WHAT TO DO WHEN ICE SUBMITS AN I-213 IN IMMIGRATION COURT

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I. Introduction

The Department of Homeland Security (DHS) initiates removal proceedings by filing a Notice to Appear (NTA) with the Immigration Court. The NTA contains the allegations and charges against a person to establish why they should be removed. A key piece of this document is asserting that the person is not a citizen of the United States. Before preparing the NTA, the DHS officer generally interviews the respondent and sometimes reviews other information in the respondent's immigration and other records. The officer takes information from all these sources to fill out Form I-213, entitled "Record of Deportable/Inadmissible Alien." The officer includes the respondent's place of birth and country of citizenship and other information they think is relevant to the person's immigration status. This form thus provides the basis and key facts to support DHS's position that a person should be removed from the United States.

When a respondent who is charged as being inadmissible to the United States denies the allegations in the NTA, including the allegation that they are not a citizen of the United States, DHS often will present the I-213 to meet its statutory burden of proving the respondent's "alienage." This practice can be frustrating, since DHS is trying to meet its burden of proving your client's removability by using DHS' own form, which in turn has largely been filled out based on information allegedly provided by your client before removal proceedings were even initiated (and usually before the client was represented by counsel). The I-213 can also be used to try to undermine the credibility of an applicant's claim for relief, or as proof of prior bad conduct.

This practice advisory addresses what a practitioner can and should do when DHS submits an I-213 to prove "alienage" or any other facts in a case. After a brief discussion of the purpose of an I-213 and why DHS often submits it during removal proceedings, this advisory discusses objections that practitioners should consider making in order to exclude the I-213 from the record in removal proceedings or, at a minimum, to argue that the I-213 should not be given any significant weight by the immigration judge. It discusses how to overcome the presumption that I-213s are inherently trustworthy and concludes with a synopsis of when and how to submit a motion to suppress in cases involving regulatory or constitutional violations.

II. What is the I-213 and Why Does ICE Submit it During Removal Proceedings?

DHS prepares a Form I-213, Record of Deportable/Inadmissible Alien, before initiating removal proceedings. The information in the I-213 is usually collected during an interview of the individual by a DHS officer, and often contains statements that the officer claims come directly from the person believed to be a noncitizen. It contains information regarding the person's country of birth, country of citizenship, and other statements such as their date and manner of entry. The form contains biographical information; the date, place, time, and manner of entry to the United States (or a statement that the information is unknown);[1] and immigration and

[1] I-213s often state that the date, time, and place of entry is "unknown," even when the interviewed subject knows this information. This is to prevent a noncitizen from later using information in the I-213 to prove elements of a claim for immigration relief, such as proving that they have filed for asylum within one year of entry into the United States as required under Immigration and Nationality Act (INA) § 208(a)(2)(B). This is

criminal history. It can also contain other information like allegations of gang membership, statements about past drug trafficking, involvement in being a persecutor or member of a terrorist organization, and their reasons for immigrating to the United States (which often include claims that the person said they came to work and not because they feared harm). Sometimes, the form contains alleged statements made by other people, like an ex-spouse, about the noncitizen.

The most common reason that Immigration and Customs Enforcement (ICE) submits an I-213 during removal proceedings is to establish "alienage" - that the person was born somewhere other than the United States. A noncitizen facing removal in immigration court may deny the charges and allegations contained in the NTA, thus requiring DHS to meet its burden of proof and show that the government has evidence that the person is in fact foreign born. If a noncitizen denies the allegation in the NTA that they are not a U.S. citizen or national, ICE will often submit the I-213 to the court as evidence to show the person is foreign born.[2] In doing so, ICE relies on the I-213 as an official record, implicitly claiming that the contents and statements recorded in the form must be taken as true.

ICE also sometimes submits I-213s to establish:

- removability;[3]
- the respondent's ineligibility for relief, i.e., failure to express fear of persecution, involvement in drug trafficking; or
- negative discretionary factors, i.e., gang affiliation.[4]

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an example of how the I-213 is not a reliable source of information regarding what occurred during the noncitizen's interview with the ICE officer, as further explored below.

[2] If a respondent is charged with removability under INA § 212 for being "inadmissible" rather than "deportable" under INA § 237, it is the respondent's burden to prove that they are entitled to be admitted to the United States, or that they are already lawfully present. INA § 240(c)(2). However, before the burden lands on the respondent to make such a showing, ICE must first prove that the respondent is not a citizen of the United States, referred to as "alienage" in the regulations. 8 C.F.R. § 1240.8(c). If a respondent denies "alienage" when pleading to the allegations in the NTA, ICE will often present the I-213 to meet its burden. For more information on procedures and strategies involved in pleading to an NTA, including denying "alienage," see ILRC's practice advisory: "Representing Clients at the Master Calendar Hearing: How to Prepare for an Initial Hearing, with Quick-Reference Checklist" (Dec. 2018), available at: https://www.ilrc.org/representing-clients-master-calendar-hearing-how-prepare-initial-hearing-quick-reference-checklist.

[3] See, e.g., *Gonzaga-Ortega v. Holder*, 736 F.3d 795, 800 (9th Cir. 2013) (I-213 submitted by ICE to prove LPR engaged in "alien smuggling" before re-entering United States).

[4] Regulations further require DHS to submit the I-213 to the immigration court in cases where a respondent is referred to the court for removal proceedings after a credible fear interview by United States Citizenship and Immigration Services (USCIS). 8 C.F.R. § 1240.17(c). USCIS's Affirmative Asylum Procedures Manual directs officers to leave the date of entry field blank on the I-213 "[r]egardless of the claimed manner of entry, whenever the applicant has failed to meet the burden of proof with respect to his or her last arrival date." USCIS, Asylum Division, "Affirmative Asylum Procedures Manual" (May 2016), available at: https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf.

III. The Application of Evidentiary Rules in Immigration Court

Although U.S. immigration courts conduct adversarial proceedings under federal law, the Federal Rules of Evidence (FRE) do not apply in immigration courts.[5] Rather, "the test for admitting evidence [in immigration courts] is whether it is probative and its admission is fundamentally fair," which is a framework roughly borrowed from the Federal Rules of Evidence.[6] In turn, what constitutes probative evidence and fundamental fairness, stems from basic principles set forth by the statute and regulations, as well as the Due Process Clause of the Fifth Amendment.

The Immigration and Nationality Act states that respondents in removal proceedings are entitled to a "reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government."[7] In addition, the Fifth Amendment Due Process Clause applies to removal proceedings, which requires that the immigration court not consider evidence that is unduly prejudicial or fundamentally unfair to the respondent.[8]

Generally, immigration court procedures favor admitting any evidence that is "material and relevant" to the case.[9] This can be helpful in proving a case for relief, for example where an applicant for asylum relays statements made by individuals who cannot appear as witnesses. Unfortunately, DHS can also attempt to use the lenient evidentiary standards in immigration court to introduce evidence that prejudices a noncitizen's case. Even so, objections are an important tool in keeping unduly prejudicial evidence from harming your client's case. Submission of some evidence might be so fundamentally unfair as to warrant its exclusion, and other evidence, while not excluded, could be given less weight due to questions about its reliability. As discussed further below, most objections to government documents will include both an objection to the document's admission into the record, as well as an alternative argument that the document be given little weight.[10]

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[5] *Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015) ("It is well established that the Federal Rules of Evidence are not binding in immigration proceedings), *citing Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999).

[6] *Matter of Y-S-L-C-*, 26 I&N Dec. at 690.

[7] INA § 240(b)(4)(B).

[8] *Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings."); *Hassan v. Gonzales*, 403 F.3d 429, 435 (6th Cir. 2005) ("we review evidentiary rulings by IJs [immigration judges] only to determine whether such rulings have resulted in a violation of due process" (internal citations and quotations omitted)).

[9] 8 C.F.R. § 1240.7(a) (the IJ "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").

[10] *Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972) ("Information contained in an affidavit should not be disregarded simply because it appears to be hearsay. In administrative proceedings that fact merely affects the weight to be afforded such evidence, not its admissibility.").

Practice Tip: In addition to reviewing the I-213 very carefully for signs of unreliability and unfair process, practitioners should simultaneously scrutinize the information contained in the NTA. Often, both the I-213 and the NTA are prepared by the same officer and a mistake in one can help prove a mistake in the other, which can in turn form the basis for excluding the I-213 from the record or entitling it to little weight. For example, the officer may have signed the certificate of service in the NTA stating that he informed your client in Spanish of the time and place of their hearing as well as the consequences of failing to appear, even though your client has informed you that the officer did not speak Spanish (or perhaps the time and place of their hearing was not even yet set at the time the NTA was served). Such blatantly false statements will undermine the I-213's presumption of reliability (discussed below) if it was prepared by the same officer.

IV. Objecting to the I-213

The Board of Immigration Appeals (BIA) and federal courts have held that I-213s are generally admissible and inherently trustworthy, absent evidence that they contain information which is incorrect or obtained by coercion or force.[11] The fact that information contained in I-213s is almost entirely hearsay, does not prevent them from being considered admissible in immigration proceedings and inherently trustworthy.[12] This is true even where the respondent is a minor and the information in the I-213 was obtained by the officer from interviewing the child.[13]

Even so, stating objections to the I-213 can be of paramount importance to a respondent in removal proceedings. The immigration judge can decide to give the I-213 little to no weight based on issues raised by counsel, and in some cases might agree the document should be excluded. Objections should be stated on the record (with the court's recording equipment running) in order to preserve the objections for appeal.[14] Additionally, objections can be made in writing so practitioners should state, whenever necessary, that they wish to reserve the right

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[11] *Matter of Mejia*, 16 I&N Dec. 6, 8 (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."); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) ("The Form I–213 was properly admitted into evidence. Deportation proceedings are civil in nature and are not bound by the strict rules of evidence."); *Matter of W-E-R-B-*, 27 I&N Dec. 795, 800 (BIA 2020) ("the information on the Form I-213 is presumptively trustworthy").

[12] *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) ("Hearsay is admissible in administrative proceedings, so long as the admission of evidence meets the tests of fundamental fairness and probity.").

[13] *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999) (finding admission of I-213 was proper to establish 15-year old respondent's removability, where he did not appear for hearing and therefore did not claim that the I-213 was unreliable); *Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002) (immigration judge erred in refusing to rely on I-213's statement of "alienage" where there was no reason to doubt the source of information, which was the eight-year old respondent's accompanying adult). *But see Matter of Rosa Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002) (I-213 not admissible where respondent was only seven years old and it wasn't clear where information in I-213 came from).

[14] *Matter of Garcia-Reyes*, 19 I&N Dec. 830, 832 (BIA 1988) ("It is clear that objections themselves should be made on the record, or such objections will not be preserved for appeal.").

to lodge or supplement their objections in writing. The basis for the objection should be clear. A general statement of "objection" without stating specific reasons, is not sufficient to give the immigration judge a basis for a ruling or to preserve arguments for appeal.[15] Finally, practitioners should ensure that they receive a ruling by the immigration judge regarding each objection for the sake of clarity and fairness during the proceedings in immigration court and any future appeals.[16]

A common DHS response to any objection to the I-213 is that I-213s are entitled to a "presumption of regularity" or "presumption of reliability."[17] The presumption rests on the idea "that the [government officials] . . . are unbiased"[18] and that therefore, there is a presumption that the proper procedures were followed in preparing official government documents. But it follows then that "the presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification."[19] As the BIA and courts have repeatedly held, the presumption does not apply where there is specific evidence of irregularity or unreliability. Practitioners should be careful not to assume that an I-213 is admissible or entitled to full weight in all cases, since the procedures followed by DHS in preparing and presenting I-213s are commonly problematic.[20] Practitioners should be prepared for DHS to claim a presumption of regularity or reliability in response to any objection to the I-213. Ideally, practitioners will be ready with specific facts or details to support their objections and overcome this presumption.

Following are important objections to consider making in cases where DHS has submitted an I-213 during removal proceedings.

Lack of Authentication – Authentication is one of the basic rules of evidence and requires a showing that the evidence presented in court "is what it purports to be."[21] The immigration regulations state that a document is self-authenticating if offered as "an official publication" or as a copy certified by the official custodian of the document or their ''authorized deputy."[22]

Authentication of the I-213 is often shown by a signed stamp on the document indicating that the document is a true and correct copy of the form from the official DHS file. ICE attorneys

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[15] See *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1440 (9th Cir. 1990) (holding that objection on grounds of relevance does not preserve an objection for lack of authentication).

[16] The immigration judge "shall . . . rule upon objections." 8 C.F.R. § 1240.1(c).

[17] See *Matter of J-C-H-F-*, 27 I&N Dec. 211, 212 (BIA 2018) ("Generally, there is a presumption of reliability of Government documents."); *INS v. Miranda*, 459 U.S. 14, 17–18 (1982) (per curiam) (presumption of regularity applied to immigration visa process, even if it was delayed in respondent's case).

[18] *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("We must start . . . from the presumption that [administrative] hearing officers . . . are unbiased.").

[19] *Id.*

[20] See also, *The Intercept*, "Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims" (Aug. 2019), available at: https://theintercept.com/2019/08/11/border-patrol-asylum-claim/

[21] *Yongo v. INS*, 355 F.3d 27, 30 (1st Cir. 2004) ("In substance, authentication requires nothing more than proof that a document or thing is what it purports to be"); FRE 901 ("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.").

[22] 8 C.F.R. § 1287.6(a); *see also Espinoza v. INS*, 45 F.3d 308, 309-10 (9th Cir. 1995) (proper authentication of I-213 was satisfied where USCIS District Director certified it).

often try to act as the certifier of the I-213 by signing a certification stamp themselves, on grounds that ICE's counsel is the "official custodian" of the document. But as several courts have found, this poses an inherent conflict of interest in an adversarial proceeding, where the authenticating party is also representing the party seeking to offer a document into the record.[23] The objection regarding authentication should highlight to the immigration judge that several seminal cases finding that the admission of the I-213 was proper, had the preparing officer present in court to authenticate the I-213.[24]

Immigration judges and the BIA often treat authenticity as just a "technicality," which they believe should not go to admissibility of the I-213, but rather to its reliability (or weight). Although such an approach is clearly incorrect, practitioners should be prepared for such pushback.[25] In anticipation of government bias in assuming admissibility of I-213s, best practice is to argue both that the I-213 should be excluded from the record and, alternatively, that it should be afforded little weight, due to the lack of authentication. The argument is that in order for an I-213 to be considered inherently reliable, it must first be properly authenticated.[26]

Practitioners should be prepared to respond to DHS' claim that seminal BIA decisions do not require authentication of Government documents. This claim is clearly incorrect. For example, in *Matter of Velasquez*, in considering criminal records, the BIA relied heavily on the Ninth Circuit's decision in *Iran v. INS*, which unambiguously held that authentication of documents is a requirement in immigration court.[27]

Immigration judges and DHS attorneys also routinely point to *Matter of Barcenas* to support the proposition that authentication is not required in immigration court because the BIA concluded the I-213 in that case was admissible. Counsel should explain to the court that the holding in Barcenas does not support DHS's position. In finding that the I-213 in that case was

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[23] *See Iran v. INS*, 656 F.2d 469, 472 (9th Cir. 1981) (immigration form must be authenticated through "some recognized procedure." In this case, the government "failed to introduce any proof of authenticity or any proof from which the immigration judge could infer that the form was a true document"); *Tashnizi v. Immigration & Naturalization Service*, 585 F.2d 781, n.1 (5th Cir. 1978) (finding that immigration judge erred in allowing government attorney to authenticate a letter: "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 cannot overlook the profound, though entirely proper, adversary bias of an attorney in such a situation.").

[24] *See Matter of Mejia*, 16 I&N Dec. 6; *Matter of Barcenas* 19 I&N Dec. 609; *Bustos-Torres*, 898 F.2d 1053; *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980); *You v. Mukasey*, 2007 WL 4386211 (9th Cir. Dec. 13, 2007) ("Although the Form I-213 was not authenticated by Special Agent Brown at the hearing, the government made Brown available for questioning," thus making its admission into the record proper).

[25] *But see Matter of Velasquez*, 25 I&N Dec. at 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.").

[26] *Iran*, 656 F.2d at 472 ("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.").

[27] *Matter of Velasquez*, 25 I&N Dec. at 684, *citing Iran*, 656 F.2d at 472 n.8.

properly admitted into evidence, the BIA held: "the Form I-213 **was properly authenticated and admitted into evidence**" because, the "Border Patrol Officer [who prepared the I-213] testified concerning the respondent's admissions in regard to his alienage and deportability" and the manner in which he filled out the I-213.[28] In other words, the I-213 was admissible only because it was properly authenticated by the preparing officer, and there was no specific challenge to its inherent reliability.

How can DHS properly authenticate an I-213? DHS can authenticate an I-213 by presenting the original form along with the preparing officer's testimony or affidavit, confirming that it is his or her original signature on the form. The agency can also authenticate a copy of the form through the testimony or an affidavit by the official custodian of the file and document. Finally, testimony or an affidavit by a DHS officer with knowledge of the specific I-213, such as the preparer of the form, could be used to authenticate the I-213. Short of these or similar forms of authentication, advocates should strongly object to an I-213's admission into the record. Alternatively, and equally importantly, advocates should argue that due to the lack of authentication, the document is unreliable and therefore should be afforded minimal weight. By making both arguments, the issues of admissibility and weight will be preserved.

Hearsay/Inherently Untrustworthy – Out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible under the Federal Rules of Evidence.[29] Despite being almost entirely hearsay, however, I-213s have been deemed inherently trustworthy due to the presumption of regularity or reliability. The justification is that as a document prepared by a government agency, the I-213 falls under an exception to the hearsay rule.[30] However, practitioners should consider challenging the I-213 as untrustworthy if certain factors are present, which make the hearsay statements no longer fundamentally reliable.

For example, the BIA held that information gathered in the I-213 through an interview with a seven-year old respondent was inherently unreliable and therefore inadmissible.[31] Also, if there is information in the I-213 that is demonstrably false, that would be grounds for excluding it from the record.[32] Additionally, multiple layers of hearsay statements in an I-213 – for example, information gathered from a former spouse – should be grounds for objecting to the I-213 as inherently unreliable.[33] Another basis for arguing that an I-213 should be given minimal or no

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[28] *Matter of Barcenas*, 19 I&N Dec. at 611 (emphasis added). Similarly, in *Matter of Mejia*, 16 I&N Dec. 6, the I-213's admissibility was upheld, but only after it was authenticated through the testimonies of the arresting officer and his supervisor.

[29] FRE 801(c).

[30] FRE 803(8). *See Matter of Mejia,* 16 I&N at 8.

[31] *Matter of Rosa Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002) (I-213 not admissible where respondent was only seven years old and it wasn't clear where information in I-213 came from).

[32] If there is false information in the I-213, it should be excluded from the record if the respondent submits probative evidence that contradicts the false information. *Espinoza v. INS*, 45 F.3d 308, 310–11 (9th Cir. 1995); *Murphy v. INS*, 54 F.3d 605, 610-11 (9th Cir. 1995).

[33] *See Banat v. Holder*, 557 F.3d 886, 893 (8th Cir. 2009) (immigration judge erred in relying on a State Department letter that contained "multiple levels of hearsay"); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 272 (2d Cir. 2006) (Consular report was inherently unreliable because it "contain[ed] multiple levels of hearsay that exacerbate its myriad reliability problems"); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 406 (3d Cir. 2003) (reliance on a State Department letter that contained "multiple hearsay of the most troubling kind" was reversible error).

weight, is if there is demonstrably untrue information contained in the form, or where concepts of fundamental fairness were violated in the course of preparing the form, such as through coercion.[34]

Framing the objection as "hearsay," however, is likely to trigger a reaction from the immigration judge and government counsel that the objection should be overruled because hearsay documents are generally admissible in immigration court. Rather, practitioners might word the objection to identify the specific factor that makes the I-213 unreliable, i.e., false information, multiple layers of hearsay, while arguing why in the *particular case*, the I-213 is not entitled to the presumption of reliability. Where issues of fundamental fairness are at stake, particularly where DHS obtained information from the client after an unlawful stop or seizure, there can be a strong basis for a suppression motion, as discussed in Part V, below.

Inability to Cross-Examine Preparer or Witness – Respondents generally are not entitled to cross-examine the preparer of an I-213, but some courts have made an exception in cases where the information on the form "is manifestly incorrect or was obtained by duress."[35] Therefore, if there is information in the form that is demonstrably false, or was obtained through unfair procedures, the immigration judge should, at a minimum, require that the preparer of the I-213 be available for cross-examination. If ICE does not, or is unable to, present an officer for cross-examination, an immigration judge can subpoena the agent.[36] An objection regarding the unreliability of an I-213 based on inability to cross-examine the preparer or a witness will often overlap with the issues of authentication and hearsay discussed above. In other words, the issues of unreliability that are raised by an unauthenticated I-213 or one with multiple layers of hearsay or false statements, can be remedied through the testimony of the preparer or witnesses referred to in the I-213. If DHS cannot present the preparer to address these issues, then the document should be excluded or afforded little to no weight.

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[34] *Matter of Barcenas*, 19 I&N Dec. 609; *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Murphy*, 54 F.3d at 610-11 (I-213 merited little, if any, weight where respondent showed incorrect information in the form and source of it was an INS informant with ulterior motives); *Pouhova v. Holder*, 726 F.3d 1007, 1013 (7th Cir. 2013) ("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 [noncitizen] who is the subject of the form.").

[35] *Barradas v. Holder*, 528 F.3d 754, 763 (7th Cir. 2009); *Espinoza v. INS*, 45 F.3d 308, 310–11 (9th Cir. 1995). At least one court held that when the accuracy of a document is challenged by the respondent, it is inadmissible where the right to cross-examine the preparer is thwarted, unless they are unavailable and reasonable efforts have been made to produce them for cross-examination. *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983).

[36] INA § 240(b)(1); 8 C.F.R. §1003.35(b). A request for subpoena must state what you seek to prove and show diligent but unsuccessful efforts to produce the witness or document. Prior to asking an immigration judge to issue a subpoena, it is good practice to request DHS to produce the witness for cross-examination and if that request is denied or goes unanswered, submit that in support of the subpoena request.

Don't Forget to Check for Compliance with Court Rules Like Timeliness! – Often, ICE will attempt to file an I-213 during a hearing instead of complying with the Immigration Court's filing requirements.[37] Practitioners should object to the untimeliness of an I-213 filing by ICE, not only on the basis of the Practice Manual's filing rules, but also on the basis that an untimely filing violates the respondent's right to a reasonable opportunity to examine evidence.[38]

However, on a practical level, practitioners should be prepared for the immigration judge to admit the I-213 into the record, and instead to allow additional time for the respondent to object or respond to the I-213. So strategically, if the respondent will not benefit from a delay in their proceedings (including time to review the I-213), objecting to the untimeliness of the I-213's submission may not, practically speaking, further their legal interests. If the immigration judge grants the respondent additional time to review the I-213, practitioners should specifically notify the court that the respondent wishes to reserve their right to state additional objections once they have had the opportunity to examine the document.

Example: Raul is in removal proceedings and charged as being present in the United States without admission or parole, under INA § 212(a)(6)(A)(i). At his master calendar hearing, Raul denies the allegations in the NTA and denies the charge of removal. In response, DHS submits a copy of an I-213, which contains Raul's name and date of birth, and indicates that he was born in Mexico. You object to the I-213's untimeliness and lack of authentication, but the immigration judge overrules your objection. Based on your prior conversations with Raul, you know that some of the information in the I-213, such as details about Raul's criminal record and gang affiliations, are untrue. He has told you that during the interview, he had a difficult time understanding the officer who was not fluent in Spanish and did not provide Raul with an interpreter. Raul has also informed you that he was arrested by ICE along with several of his Hispanic friends while they were standing in front of a convenience store in their neighborhood, and that the officers provided them with no reason for their arrest.

When you raise these issues with the immigration judge, DHS urges the judge to overrule your objections on grounds that the I-213 is subject to a "presumption of reliability." In response, you should point out that the presumption can be rebutted in Raul's case due to the inherent unreliability of the information contained in the I-213. You should highlight the lack of an interpreter during the interview and demonstrably false information in the form regarding Raul's criminal record and gang affiliations, thus lending doubt to the reliability of any other information in the document. The circumstances under which he was arrested by

[37] The Immigration Court Practice Manual specifies that filings are due 15 days before a scheduled master calendar or individual hearing, with exceptions for rebuttal or impeachment evidence and for cases where the respondent is detained. Immigration Court Practice Manual Rule 3.1(b).

[38] INA § 240(b)(4); 8 C.F.R. § 1240.10(a)(4). *See Doumbia v. Gonzales*, 472 F.3d 957, 962 (7th Cir. 2007) ("The sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair where 'fundamentally fair' should simply be read to mean 'in accordance with the reasonable opportunity guaranteed by [INA § 240](b)(4).'").

ICE also raise questions as to whether the information contained in the I-213 is a result of a Fourth Amendment violation (see section on suppression motions below).

CAUTION: Whether to strongly object to the I-213 is a strategy decision that should be made on a case-by-case basis. For example, in a case where a client is eligible for adjustment of status or some other relief, denying the allegations in the NTA and objecting to the I-213 may not ultimately benefit the client. In fact, it may unduly delay their ability to adjust status and have the unintended consequence of DHS becoming less likely to stipulate to eligibility for relief, or at least to certain elements of the claim. On the other hand, if a client has no options for relief, challenging the I-213's admission into the record on legal or constitutional grounds would likely benefit the client if it can then lead to termination of the removal proceedings. So practitioners should carefully weigh the pros and cons of objecting to the I-213's admission into the record of proceedings in immigration court and should only proceed in a way in which their client's long-term immigration goals will be served. Even so, to obtain the I-213 and other evidence DHS might have, denying factual allegations and charges in the NTA might still serve the client in many cases. Because there is no formal discovery in immigration proceedings, denying charges remains an important tool for gathering this information, after which, the respondent can choose the best case-specific strategy.

V. Using a Motion to Suppress to Challenge an I-213's Statement of "Alienage" or Other Allegations

In cases where the information contained in the I-213 was obtained illegally – in violation of regulations or the Constitution - a motion to suppress may be appropriate. While obtaining information illegally (or gaining access to the respondent illegally) is a legitimate basis for objecting to the admissibility and weight to be given an I-213, a motion to suppress may be a more effective way of excluding the document from the immigration court's record.[39]

The Supreme Court has held that Fourth Amendment violations, standing alone, do not justify the suppression of evidence in removal proceedings.[40] However, it left open the idea that "[e]gregious violations of the 4th Amendment or other liberties that might transgress notions of fundamental fairness" or evidence of "widespread" violations, could undermine the probative value of the evidence obtained" and justify suppression of the evidence.[41] Since then, many courts have at least acknowledged this exception for egregious or widespread violations.[42]

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[39] For a detailed guide on the legality and mechanics of motions to suppress, see ILRC's publication *Motions to Suppress: Protecting the Constitutional Rights of Immigrants in Removal Proceedings* (4th Ed.).

[40] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

[41] *Id.* at 1050-51.

[42] *Zuniga-Perez v. Sessions*, 897 F.3d 114, 124 (2d Cir. 2018); *Oliva-Ramos v. Attorney General*, 694 F.3d 259 (3d Cir. 2012); *U.S. v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005); *Wroblewska v. Holder*, 656 F.3d 473, 478 (7th Cir. 2011); *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010); *Sanchez v. Sessions*, 904 F.3d 643 (9th Cir. 2018).

In addition, courts have also suppressed evidence obtained through conduct that would render use of the evidence "fundamentally unfair" and in violation of an individual's due process rights under the Fifth Amendment.[43] Such challenges often focus on whether confessions or other statements were involuntary or coerced.

Finally, evidence may be suppressed if it was obtained in violation of a federal regulation that "serves a purpose of benefit to the [noncitizen]" and "the violation prejudiced interests of the [noncitizen] which were protected by the regulation."[44]

The most common basis of a motion to suppress is a Fourth Amendment violation where the initial arrest by immigration authorities was made without a "reasonable suspicion" that an individual was unlawfully present in the United States. Whether or not there was a reasonable suspicion is a highly fact-intensive question and is based on the "totality of the circumstances." A person's apparent race or ethnicity cannot provide reasonable suspicion of "alienage," and a stop based exclusively on such factors has been held to constitute an egregious Fourth Amendment violation.[45] Importantly, after an egregious violation, any subsequent information obtained from the noncitizen is inadmissible as it is part of "fruit of the poisonous tree."[46]

Once allegations of egregious violations have been raised by a respondent, the immigration judge should hold an evidentiary hearing to determine whether there was an egregious constitutional violation or regulatory violation.[47]

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[43] *Matter of Garcia*, 17 I&N Dec. 319, 320 (BIA 1980); *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009).

[44] *Matter of Garcia-Flores* 17 I&N Dec. 325, 328 (BIA 1980) (internal citations and quotations omitted). 8 C.F.R. § 287.8(b)(2) provides that: "If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is [a noncitizen] illegally in the United States, the immigration officer may briefly detain the person for questioning." *See Sanchez*, 904 F.3d 643 (finding I-213 should be suppressed and removal proceedings terminated where information in I-213 was obtained after stop by U.S. Coast Guard was made without reasonable suspicion"); *B.R. v. Garland*, 26 F.4th 827 (9th Cir. 2022) (remanding, relying on *Sanchez*, where minor's mother was not served with NTA until seven years after minor was served, in violation of regulations. Instructing BIA to address whether proceedings should be terminated due to regulatory violation).

[45] *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975); *see also Puc-Ruiz*, 629 F.3d at 779; *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 237 (2d Cir. 2006) (Border Patrol's stop of individual on foot lacked reasonable suspicion, but was not sufficiently egregious since there was no evidence of racial profiling or a long and severe seizure); *Orhorhaghe v. INS*, 38 F.3d 488, 492 (9th Cir. 1994).

[46] *See Lopez Mendoza*, 468 U.S. 1032; *Wong Sun v. United States*, 371 U.S. 471 (1963) ("The exclusionary prohibition extends as well to the indirect as the direct products of illegally obtained evidence."); *Matter of Yau*, 14 I&N Dec. 630, 639 (BIA 1974) (Chairman Roberts, concurring) ("Where Government agents obtain evidence thus illegally, not only is the use of the evidence itself forbidden, but also use of information or evidence deriving from the evidence thus illegally obtained, since they constitute 'the fruit of the poisonous tree[.]'"), *citing Wong Sun*, 371 U.S. 471.

[47] *Zuniga-Perez v. Sessions*, 897 F.3d 114 (2018) (I-213 should have been suppressed where it stated that state troopers had felony search warrant to look for fugitive and also had information that there were "known Hispanic migrants" in the home, since presence of CBP agents for "translation assistance" was an egregious violation, especially, where DHS provided no evidence of the felony warrant and the arrested party was not the fugitive who was the subject of the warrant).

In order to effectively suppress an I-213 during removal proceedings where "alienage" is at issue, the following steps are essential:

- Deny all allegations and charges in the NTA.
- State that it is ICE's burden to prove "alienage."
- If ICE presents the I-213, object as to timeliness (if applicable) and authentication; if needed, reserve the right to raise additional objections after you have time to review the I-213, or state additional objections in the moment if already prepared.
- Ask for time to respond in writing, if needed (usually additional time is needed to prepare arguments). Indicate you will be filing a motion to suppress the evidence.
- Pursuant to court's briefing schedule, file a Motion to Suppress Evidence and Terminate Removal Proceedings. The motion should be supported by the respondent's declaration regarding what occurred, as well as witness statements and other evidence that an egregious violation occurred.[48]
- Request an evidentiary hearing on the suppression motion.
- At the evidentiary hearing, present the client's testimony regarding the arrest and facts establishing regulatory violations and Fourth and Fifth Amendment violations.[49] Explain that information obtained subsequent to the arrest is "fruit of the poisonous tree."

  Example: Taking Raul's example from before, the first step would be to object to the admission of the I-213 into the record due to its untimeliness and lack of authentication. If overruled, you should consider what the long-term strategy is in Raul's case. If he is eligible for immigration relief, your main concern will be that the I-213 contains prejudicial information and you should argue that it is entitled to very little to no weight because: it is not authenticated pursuant to regulatory requirements; it contains demonstrably false information, particularly regarding Raul's criminal history and gang affiliation; and the information was obtained without the use of an interpreter. You will also present any information relating to whether the process through which the information in the I-213 was collected, was fair. Based on each of these objections, you will additionally object due to your inability to cross-examine the preparer of the I-213.

  If the long-term goal is to get Raul out of removal proceedings rather than obtaining immigration relief in court, you will file a motion to suppress, in which you will argue (as supported by a declaration from Raul and any other relevant evidence), that the information in the I-213 is the "fruit" of a Fourth Amendment violation, since Raul was arrested without "reasonable suspicion." You will argue he was arrested merely for associating with Hispanic

[48] ILRC's website contains a sample motion to suppress: https://www.ilrc.org/sites/default/files/sample-pdf/d_mtst.pdf.

[49] Practitioners should be careful in presenting a client's testimony so that they do not inadvertently admit to "alienage." However, if a client has submitted a relief application in immigration court, that application cannot be used by DHS to meet its burden of proving "alienage." *See* 8 C.F.R. §§ 1240.11(e), 1240.49(e).

friends on a street corner, thus strongly suggesting racial profiling. You will request an evidentiary hearing, in order to present these facts in support of your motion to suppress the I-213. You will then move to terminate the proceedings due to DHS' failure to meet its burden of proving "alienage."

SUPPRESSION MOTIONS IN THE FIFTH CIRCUIT: For cases arising in the Fifth Circuit, practitioners will face challenges in seeking to suppress an I-213 based on egregious or widespread violations. Fifth Circuit cases state that identifying information such as nationality and immigration status, are not suppressible in cases involving egregious or widespread violations, even where a stop lacked reasonable suspicion.[50] This landscape will defeat almost all claims to suppress evidence of alienage in the Fifth Circuit. Nonetheless, the concurring opinion by Judge Jolly in *Hernandez-Mandujano*, provides a framework for arguing that the Supreme Court's 1984 decision in *Lopez-Mendoza* allows for suppression of *evidence related to or demonstrating* a person's identity, particularly in cases involving egregious violations, although the person's identity, such that the court has jurisdiction, is not subject to suppression.[51] Practitioners should be aware that such arguments may be difficult to win in cases arising within the Fifth Circuit. As always, practitioners should also analyze whether there are other legal grounds for termination of proceedings, such as improper service or invalidity of the NTA.

VI. I-213 Response Checklist

The following checklist can help guide you in responding and objecting when DHS submits an I-213 during removal proceedings.

- ✓ Objection: Untimely submission (if applicable)
- ✓ Objection: Lack of authentication
- ✓ Objection: Inherently unreliable due to demonstrably false information in I-213
- ✓ Objection: Inherently unreliable due to multiple layers of hearsay

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[50] *United States v. Roque-Villaneuva*, 175 F.3d 345, 346 (5th Cir. 1999) ("Even if the Defendant was illegally stopped, neither his identity nor his INS file are suppressible."); *United States v. Hernandez-Mandujano*, 721 F.3d 345, 351 (5th Cir. 2013) (per curiam) (finding stop by immigration agents was illegal because it lacked reasonable suspicion, but affirming BIA's conclusion that the motorist's admission that he was a Mexican citizen was not suppressible).

[51] *Hernandez-Manjujano*, 721 F.3d at 351-56 (Jolly, J., concurring) (stating that the Fourth, Eighth, and Tenth Circuits "correctly distinguish between . . . a broad attempt to suppress one's identity itself and an attempt to suppress evidence relating to one's identity, such as statements made during an unlawful arrest"). In his concurring opinion, Judge Jolly characterized the Fifth Circuit's majority opinion as being similar in principle to Third and Sixth Circuit decisions, in that they also interpreted *Lopez-Mendoza* "as barring suppression evidence of identity." *Id.* at 352 (citing *United States v. Bowley*, 435 F.3d 426 (3rd Cir. 2006); *United States v. Navarro-Diaz*, 420 F.3d 581 (6th Cir. 2005)). However, practitioners in the Third and Sixth Circuits should note that unlike the Fifth Circuit, these courts have each explicitly recognized the possibility for suppression, where there are egregious violations.

- ✓ Objection: Inherently unreliable due to unfair process, i.e., lack of competent interpreter, duress, etc.
- ✓ Objection: Inability to cross-examine preparer in spite of each of the above objections
- ✓ If not asking for time to review, make sure judge rules on each objection
- ✓ File Motion to Suppress based on illegally-obtained information in the I-213, including regulatory, Fourth Amendment, and Fifth Amendment violations

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