most often cited precedential decisions makes clear that the evidentiary weight and admissibility of a Form I-213 is a fact and case specific inquiry.

In *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976), the arresting officer testified to the statements of the respondent, to the process by which that respondent was questioned, and to the identity of the interrogating officers, one of whom signed the I-213 itself. This provided all the evidentiary foundation necessary. Furthermore, the respondent "did not make an oral or written statement on the issue of his deportability," his counsel "submitted nothing to challenge the reliability of the official record," and he "offered no evidence of impropriety in [his] arrest and detention …. or his subsequent interrogation…." All of this led the Board to rule in *Mejia*, by way of summation, that "the absence of any proof that the Form 1-213 contains information which is incorrect or which was obtained by coercion or force," 16 I&N Dec, pgs. 6 – 8, a holding that *only* makes sense in light of the aforementioned record.

In *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988), again, the arresting officer prepared the Form I-213 and personally testified to what respondent told him and to the circumstances of his seizure. Furthermore, the respondent "offered no evidence to even

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[80] *See Yan v. Gonzales*, 438 F.3d 1249, 1256 n.7 (10th Cir. 2007); *see also Xiu Xia Zheng*, 2013 U.S. App. LEXIS 2865, at *8 (''[W]hen the BIA considers a motion to reopen proceedings, it has the discretion to afford less evidentiary weight to unauthenticated government documents from China'').

[81] Consider *Spears* hearings. In *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), the Fifth Circuit authorized federal courts to hold pre-suit hearings for *in forma pauperis* inmates to decide whether a civil claim "lacks an arguable basis in law," "if the facts alleged are clearly baseless," or "when the facts alleged rise to the level of irrational or wholly incredible." District courts were given "especially broad discretion" to use dismissal procedures to weed out frivolous or meritless suits. *Wilson v. Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991). But even in that preliminary civil context, the Fifth Circuit, no friend to the imprisoned, has warned:

> [The] judge must take care that the evidence considered is authentic and reliable. Witnesses should be sworn; appropriate cross-examination should be allowed; and documents should be properly identified and authenticated. In short, a Spears hearing may be abbreviated, but the evidence adduced must meet adequate indicia of reliability.

Wilson, 926 F.2d at 483. One would think that the due process afforded in immigration cases would at least equal the due process afforded in a *Spears* hearing. In any case, the case makes clear that authentication is an "indicia of reliability."

[82] Apologies to Shakespeare.

suggest that the contents of the form did not relate to the respondent, that the information was erroneous, *or* that it was the result of coercion or duress." 19 I&N Dec., at pg. 11 (emphasis added). And the respondent did not even object to the admission of the I-213.

Matter of Gomez-Gomez is an *in abstentia* case so the issue of any need for a foundation was not even raised. Nevertheless, the Board went out of its way to emphasize the importance of knowing the source of information:

> We emphasize that while generally considered to be reliable and sufficient to establish alienage, not every Form I-213 that alleges alienage must be ultimately so found. The Service would be well advised to include as many indicia of trustworthiness regarding the information in that document as are practicable, *such as the source of the information* and the circumstances of the alien's apprehension....

23 I&N Dec. 522,526 (BIA 2002) (emphasis added). The Board even noted that it had *not* held elsewhere (in *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999)) that "any allegation of alienage in a Form I-213, however conclusory, is sufficient to meet the Service's burden of proof." 23 I&N Dec. at 526, n. 5.

Ponce-Hernandez is particularly instructive because the I-213, as described by the Board was utterly conclusory yet deemed admissible and reliable but pay attention to the context of the case. **First** the description of the I-213:

> To establish the respondent's deportability, the Service produced a copy of [Form I-213 which …] stated that the respondent was a native and citizen of El Salvador who last entered the [U.S.] without inspection…. It also contained personal information regarding the respondent's sex, hair, eyes, complexion, height, weight, marital status, and occupation, which is a laborer. It also contained specific information regarding the names and nationality of the respondent's parents and the town in El Salvador where he resided before illegally entering the United States. The Form I-213 was signed by the Service agent who completed the document. The narrative portion of the Form I-213 contains a notation regarding funds but does not give any further information. The above-referenced information on the Form I-213 is detailed, and there is nothing to indicate that it came from anyone other than the respondent.

22 I&N Dec. at 785. Although the Board found "nothing facially deficient" here, the Board acknowledged the dissent's laundry list of I-213 issues but found them to be "speculative" and, in any case, the juvenile's absence itself had made impossible "further inquiry" into any such deficiencies. *See* footnotes 1, 3.

Second consider the context: again, the Respondent did not appear and an *in abstentia* order was entered against him which meant that "he waived his opportunity to claim that the Form I-213 contains information which was incorrect or obtained by coercion or duress," 22 I&N Dec. at 785 – 786, and no challenge to the veracity of the I-213 was

made, a point about *Ponce-Hernandez* emphasized by the Board elsewhere. *See Matter of Gomez-Gomez*, 23 I. & N. Dec. 522, n. 5 (BIA 2002).

The Board was shooting at fish in a barrel in *Ponce-Hernandez*. No challenge was made to the lack of foundation because the respondent didn't show up for his hearing. How did the case get to the Board at all? Well, the IJ found the I-213 inadequate as evidence of alienage because he (or she) "took issue with the fact that the Form I-213 did not specify that the respondent[, a juvenile,] was advised that his statements could be used against him in later proceedings." *Id*., 787. The Board's response to this point can be useful to us. It wrote:

> [T]he record establishes that the respondent was properly served with his Order to Show Cause and read a specific set of instructions for minors being placed in proceedings. …[T]he compliance with proper procedure serves as evidence that the Service acted in compliance with the rules. In light of these factors and the fact that the respondent presented no evidence that he was not fully advised of his rights, or that he was in any way prejudiced, we find no basis for discounting the contents of the Form I-213.

Id., 787. If this rationale has merit then the inverse must be true as well. Evidence of noncompliance with proper procedure should serve as evidence that the DHS's evidence is less than reliable. Evidence that the DHS did not fully advise the respondent of *whatever*, as otherwise required to do so, should serve to discount the reliability of the I-213.[83] In any case, nowhere in *Ponce-Hernandez* does the Board write that no evidentiary foundation is needed. The issue simply was not raised because of the *in abstentia* context.

****** How do you show that an inherently reliable Form I-213 is not so inherently reliable after all?***

> **Short answer:**
> The idea that a I-213 is facially accurate unless you prove otherwise is deeply rooted in the subconscience of judicial decision makers at all levels. So, as suggested by *Ponce-Hernandez*, just cited, you must:
>
> > (1) present a true laundry list of all the ways that that the full process by which your client came to be put into proceedings can't be trusted and
> > (2) attack the accuracy and form of the I-213 itself.[84]

[83] N.B.: the dissent notes, at pg. 792, that 8 C.F.R. § 287.3(a) may have been violated. That regulation provides that the examination of an arrested alien shall be before an officer other than the one who apprehended and arrested the alien. Id.

[84] Some ideas from *Pouhova v. Holder*, wherein it reads:

> In a specific case though, a particular Form I-213 may not be inherently reliable. For example, it may contain information that is known to be incorrect, it may have been obtained by coercion or duress, it may have been drafted carelessly or maliciously, it may mischaracterize or misstate material information or seem suspicious, or the evidence may have been obtained from someone other than the alien who is the subject of the form..

The latter is super important. I can't count the number of cases I have read and cases that I have *had* that did #(1) really well (because it's easy) but then the court ignored that fact and proceeded to blow off my attempts to do #(2) as ineffective.

Doing #(1) is to counter what's called the presumption of regularity, which is basically a mechanism of administrative deference. To summarize, the courts presume, in the absence of clear evidence to the contrary, that public officers have properly discharged their official duties.[85] The inference taken from this principle is that documents are presumptively reliable.

DHS and the Courts throw around "the presumption of regularity" as if it is self-explanatory and bullet proof but it shouldn't be for lots of reasons.[86] The presumption rests upon, inter alia, the idea "that the [government officials] . . . are unbiased" but it follows then that "the presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (internal citations omitted).

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726 F.3d 1006, 1013 (7th Cir. 2013).

[85] *See United States v. Chemical Foundation, Inc*., 272 U.S. 1, 14 – 15 (1926); *INS v. Miranda*, 459 U.S. 14, 17–18 (1982) (per curiam) (presuming the regularity of the immigration visa process based on perceptions about the substance of the agency's work). For more on the presumption of reliability, see *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 Harv. L. Rev. 2431 (Jun 8, 2018) https://harvardlawreview.org/2018/06/the-presumption-of-regularity-in-judicial-review-of-the-executive-branch/

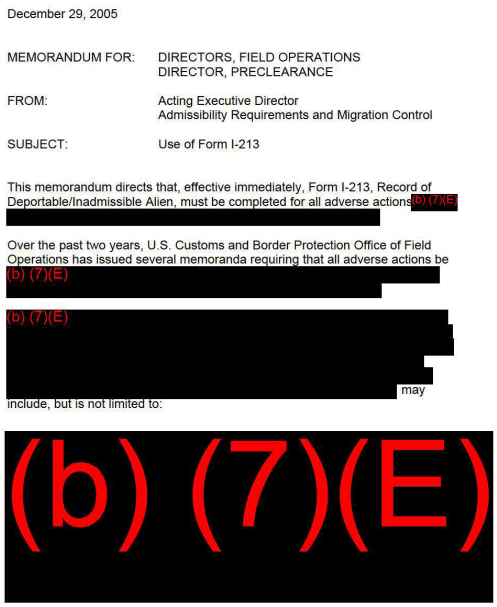
[86] From one particularly dismissive unpublished case:

> Shayesteh also argues that the documents prepared by Government officials — such as the I-213 forms and the reports from the FBI —should have been excluded. This argument fares no better. Courts have long recognized that "agency action is entitled to a presumption of regularity," *Bradley v. AG of the United States*, 603 F.3d 235, 239 (3d Cir. 2010) (alteration omitted) (quoting *McLeod v. INS*, 802 F.2d 89, 95 (3d Cir. 1986)), and, consequently, that "records made by public officials in the ordinary course of their duties . . . evidence strong indicia of reliability," *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996); *see Vlisidis v. Holland*, 245 F.2d 812, 814 (3d Cir. 1957). The I-213s and FBI documents fall squarely within this purview. *See, e.g., Antia-Perea v. Holder*, 768 F.3d 647, 657 (7th Cir. 2014) ("[I]t is well established that HN9[ ] the I-213 is a presumptively reliable and admissible document."); *Chavez-Castillo v. Holder*, 771 F.3d 1081, 1085 (8th Cir. 2014) (affidavit from law-enforcement officer is presumptively reliable). The Government says that the records came either from Shayesteh's A-File or directly from an FBI agent, and Shayesteh has provided no basis to question those explanations. *See Fei Yan Zhu*, 744 F.3d at 274. Accordingly, we likewise deny this due process challenge.

Shayesteh v. AG United States, 627 Fed. Appx. 70 (3rd Cir. Sept. 23, 2015). This is just lazy. They can't even be bothered to tell us what the bases for exclusion were that the respondent raised. They just go straight to: "[redacted] you. It's a government record, at least according to the Government." And why do they capitalize Government? It's not a proper noun.

The idea that CBP officers are unbiased is ludicrous.[87] Indeed, both INA §287(a) and 8 C.F.R. §287.3(a) seem to rest upon the presumption that the arresting officer is necessarily biased, which is why a person arrested for a civil immigration violation without a warrant is supposed to be taken before an officer different than the arresting officer for examination. Despite the law, it is often the same arresting officer who conducts the examination in violation of statutory and regulatory law.[88] And everything I previously wrote about authentication concerns a regulatory requirement. Thus, if there is no authentication, there is one more reason to eschew the presumption of reliability.

This begs a question: What are the procedures applicable to Forms I-213? That's a good question. Do you know the answer? If so, please let me know. One 2005 Memorandum is super-less-than-illuminating. From page one:



December 29, 2005

MEMORANDUM FOR: DIRECTORS, FIELD OPERATIONS
DIRECTOR, PRECLEARANCE

FROM: Acting Executive Director
Admissibility Requirements and Migration Control

SUBJECT: Use of Form I-213

This memorandum directs that, effective immediately, Form I-213, Record of Deportable/Inadmissible Alien, must be completed for all adverse actions (b) (7)(E)

Over the past two years, U.S. Customs and Border Protection Office of Field Operations has issued several memoranda requiring that all adverse actions be (b) (7)(E)

(b) (7)(E)

may include, but is not limited to:

(b) (7)(E)

[87] But that fact is no obstacle to the Courts. *See e.g., Espinoza v. INS*, 45 F.3d 308, 311 (9th Cir. 1994), *as amended on denial of reh'g,* 1995 U.S. App. LEXIS 7699 (Jan. 12, 1995) ("[W]hen the evidence introduced is that "recorded by a [] [DHS] agent in a public record," the absent agent "cannot be presumed to be an unfriendly witness or other than an accurate recorder[.]").

[88] I have on several occasions taken the depositions of CBP officers. Each of the officers had decades of experience. Each of them also professed ignorance of this regulatory requirement. On the point of law, *see Matter of Ponce-Hernandez*:

> The dissent would find that an apparent regulatory violation occurred because the Form I-213 seems to indicate that the same Service officer who located or apprehended the alien also questioned him. While in some instances this could be shown to be a violation of 8 C.F.R. § 287.3 (1995), the regulations explicitly permit an arresting officer to interview an alien when "no other qualified officer is readily available and the taking of an alien before another officer would entail unnecessary delay." Since we do not know whether another officer was available, we cannot find that there has been a violation of 8 C.F.R. § 287.3(a), and we do not reach any issues associated with such a possible regulatory violation.

22 I&N Dec. 784, n. 2 (BIA 1999).

See AILA Doc. 19062561[89]. The rest of the pages are even worse. You can blow that up and squint all you like but you aren't going to learn anything. Does anyone else see a due process problem with a legal principle that goes:

(a) I-213s are inherently reliable because we presume that the government followed procedure because, well, it's the government;
(b) What are those procedures, you ask? We don't know;
(c) But if you wish to challenge this presumption, you have to show that those governmental procedures weren't followed; and
(d) No, the government doesn't have to tell you what those procedures are;
(e) Have a nice day.[90]

In any case, whatever information you find that suggests how I-213s are supposed to be filled out, including from other government forms, is information you can use against the government if your client's I-213 doesn't satisfy it.

Is your client a juvenile? If so, on Appendix 11-4 "Juvenile Aliens: A Special Population" to the Detention and Removal Officer's Field Manual,[91] it reads:

> The Arresting Officer should obtain as much detailed biographical information as possible (see inset for questions to ask when interviewing a juvenile).[[92]] When completing the I-213, get the name, address, location, and telephone number of any or nearest relatives in the United States. Form should be signed by the Arresting Officer and reviewing official.

Thus, if the officers didn't ask your juvenile client for the name, address, location, and telephone number of their nearest relative in the U.S., or any of the other prescribed questions, or more likely, if it isn't signed by by the arresting officer and the reviewing official, maybe you have a basis to argue procedural irregularity.

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[89] https://www.dropbox.com/preview/jamaica/2005%20memo%20re%20i213s.pdf?role=personal

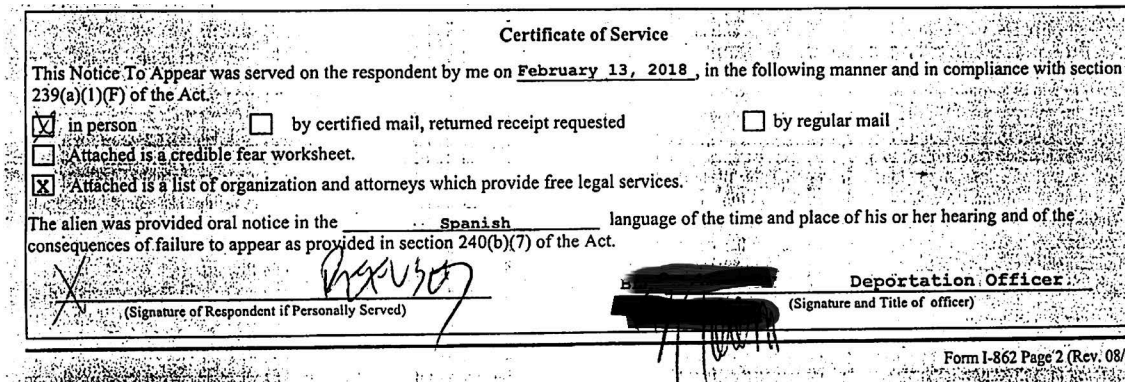
[90] "But I don't want to go among mad people," Alice remarked. "Oh, you can't help that," said the Cat: "we're all mad here. I'm mad. You're mad." "How do you know I'm mad?" said Alice. "You must be," said the Cat, "or you wouldn't have come here." — Lewis Carroll, Alice in Wonderland

[91] Copy at https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf

[92] The Appendix reads:

> Ask the juvenile for the following information and add it to the narrative of the I-213 Form:
> • Location of immediate family; • Location and phone numbers of any friends or relatives in the United States or contiguous territory; • Type of locale in country where juvenile was raised (suburban, rural, urban, etc.); • Whom the juvenile lived with before leaving home; • Length of time in transit, from home to the United States; • Route of travel (e.g., countries, length of time spent in each, status in each, date of arrival at border, etc.); • Destination in United States; • Person whom juvenile was to contact in the United States and phone number; • Present funds and anticipated method of support; • If smuggled, the arrangements made; • The health of the juvenile: are there any health problems admitted? • Juvenile's language skill: (1) Spanish, English, etc. (2) Speak, read, write, understand?

And you aren't limited to the process of completing I-213s. Read *all* of the DHS documents you have that relate to your client. Really. I'm not kidding. All of them. You will be amazed. One day I was sitting in Court and I read a certificate of service for a Notice to Appear ("NTA"). It looked like this one:



Certificate of Service

This Notice To Appear was served on the respondent by me on February 13, 2018, 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.

X _____ (Signature of Respondent if Personally Served)

[redacted] Deportation Officer (Signature and Title of officer)

Form I-862 Page 2 (Rev. 08/

They *all* look like this one. Read it. I did and then I asked myself: How did the agent provide oral notice in the Spanish language of the time and place of his hearing when no such hearing was even scheduled at the time of the issuance of the NTA? It was one of those *Pereira* style NTAs. And then I asked myself, what are "the consequences of failure to appear as provided in [INA §] 240(b)(7)"[93] and why is this in the certificate of service? I didn't know the answers to those questions, so I looked up §240(b)(7), all the cross-referenced statutes therein, and all the statutes and regulations relating to NTAs, service of the same, etc. It turns out that that entire portion of the certificate of service doesn't serve any legal requirement related to either the Court's jurisdiction or to proper service or any such thing. It is literally superfluous to those issues.[94] But it does serve a

[93] This provision reads:

> 7. Limitation on discretionary relief for failure to appear
> Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 239(a) of this Act [8 U.S.C §1229(a)], was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 240A [8 U.S.C §1229b – Cancellation of Revoval, both EOIR-42A and EOIR-42B relief], section 240B of this Act [8 U.S.C §1229c – Voluntary departure] , section 245 of this Act [8 U.S.C §1255 – Adjustment of Status], section 248 of this Act [8 U.S.C §1258 - Change of nonimmigrant classification], or section 249 of this Act [8 U.S.C §1259 - Record of admission for permanent residence in the case of certain aliens who entered the United States prior to January 1, 1972- *aka* Registry] for a period of 10 years after the date of the entry of the final order of removal.

[94] INA §239(a)(1)(G)(i) – the "time and place" information addressed in *Pereira* and *Bermudez Cota* and subsection (ii) thereof require that written notice of proceedings include:

> (i) The time and place at which the proceedings will be held [and] (ii) The consequences under section 240(b)(5) [8 U.S.C. §1229a(b)(5) of this title] of the failure, except under exceptional circumstances, to appear at such proceedings.

But the claim by the officer to have given *oral* notice in the certificate of service obviously doesn't satisfy these provisions relating to *written* notice. It's there for a different reason.

different purpose: *to put your client in legal jeopardy*. Think of it like a legal land mine buried in a relatively obscure place where most people won't step, but some will.

I started asking all my clients about whether the officer interrogating them ever talked to them about what would happen if they didn't show up for an immigration court hearing. Occasionally, a client was told that he or she was told about the possibility of a removal order. But I have never met the client who was told that he or she would be ineligible for all the various forms of relief enumerated in that statute (cancellation of removal, voluntary departure, adjustment of status, registry, etc.). And I have never met the client to whom the words "exceptional circumstances" were uttered. It should matter that the DHS is making false statements on a routine basis to the courts.[95]

Thereafter, I started litigating the point to attack the process: "The Certificate of Service constitutes a false statement to the Court."[96] The end game is to undermine the presumption of reliability across the board so that the court, when it is looking at the I-213 that it will likely admit nevertheless looks at the form with skepticism. In my cases, invariably, the guy (they are mostly guys) who signs the NTA's certificate of service – false statements and all – is the same guy who fills out the I-213, so if you can show him to be a liar, my argument to the courts is that it should matter and taint the I-213. I have gotten one IJ to terminate on this basis. In that case, we denied service of the NTA but

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On a separate point, I do have a theory that the standard form NTA does not satisfy the just mentioned requirement that it contain notice of "[t]he consequences under section 240(b)(5) [8 U.S.C. § 1229a(b)(5) of this title] of the failure, except under exceptional circumstances, to appear at such proceedings[,]" but that theory is well beyond the scope of this paper. But I invite you to read §240(b)(5) in its entirety and then read the NTA cover to cover and ask yourself whether the NTA is adequate in light of that particular provision of the statute.

[95] The court's rules provide that:

> A signature represents a certification by the signer that: he or she has read the document; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is grounded in fact; the document is submitted in good faith; and the document has not been filed for any improper purpose.

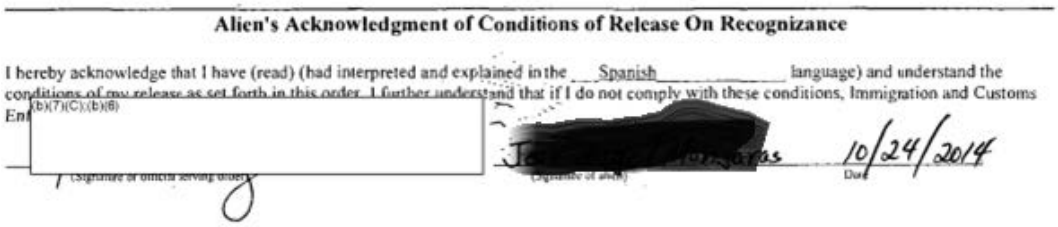
Imm. Court Prac. Manual, Ch. 3.3(b) (*citing* 8 C.F.R. § 1003.102(j)(1).

[96] And also to get around *Matter of Bermudez-Cota* as irrelevant because the alien therein conceded service of the NTA. 27 I&N Dec. 441 (BIA 2018), nor was service contested in *Pereira v. Sessions*, 585 U.S. __, 138 S. Ct. 2105 (2018), as noted in the *Bermudez-Cota* decision. 27 I&N Dec. at 442. My written argument, after citing to the Practice Manual's provision on signatures, goes something like:

> As to "oral notice in the Spanish language" of the "time and place of his or her hearing," Mr. [DHS Officer's] attestation to this Court is obviously false – no such hearing had been scheduled and the putative NTA itself, on page one, makes that incontrovertible. As to "oral notice in the Spanish language" of "the consequences of failure to appear" under INA § 240(b)(7), Mr. _____ contends that this attestation by [the officer] to this Court is equally false. Mr. _____ directly disputes each point. See Index, Tab __, pg. ___, ¶¶ ____. Nor is [the officer's] false claim to this Court meaningless and superfluous. It is anything but. There are very serious legal consequences that are triggered by the oral warnings that [the officer] claims to have given Mr. _____. The statute plainly imposes a ten-year bar to eligibility for many forms of discretionary relief if the person is given oral notice of those sequences but nevertheless later fails to appear at a removal hearing is ordered removed in absentia. In short, [the officer's] false claims serve no purpose but to expose Mr. _____ to legal jeopardy.

since the IJ himself had served it on the client during a prior hearing, at which the client appeared *pro se*, he found service to be established. But the IJ then found the I-213 to be unreliable because the officer who executed the I-213 was the same officer who made false statements in the certificate of service. The IJ did not appreciate that a DHS officer had made a written material misrepresentation to the court. He then literally invited the DHS to submit something other than the I-213 because of the finding he had just made. But the government, incapable of recognizing the peril into which my argument had placed its case, stood its ground like a deer staring into headlights. The IJ – annoyed – terminated and that was that. It's on appeal and the Board may save the DHS from its own incompetence. That has certainly happened before. But life goes on.

What other DHS documents provide a basis for similar attacks? Well, at the bottom of an Order of Release on Recognizance it reads:



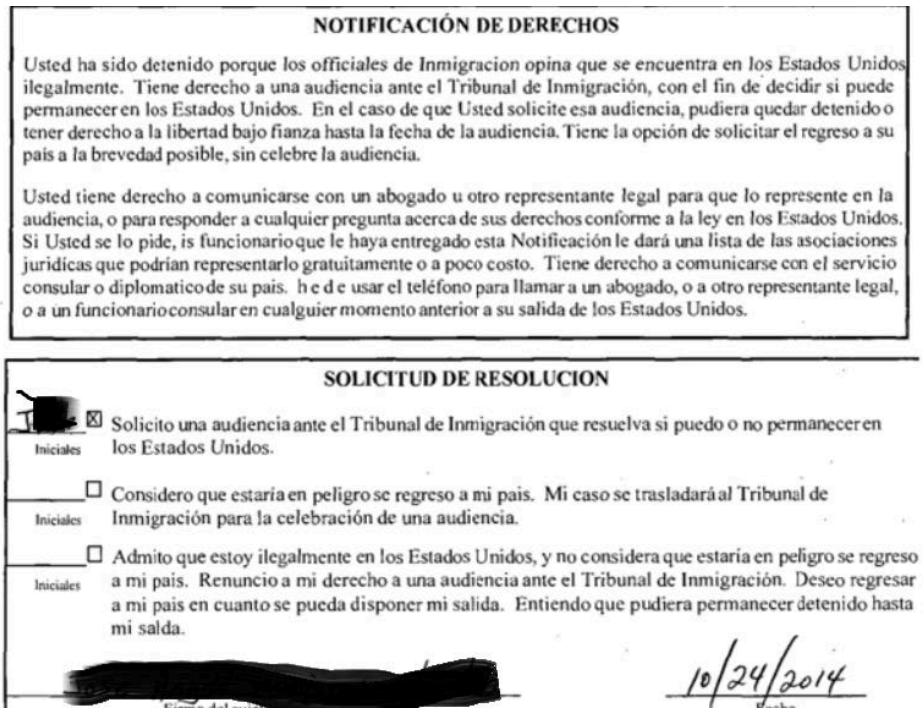
Alien's Acknowledgment of Conditions of Release On Recognizance

I hereby acknowledge that I have (read) (had interpreted and explained in the Spanish language) and understand the conditions of my release as set forth in this order. I further understand that if I do not comply with these conditions, Immigration and Customs En

(b)(7)(C);(b)(6)

10/24/2014

Is this true? Ask your client, if not, then you have one more procedural irregularity to which to point. If you do an ICE foia, you may find a document that looks like this:



NOTIFICACIÓN DE DERECHOS

Usted ha sido detenido porque los officiales de Inmigracion opina que se encuentra en los Estados Unidos ilegalmente. Tiene derecho a una audiencia ante el Tribunal de Inmigración, con el fin de decidir si puede permanecer en los Estados Unidos. En el caso de que Usted solicite esa audiencia, pudiera quedar detenido o tener derecho a la libertad bajo fianza hasta la fecha de la audiencia. Tiene la opción de solicitar el regreso a su pais a la brevedad posible, sin celebre la audiencia.

Usted tiene derecho a comunicarse con un abogado u otro representante legal para que lo represente en la audiencia, o para responder a cualquier pregunta acerca de sus derechos conforme a la ley en los Estados Unidos. Si Usted se lo pide, is funcionario que le haya entregado esta Notificación le dará una lista de las asociaciones juridicas que podrían representarlo gratuitamente o a poco costo. Tiene derecho a comunicarse con el servicio consular o diplomatico de su pais. h e d e usar el teléfono para llamar a un abogado, o a otro representante legal, o a un funcionario consular en cualquier momento anterior a su salida de los Estados Unidos.

SOLICITUD DE RESOLUCION

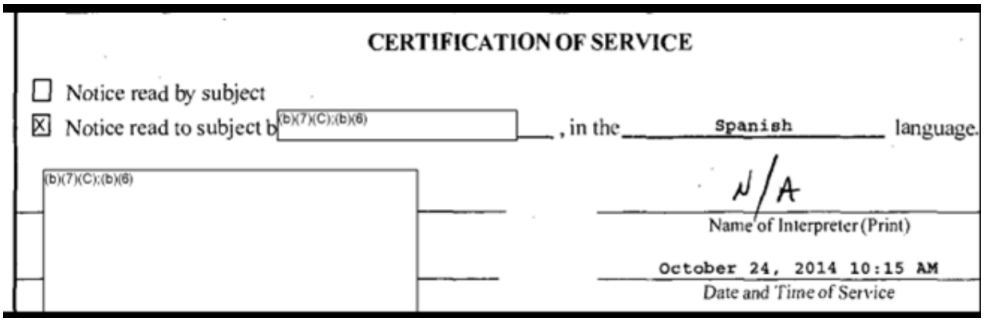
Iniciales ☒ Solicito una audiencia ante el Tribunal de Inmigración que resuelva si puedo o no permanecer en los Estados Unidos.

Iniciales ☐ Considero que estaría en peligro se regreso a mi pais. Mi caso se trasladará al Tribunal de Inmigración para la celebración de una audiencia.

Iniciales ☐ Admito que estoy ilegalmente en los Estados Unidos, y no considera que estaría en peligro se regreso a mi pais. Renuncio a mi derecho a una audiencia ante el Tribunal de Inmigración. Deseo regresar a mi pais en cuanto se pueda disponer mi salida. Entiendo que pudiera permanecer detenido hasta mi salda.

10/24/2014

The certificate of service for that document looks like this:



CERTIFICATION OF SERVICE

☐ Notice read by subject

☒ Notice read to subject by (b)(7)(C);(b)(6) , in the Spanish language.

(b)(7)(C);(b)(6)

N/A
Name of Interpreter (Print)

October 24, 2014 10:15 AM
Date and Time of Service

Was the notice read to your client? If not, then you have one more procedural irregularity to which to point. The goal is to pile up enough of them until the IJ starts paying attention and you make your point: immigration officers cannot be trusted to have properly discharged their official duties.