A close-up photograph of a wooden gavel resting on a stack of law books. In the background, a pair of brass scales of justice is visible. The scene is set against a blurred background of ornate architectural details, possibly a courtroom. The lighting is warm, highlighting the textures of the wood and metal.

# **Immigration Advanced Defenses in Defending Illegal Reentry Cases**

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2d Series

# **TRAINING DAY**

## **Immigration Cases Advanced Defenses**

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## Introduction

\_\_\_\_\_ Prosecution for immigration crimes, especially, illegal reentry after removal, are becoming more common across the country. In January of 2005 11% of all federal inmates were in custody for an immigration crime. The non-United States citizen population in federal prisons now stands at 28% of the 187,000 persons incarcerated in Bureau of Prisons facilities.

On its face, the crime of illegal reentry, 8 USC 1326, seems to be one of the simplest criminal offenses in the US code. It consists of four elements:

1. An alien;
2. Who has been formally removed or excluded;
3. Who thereafter has entered, attempted to enter or has been found in the United States;
4. And did not have consent from the Attorney General to reapply for admission.

In cases where a person is accused of being “found in” the crime is a pure status offense, where the accused does not have to commit an act to be found guilty of committing the offense. It only consists of a person’s status as a non-citizen, who was deported at some time in the past (an administrative event), who was merely present in the United States without permission (a lack of an administrative event).

In most 1326 trials, the bulk of the evidence of the accused is documentary. To prove the elements the government will most often rely on:

1. For alienage: Admissions made by the alien in the past or present case or birth certificate submitted by the alien in the past in an attempt to obtain an immigration benefit.
2. For removal: An immigration judges/immigration officers order of removal and an I-205 warrant of removal. An immigration officer may testify as to the procedures of removal or in rare cases that they actually recall the actual physical removal of the person.
3. For entry/found in: The arresting officer who saw the defendant in the United States.
4. For consent: A case agent testifying that he reviewed the defendants a-file and various immigration databases and could find no application and/or consent by the attorney general for the defendant to re-enter. There may also be a Certificate of Non-Existence.

As a result, a 1326 trial may consist of as few as two witnesses. One is the case agent, who is the custodian of the A-file and testifies as to elements 1, 2, and 4. The other is the arresting agent, who testifies as to the element 3.

## Discovery

Most of the documents in a 1326 trial come from the “A-File” or Alien File of the defendant. The A-File is the documented immigration history of the defendant and is discoverable under Rule 16, Fed.R.Crim.Proc. The A-file will consist of the immigration history collected by the government and the documents in the A-file will generally be admissible as public records.

Review of the entire A-file is key to case. In particular one needs to look for:

1. Prior statements made by the defendant to authorities.
2. Removal orders and Notices to Appear (NTA's) or Orders to Show Cause (OSC).
3. Documents relating to criminal history.
4. I-205 warrant of removal.
5. Any previous immigration applications the person may have filed.
6. Prior legal status the person may have had.

## **Documents in the A-File (What's Really Important)**

Immigration law is highly complex and paper driven; the A-file is a good reflection of this. It can consist of hundreds of pieces of paper and there may be even more documents in other A-files and databases. This is a snapshot at some of the more important documents as your eyes glaze over and you pore your way through an A-file.

### **I-205 (Warrant of Removal/Deportation)**

The I-205 is a Warrant of Removal/Deportation document maintained by Immigration and Customs Enforcement (previously INS). This is one of the most critical documents maintained in an alien's A-file. It functions as an arrest warrant for the immigration service, permitting them to detain an individual until removal, as well as verifying the removal of the alien.

An immigration judge's order of removal is not sufficient to demonstrate the person was actually physically removed from the United States. Instead, an order of removal is only evidence that a judge ordered a person removed at an immigration hearing. To demonstrate actual removal from the United States it is necessary to have the I-205 produced to show that the removal order of the judge/district director was actually carried out.

The I-205 is like a checklist. It is meant to ensure that the removal actually took place. The front page consists the order to arrest and remove the person from the United States. It will include some background information, including the name, place of entry and the provision under which the person was ordered removed. It is the back or second page that is most often important for our purposes.

The second page is where the immigration service will document the removal was actually executed. It has the name of the alien followed by the place, date and means of removal. In the example noted in the Appendix to these materials it is noted that Luis Alex was deported through Brownsville, Texas (a city on the U.S./Mexico border) on October 30, 2006. He was deported "afoot;" that is he literally walked over the international bridge from the United States to Mexico.

Underneath this description is a photo of the person removed with the person's right index fingerprint. Further below is a signature of the person removed, followed by the signature of the person who took the fingerprint. See, Appendix II Criminal Aliens: The Removal Process, attached.

The two key areas are below. The first is a space for the person who witnessed the departure to sign and place his title. Then further down there is an additional space for the person who verified the departure. These are the two witnesses to the actual removal from the United States of the defendant.

When a person is found away from the border, he is normally placed on a Justice Prisoner

Alien Transportation System (JPATS) flight that flies from the interior of the United States to one of the border towns or an international port of entry. When the JPATS plane arrives, usually carrying anywhere from 50 to 120 persons, they are boarded onto government buses and vans by ICE and U.S. Marshals officers. They are then transported to the port of entry, where they are then processed for the actual removal by an immigration officer. This can take place overland if the person is being deported to Mexico or by being placed on an international flight if the removal is to another country. This is when the back of the I-205 is filled out and completed.

The I-205 is admissible at trial, as is most of the rest of the A-File, under the public records exception to the hearsay rule. *United States v. Quezada*, 754 F.2d 1190, 1194 (5<sup>th</sup> Cir. 1985); *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1217-18 (9<sup>th</sup> Cir. 2001); *United States v. Contreras*, 63 F.3d 852, 857 (9<sup>th</sup> Cir. 1995).

The I-205 also has been found to not run afoul of *Crawford*. *United States v. Garcia*, 452 F.3d 36 (1<sup>st</sup> Cir. 2006); *United States v. Valdez-Maltos*, 443 F.3d 910 (5<sup>th</sup> Cir. 2006); *United States v. Torres-Villalobos*, – F.3d –, 2007 WL 1342561 (8<sup>th</sup> Cir. 2007); *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1074 (9<sup>th</sup> Cir. 2005) (finding no *Crawford* violation as I-205 is nontestimonial because it was not made in anticipation of litigation and was a routine cataloging of unambiguous facts), *United States v. Cantellano*, 430 F.3d 1142 (11<sup>th</sup> Cir. 2005). Failure to sign the I-205 does not preclude a finding the alien was deported. *United States v. Mendez-Casillas*, 272 F.3d 1199 (9<sup>th</sup> Cir. 2001).

An I-205 is important because an alien who is ordered removed but never actually left the country is not guilty of re-entering the country after removal. *United States v. Romo-Romo*, 246 F.3d 1272, 1274 (9<sup>th</sup> Cir. 2001); *United States v. Fermin-Rodriguez*, 5 F.Supp.2d 157, (S.D.N.Y. 1998) (finding where alien was deported by immigration service while deportation was stayed pending appeal there was not a “deportation” to support an indictment for illegal reentry).

Courts have held that it is not necessary to have direct evidence, e.g. testimony by the actual agent who personally witnessed the departure from the United States or videotape evidence if there is circumstantial evidence of the removal. *See, United States v. Melendez-Torres*, 420 F.3d 45, 49 (1<sup>st</sup> Cir. 2005) (finding testimony of the routine procedures of removal and the Form I-205 checklist completed sufficient for a rational trier of fact to conclude beyond a reasonable doubt person was actually deported).

Often, the I-205 Departure witnesses by will have a signature that is illegible or missing. There is no space provided for the official to print out or type his name and this is only rarely done. As a result, even though it is signed the government may at times be unable to produce the agent because the signature is illegible. The following space underneath it provides for an explanation for why a particular departure was not witnessed.

### I-296

The I-296 is the kissing cousin of the I-205. Like the I-205 it is used to verify the actual physical removal of a person from the United States. However, it is used in place of the I-205

when the removal is pursuant to an expedited removal. An expedited removal is the removal of a person at the border without that person ever seeing an immigration judge. In 1996, Border Patrol agents and other immigration officials were given the authority to order someone removed if they apprehend that person at the border and that person is not a legal permanent resident or do have a credible form of relief and are aggravated felons.

The I-296 consists of warnings at the top of the page with a truncated "Verification of Removal" at the bottom of the page. Like the I-205 it provides a space for an officer to verify the signature, departure date, port and manner of departure and picture/fingerprint of the person being deported.

The government may use the I-296 in place of the I-205 to show the person was actually removed in trial.

### **Notice to Appear**

\_\_\_\_\_The Notice to Appear (NTA) is the charging document used by the immigration authorities to attempt to removal a person. The NTA acts like an indictment, informing the person and the immigration court as to what the immigration service intends to prove so the person can be ordered removed. It is also the formal document that places a person into removal proceedings. The NTA generally will list the factual allegations against the person, almost always starting with "You are not a citizen or national of the United States" and "You are a native of \_\_\_\_\_." Following that are the factual allegations that the service feels renders the person removable. It is then followed by the specific statute that the person has run afoul of that results in his removal from the country. At the bottom of the page will be setting of a court hearing, if any.

On the second page of the NTA are various warnings and advisements as well as the certificate of service on the person.

The NTA can be useful to research if the person can collaterally attack the removal order. It will help identify the reason for why the person was removed. It can also help determine if the person ever had legal status to be in the United States.

### **Order to Show Cause**

The granddaddy of the NTA, the Order to Show Cause (OSC), is the charging document used by immigration authorities prior to the advent of the NTA in 1996. The OSC has the same effect as an NTA.

### **Certificate of Non-Existence**

The Certificate of Non-Existence is a document generated by the Office of Citizenship and Immigration Services (formerly INS) in Washington, D.C. in response to an agent requesting a review of available to documents to determine if an individual has obtained consent for re-

admission into the United States from the Attorney General or the Secretary of the Department of Homeland Security to reenter the United States. It is generated as part of the case against the person and sent from Washington. The government then introduces it at trial to prove element 4 through the case agent.

The Certificate has been found to be sufficient to meet the governments requirement as to the element of lack of consent to re-enter the United States. *United States v. Martus*, 138 F.3d 95 (2<sup>nd</sup> Cir. 1998); *United States v. Sanchez-Milam*, 305 F.3d 310 (5<sup>th</sup> Cir. 2002) *United States v. Blanco-Gallegos*, 188 F.3d 1072 (9<sup>th</sup> Cir. 1999).

The Certificate has also been found to not run afoul of the Confrontation Clause even though it is prepared for purposes of litigation. *United States v. Rueda-Rivera*, 396 F.3d 678 (5<sup>th</sup> Cir. 2005); *United States v. Urqhart*, 469 F.3d 745 (8<sup>th</sup> Cir. 2006); *United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9<sup>th</sup> Cir. 2005). A properly executed certificate meets the Rule 902 requirements for self-authentication. *United States v. Mateo-Mendez*, 215 F.3d. 1039 (9<sup>th</sup> Cir. 2000).

## 4<sup>th</sup> Amendment Issues in 1326 Cases

Undocumented persons are still protected by the Bill of Rights, including the 4<sup>th</sup> amendment, at least for now. However, this may be only in theory and not in practice. The problem in a 1326 case comes down to the application of the Exclusionary Rule that functions as the remedy for 4<sup>th</sup> Amendment violations. As a result, when you wish to file a motion to suppress in a 1326 case, you have two hurdles to surmount. The first is convince the court a violation of the 4<sup>th</sup> Amendment occurred. The second is convince the court they can actually suppress something that will be of value to your client. The government will urge that even with a violation, the client's A-file, fingerprints and identity can all come in.

The problem all stems back to a civil immigration decision of the U.S. Supreme Court, *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). This case is frequently cited by the government for the proposition that a court cannot suppress anything in a 1326 case because everything about the case relates back to the identity of your client and to the "body" of the client and the body can never be suppressed even if there has been an unlawful seizure. But *Lopez-Mendoza* is a case that focuses more on the court's jurisdiction over a person who has been subject to an illegal arrest, and does not fully analyze the suppression of various aspects of evidence seized by a person because of an illegal seizure. It is here that we have to advocate for some 4<sup>th</sup> Amendment protections for non-U.S. citizens. Otherwise, there is an entire group of people for whom the 4<sup>th</sup> Amendment does not apply.

The irony of all of this for your client is the government's case is heavily dependent on evidence that comes only from the A-file. If the A-file and other evidence was obtained because of an illegal search and seizure, the client could benefit tremendously from a successful motion to suppress (similar to a drug possession case).

So what are you looking to suppress? There may be several possibilities. Among them:

### Fingerprints

This is one area where there is a fair amount of guidance. Courts have a well-established test on the issue of suppression of fingerprints. If the fingerprints were taken solely for identification purposes, most courts will find they are not suppressible. So if the fingerprints are taken as part of the routine booking process, even if the seizure was unlawful, you will not be able to suppress them. *United States v. Garcia-Beltran*, 389 F.3d 864, 868-69 (9<sup>th</sup> Cir. 2004); *United States v. Parga-Rosas*, 238 F.3d 1209 (9<sup>th</sup> Cir. 2001); But if the prints are taken for investigatory purposes, courts have found them suppressible.

If fingerprints are obtained due to an illegal arrest whose purpose was to obtain the fingerprints, the prints are suppressible. *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); *Hayes v. Florida*, 470 U.S. 811, 815, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985). A detention for the purpose of obtaining fingerprints can lead to the suppression of the prints if the detention is unlawful, if the fingerprints are not taken as part of routine booking

process. *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8<sup>th</sup> Cir. 2001); *United States v. Flores-Sandoval*, 422 F.3d 711, 715 (8<sup>th</sup> Cir. 2005); *United States v. Jennings*, 468 F.2d 111, 115 (9<sup>th</sup> Cir). The Fifth Circuit rule is even broader, permitting for the suppression of fingerprints in any case if the arrest was illegal. *United States v. Lyles*, 471 F.2d 1167, 1169 (5<sup>th</sup> Cir. 1972).

So the question is: were the fingerprints obtained for investigatory or identification purposes or both? Of course, in immigration cases, establishing the identity of the person is an essential piece of the investigation. But if it can be shown that the prints were obtained to pursue a criminal immigration law violation, courts have found them to be suppressible, even in those mixed-use cases where the immigration officials also needed to identify the person. *United States v. Guevara-Martinez*, 262 F.3d 751, 755 (8<sup>th</sup> Cir. 2001); *United States v. Garcia-Beltran*, 389 F.3d 864 (9<sup>th</sup> Cir. 2004).

Ask yourself, were the fingerprints taken after the immigration officials had interviewed your client in response to suspicions of criminal wrongdoing; in other words were the agents following up on their suspicions and investigating your client further by fingerprinting him. If so they can then be suppressed. Or were they taken simply as part of the booking process. If this is the case, they will not be suppressible. Beware, the courts have also found some prints while bad initially, are later “purged of the taint.” *United States v. Guevara-Martinez*, 262 F.3d 751, 755 (8<sup>th</sup> Cir. 2001).

### A-File

This is where things get bad to worse for your client. It is here where the court is most likely to say that even though the stop was bad they can't suppress the A-file. Too bad, so sad. This is where *Lopez* logic takes over and the government will argue you have no standing to suppress the A-file. The argument to suppress the A-file is that it is fruit of the poisonous tree. The government will argue that the A-file was created by the government itself and prior to and independent of the illegal seizure of the alien. The A-file consists of a set of independently created records revealing the person's immigration and prior criminal record and should not be suppressed. The counter-argument is the A-file would only come to the attention of the authorities because of the illegal arrest.

The Third, Sixth and Fifth Circuits have held that unless there are egregious circumstances the A-file cannot be suppressed because the alien has no possessory or proprietary interest in the A-file and therefore has no standing to challenge the introduction of the file into evidence. *United States v. Bowley*, 435 F.3d 426, 431 (3d Cir. 2006)(finding no reasonable expectation of privacy in file maintained solely by the government); *United States v. Herrera-Ochoa*, 245 F.3d 495 (5<sup>th</sup> Cir. 2001); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5<sup>th</sup> Cir. 1999); *United States v. Navarro-Diaz*, 420 F.3d 58 (6<sup>th</sup> Cir. 2005); *United States v. Pineda-Chinchilla*, 712 F.2d 942, 943-44 (5<sup>th</sup> Cir. 1983). Examples of egregious circumstances cited include evidence obtained after repeated requests for counsel that are refused or entry in a residence at night without a warrant. *Lopez-Mendoza*, 1051 n. 5.

However, there is a split in the circuits regarding the standing issue. In *United States v. Olivares-Rangel*, 458 F.3d 1104 (10<sup>th</sup> Cir. 2006), found that the standing issue goes to the violation and not to the evidence itself. As it goes to the violation, an alien does have standing in regards to the A-file. The court then found that if the fingerprints of the alien had been obtained for investigatory purposes and not for booking purposes and if these prints led to the A-file, then the A-file is itself suppressible as fruit of the poisonous tree.

### **The Body**

The alien himself cannot be suppressed if there is a violation. This goes back to *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1994), where the court found the 'body' or identity of a defendant can never be suppressed. Other courts have followed suit. *United States v. Guzman-Bruno*, 27 F.3d 420 (9<sup>th</sup> Cir. 1994); *United States v. Del Toro Gudino*, 376 F.3d 997, 1001 (9<sup>th</sup> Cir. 2004).

What you are seeking to suppress is not the identity of the person, but rather evidence that tends to establish his identity, including the fingerprints, A-file, photographs and statements.

## Collateral attacks on the prior removal order

A collateral attack in a reentry case is a pretrial motion filed challenging the removal order that is now being used, in part, to prosecute your client. A sample motion is attached to the materials.

The Supreme Court has ruled as a matter of due process, an unlawfully obtained removal order may not be used as the basis for a 1326 conviction. Therefore an accused alien can collaterally attack a prior deportation order that was wrongfully obtained in a 1326 prosecution. *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987) (immigration judge's inadequate explanation of alien's potential eligibility for relief along with an uninformed waiver by the alien which led to an improper denial of judicial review, was fundamentally unfair).

Sounds easy, huh? It ain't.

### The Basics

Although not always consistent, courts have ruled the *Mendoza-Lopez* collateral attack has three steps:

1. The deportation proceeding must have been “**fundamentally unfair.**”
2. **Depriving the alien of judicial review;** and
3. The defect must **prejudice** the alien, depriving him of what would otherwise have been a reasonable likelihood of avoiding removal.

*United States v. Encarnacion-Galvez*, 964 F.3d 402, 407 (5<sup>th</sup> Cir. 1992); *United States v. Wittgentstein*, 163 F.3d 1164 (10<sup>th</sup> Cir. 1998).

Congress later “codified” *Mendoza-Lopez* under section 1326(d) but what it really did was water down the constitutionally-based defense by adding two requirements *Mendoza-Lopez* did not. First, the alien has to exhaust administrative remedies. Secondly, the deprivation of judicial review has to be “improper.” Ironically, in *Mendoza-Lopez* the aliens did not exhaust administrative remedies and deprivation of judicial review was not improper. With so little judicial review left to persons in the immigration context, its hard to see where its “improper.”

### Where to Start

Probably the most helpful place to start in your analysis in most 1326 cases is with the third step, prejudice. This is because the alien must show prejudice to invalidate a 1326 conviction. *United States v. Alvarado-Delgado*, 98 F.3d 492, 493 (9<sup>th</sup> Cir. 1993)(en banc) (holding that defendant who was deported without being informed about his deportation hearing still must show prejudice); *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1077 (9<sup>th</sup> Cir. 2005) (same and rejecting argument an egregious due process violation dispenses with the

requirement to show prejudice). It is up to the defendant to prove prejudice. *United States v. Proa-Tovar*, 975 F.2d 592, 595 (9<sup>th</sup> Cir. 1992) (en banc). The exception is the Ninth Circuit, which at times has dispensed with the requirement of prejudice in favor of a bright line rule. *United States v. Prova-Tovar*, 945 F.2d 1450 (5<sup>th</sup> Cir. 1991).

So what is prejudice? Basically ask yourself, could your client have received an immigration benefit if everything had gone well for the client. For example, if your client was formerly a legal permanent resident, he might have been able to avoid removal. But if your client was some guy who had lived in the United States all of a year with no legal status or family in the United States then there likely will be no prejudice. Use a process of elimination to determine who definitely does not qualify because they have no immigration benefits coming to them in the first place. They will not be able to collaterally attack their removal order.

Next, look for fundamental fairness in the proceeding. This is the sniff test. Something just doesn't feel right. Improper advisements by the immigration judge, changes in the law, improper waivers of appeal, etc. can serve as the basis for an unfair hearing.

Finally look to see how the case developed procedurally. Did the client waive appeal at some point? Did the client give up because he didn't want to wait around for an answer from the Board of Immigration Appeals for two years while he sat in an INS detention center? These questions can all be difficult to answer as you have to piece together the client's immigration hearing. It will be necessary to obtain transcripts of the proceeding. The easiest way is to see if the client appealed the case to the Board of Immigration Appeals as a written transcript will exist of the proceedings. If not, the proceedings will be on tape. In either case, contact the immigration court where the proceedings took place and obtain copies from them.

Consider getting the assistance of an immigration lawyer as an expert to assist in reviewing and developing arguments, especially if you feel you have something. As the courts have noted:

A petitioner must weave together a complex tapestry of evidence and then juxtapose and reconcile that picture with the voluminous, and not always consistent, administrative and court precedent in this changing area ... these factors and related legal requirements are daunting enough for a seasoned immigration lawyer... It is no wonder we have observed with only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.

*Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9<sup>th</sup> Cir. 2004).

## The Circuits and *St. Cyr*

Each circuit has developed its law on collateral attacks, some more favorable to the cause than others. Further, *INS v. St. Cyr*, 121 S.Ct. 2271 (2001), created a potentially new ground of unfair and prejudicially flawed removal proceedings. Prior to 1996, an alien with an aggravated felony could often apply for relief from removal known as 212(c) relief. This was a discretionary form of relief, where the immigration court would weigh the equities. If the scales tipped toward the good aspects of a person's life, they were allowed to stay. If the scales tipped toward the bad (including taking into account the conviction that rendered the person removable), out they went.

In 1996, Congress repealed 212(c) but left open questions regarding its retroactivity to persons who had been convicted prior to 1996. The BIA and several circuit courts consistently and incorrectly ruled that it applied retroactively, depriving thousands of people from the ability to apply for 212(c) relief that would have allowed them to stay in the United States. It would take five years, until the Supreme Court ruled in *St. Cyr*, before it was clear that the repeal of 212(c) was not retroactive and that persons could still apply for relief from removal. It can not be underestimated the number of persons who were legal residents and were deported in this five year window who could have benefitted from 212(c). We see these people after they come back to reunite with families. However, the circuit courts have split on the issue of whether a person can collaterally attack a removal order under *St. Cyr*. Some courts have ruled that it is not fundamentally unfair (step 1) to have not informed a person about the right to apply for discretionary relief such as *St. Cyr*. Others have ruled that such failure is fundamentally unfair.

Below is snapshot of what the circuits have done in cases of collateral attacks, with special emphasis placed to what they are doing in the context of *St. Cyr*. It does not include unpublished opinions and is not exhaustive as to issues. Instead, it is meant to give you an idea of what you could be looking at. Enjoy.

### **First Circuit**

The First Circuit has not reached the issue of whether failure to inform about discretionary relief, such as 212(c), is fundamentally unfair. Instead, when given the opportunity to look to whether the alien had shown prejudice. It then followed the district court's lead, which held a 212(c) hearing as if it was an immigration court, weighing the positive and negative factors and held because the immigration court would have ruled against him, the defendant failed to show prejudice. *United States v. Luna*, 436 F.3d 312 (1<sup>st</sup> Cir. 2006). **Result: None.**

Collateral attacks: *United States v. Vieira-Candelario*, 6 F.3d 12 (1<sup>st</sup> Cir. 1993) (holding that where alien voluntarily withdrew his appeal of an immigration judge's erroneous decision to deny defendant a chance to apply for discretionary relief, there was no due process violation); *United States v. DeLeon*, 444 F.3d 41 (1<sup>st</sup> Cir. 2006) (holding alien who was not told about eligibility of discretionary relief because he lied about his identity was not denied due process); *United States v. Smith*, 36 F.3d 128 (1<sup>st</sup> Cir. 1994) (holding alien who waived his appeal because he did not want to languish in detention not improperly deprived of judicial review but also holding that if waiver of appeal was coerced and involuntary would be deprivation of judicial

review);

## Second Circuit

The Second Circuit has held that failure to inform alien about discretionary relief, if prejudicial, can render hearing fundamentally unfair. *United States v. Copeland*, 376 F.3d 61 (2<sup>nd</sup> Cir. 2004); *United States v. Calderon*, 391 F.3d 370 (2<sup>nd</sup> Cir. 2004); *United States v. Sosa*, 387 F.3d 131 (2<sup>nd</sup> Cir. 2004). The Second Circuit also sanctions the use of a district court to hold a “212(c) hearing” to weigh factors and determine if person was prejudiced. *United States v. Scott*, 394 F.3d 111 (2<sup>nd</sup> 2005); *United States v. Sosa*, 387 F.3d 131 (2<sup>nd</sup> Cir. 2004). **Result: Win!**

Collateral attacks: *United States v. Lopez*, 445 F.3d 90 (2<sup>nd</sup> 2006) (holding failure to inform alien of right to habeas review not denial of judicial review); *United States v. Scott*, 394 F.3d 111 (2<sup>nd</sup> 2005); and *United States v. Perez*, 330 F.3d 97 (2<sup>nd</sup> 2003); **(holding failure of attorney to file for relief was fundamentally unfair)**; *United States v. Calderon*, 391 F.3d 370 (2<sup>nd</sup> Cir. 2004) **(holding alien denied judicial review when told habeas review not available to him)**; *United States v. Gonzalez-Roque*, 301 F.3d 39 (2<sup>nd</sup> Cir. 2002) (holding no denial of due process where alien given several continuances but still could not obtain documentation to apply for relief for removal); *United States v. Paredes-Batista*, 140 F.3d 367 (2<sup>nd</sup> Cir. 1998) (holding telephonic deportation hearing was not a denial of due process);

## Third Circuit

The Third Circuit requires showing of deprivation of liberty or property interest. Therefore, failure to inform alien about discretionary relief, such as 212(c), is not fundamentally unfair because no liberty or property interest in discretionary relief. *United States v. Torres*, 383 F.3d 92 (3<sup>rd</sup> Cir. 2004). **Result: Loss.**

Collateral attacks: *United States v. Charleswell*, 456 F.3d 347 (3<sup>rd</sup> Cir. 2006) (holding **failure of immigration officials to inform alien of right to appeal reinstatement order was denial of due process**); *United States v. McCalla*, 38 F.3d 675 (3<sup>rd</sup> Cir. 1994) (holding neither a telephonic deportation proceeding nor an immigration judge relying only on the alien’s admissions of grounds of deportation was denial of due process).

## Fourth Circuit

The Fourth initially required a showing of deprivation of liberty or property interest. Therefore, failure to inform alien about discretionary relief, such as 212(c), is not fundamentally unfair because no liberty or property interest in discretionary relief. *United States v. Wilson*, 316 F.3d 506 (4<sup>th</sup> Cir. 2003); *Smith v. Ashcroft*, 295 F.3d 425 (4<sup>th</sup> Cir. 2002). But the Fourth has been inconsistent and has since had a published decision that goes the other way although it does not overrule its earlier decision. Instead it also weighed the factors and impliedly used 212(c) as a basis for due process violation as it used the same 212(c) hearing process to determine prejudice. *United States v. El Shami*, 434 F.3d 659 (4<sup>th</sup> Cir. 2005). **Result ???**

Collateral attacks: *United States v. El Shami*, 434 F.3d 659 (4<sup>th</sup> Cir. 2005) (**holding failure of immigration officials to provide written notice of hearing was denial of due process**);

### Fifth Circuit

Things looked bleak in the Fifth in regards to *St. Cyr*, as the circuit required showing of deprivation of liberty or property interest. Therefore, failure to inform alien about discretionary relief, such as 212(c), is not fundamentally unfair because no liberty or property interest in discretionary relief. *United States v. Lopez-Ortiz*, 313 F.3d 225 (5<sup>th</sup> Cir. 2002). In fact, the Fifth Circuit had been the first circuit to look at this issue and had set the tone for several of the other circuits. This seemed to kill us but like the Fourth Circuit the Fifth Circuit has not been consistent. In *United States v. Mendoza-Mata*, 322 F.3d 829 (5<sup>th</sup> Cir. 2003), the Fifth Circuit overlooked *Lopez-Ortiz* and jumped to the issue of prejudice, weighing the 212(c) factors to determine no likelihood of relief and therefore no prejudice. **Result: Loss (probably)**

Worse, the Fifth Circuit has also begun to permit collateral attacks of prior removal orders in a civil context only where there is a **gross miscarriage of justice** adding another element and a huge burden on the alien. This has not spilled over into the criminal context, but it could be headed that way. *Ramirez-Molinar v. Ziglar*, 436 F.3d 508 (5<sup>th</sup> Cir. 2006);

Collateral attacks: *United States v. Lopez-Vasquez*, 227 F.3d 476 (5<sup>th</sup> Cir. 2000) (holding alien who never saw an immigration judge and was instead correctly removed by the immigration service under the process of expedited removal was not a due process violation); *United States v. Benitez-Villafuerte*, 186 F.3d 651 (5<sup>th</sup> Cir. 1999) (holding commingling of prosecutorial and adjudicative processes during an expedited removal hearing is not denial of due process unless officers already prejudged their findings; also holding the INS pecuniary interest in Congressional funding dependent on numbers of aliens deported was not denial of due process); *United States v. Zaleta-Sosa*, 854 F.2d 48 (5<sup>th</sup> Cir. 1988) (holding failure to notify alien of right to contact consulate was not denial of due process); *United States v. Saucedo-Velasquez*, 843 F.2d 832 (5<sup>th</sup> Cir. 1988) (holding minor who waived counsel in deportation proceedings was not denied due process because minor was experienced enough in immigration and criminal proceedings because of previous run ins with law enforcement); *United States v. Estrada-Trochez*, 66 F.3d 733 (5<sup>th</sup> Cir. 1992) (holding no denial of due process where alien removed in absentia after INS mailed notice of hearing after nine year delay to alien's old address but alien had failed to file notice of address change as required by law); *United States v. Palacios-Martinez*, 845 F.2d 89 (5<sup>th</sup> Cir. 1988) (holding immigration judge who did not ensure alien understood each and every right under INS regulations not denied due process); *United States v. Zaleta-Sosa*, 854 F.2d 48 (5<sup>th</sup> Cir. 1988) (holding immigration judge who did not inform alien of appeal rights until final hearing and did not ensure alien understood appeal rights did not violate alien's due process); *United States v. Encarnacion-Galvez*, 964 F.2d 402 (5<sup>th</sup> Cir. 1992) (holding alien who knowingly and voluntarily signed waiver of immigration hearing not denied due process); *United States v. Campos-Ascencio*, 822 F.2d 506 (5<sup>th</sup> Cir. 1987) (**holding failure by immigration judge to inform alien he has right to self-obtained counsel was violation of due**

process);

### Sixth Circuit

The Sixth Circuit requires showing of deprivation of liberty or property interest. Therefore, failure to inform alien about discretionary relief, such as 212(c), is not fundamentally unfair because no liberty or property interest in discretionary relief. *Ashki v. INS*, 233 F.3d 913 (6<sup>th</sup> Cir. 2000). **Result: Loss**

Collateral attacks: *United States v. Escobar-Garcia*, 893 F.2d 124 (6<sup>th</sup> Cir. 1990) (holding failure of immigration officer to advise of right to “judicial review” when advised only generally of right “to appeal” not a violation of due process).

### Seventh Circuit

The Seventh Circuit has also rejected constitutional right to be informed about discretionary relief. *United States v. Santaigo-Ochoa*, 447 F.3d 1015 (7<sup>th</sup> Cir. 2006). **Result: Loss**

Collateral attacks: *United States v. Rodriguez*, 420 F.3d 831 (8<sup>th</sup> Cir. 2005) (holding immigration judge who dissuaded alien from appealing removal order because of judge’s feelings alien would not be successful had not denied the alien from judicial review); *United States v. Torres-Sanchez*, 68 F.3d 227 (8<sup>th</sup> Cir. 1995) (holding failure to obtain an attorney not denial of due process); *United States v. Santos-Vanegas*, 878 F.2d 247 (8<sup>th</sup> Cir. 1989) (**holding denial of due process where immigration judge and Board of Immigration Appeals failed to inform alien of his right to appeal to federal circuit and immigration judge used improper legal standard to assess claim was prejudicial**); *United States v. Polanco-Gomez*, 841 F.2d 235 (8<sup>th</sup> Cir. 1988) (holding group hearing where aliens waived rights and agreed to be deported not a violation of due process);

### Eight Circuit

The St. Cyr issue is still open in the Eighth. **Result: None**

Collateral attacks: *United States v. Rodriguez*, 420 F.3d 831 (8<sup>th</sup> Cir. 2005) (holding immigration judge’s incorrect legal prediction that dissuaded appeal not denial of due process); *United States v. Mendez-Morales*, 384 F.3d 927 (8<sup>th</sup> Cir. 2004) (holding that statute which deprived federal court of review power over removal order was not denial of due process).

### Ninth Circuit

The Ninth has held that failure to inform alien about discretionary relief, if prejudicial, can render hearing fundamentally unfair. *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9<sup>th</sup> Cir. 2004); *United States v. Ortega-Ascanio*, 376 F.3d 879 (9<sup>th</sup> Cir. 2004). **Result: Win!**

Collateral attacks: *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9<sup>th</sup> Cir. 2005) (holding where alien missed first day of his removal hearing but witness who testified was later recalled, no denial of due process); *United States v. Ortiz-Lopez*, 385 F.3d 1202 (9<sup>th</sup> Cir. 2004) (**holding where alien not told of fast-track process that would have made him eligible for voluntary departure, due process violation**); *United States v. Pallares-Galvan*, 359 F.3d 1088 (9<sup>th</sup> Cir. 2004) (**holding where immigration judge asked only cursory question regarding waiver of appeal denial of due process**); *United States v. Ahumada-Aguilar*, 295 F.3d 943 (9<sup>th</sup> Cir. 2002) (**holding denial of due process where immigration judge failed to inquire fully into alien's waiver of counsel**); *United States v. Medina*, 236 F.3d 1028 (9<sup>th</sup> Cir. 2001) (holding no denial of due process where tapes and transcripts of aliens deportation proceeding were not preserved); *United States v. Prova-Tovar*, 945 F.2d 1450 (9<sup>th</sup> Cir. 1991) (**holding immigration judge who asked general questions regarding understanding and waiver of rights to roomful of aliens with appointed counsel without further individual inquiry was violation of due process**).

### **Tenth Circuit**

The Tenth Circuit requires showing of deprivation of liberty or property interest. Therefore, failure to inform alien about discretionary relief, such as 212(c), is not fundamentally unfair because no liberty or property interest in discretionary relief. *United States v. Aguirre-Tello*, 353 F.3d 1199 (10<sup>th</sup> Cir. 2004). **Result: Loss.**

Collateral attacks: *United States v. Rivera-Nevarez*, 418 F.3d 1104 (10<sup>th</sup> Cir. 2005) (failure of alien to appeal case to federal circuit court resulted in his failure to explore judicial review even though court agreed basis for removal was fundamentally unfair); *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061 (10<sup>th</sup> Cir. 2004) (reinstatement of removal order not denial of due process); *United States v. Rangel de Aguilar* 308 F.3d 1134 (10<sup>th</sup> Cir. 2002) (holding expedited removal process not denial of due process);

### **Eleventh Circuit**

The Eleventh Circuit requires showing of deprivation of liberty or property interest. Therefore, failure to inform alien about discretionary relief, such as 212(c), is not fundamentally unfair because no liberty or property interest in discretionary relief. *Oguejiofor v. Ashcroft*, 277 F.3d 1305 (11<sup>th</sup> Cir. 2002). **Result: Loss.**

### **Actual prejudice**

Most circuits require showing of prejudice by defendant to be successful in a collateral attack. *United States v. Loaisiga*, 104 F.3d 484 (1<sup>st</sup> Cir. 1997); *United States v. Palacios-Martinez*, 845 F.2d 89 (5<sup>th</sup> Cir. 1991); *United States v. Espinoza-Farlo*, 34 F.3d 469 (7<sup>th</sup> Cir. 1994); *United States v. Santos-Vanegas*, 878 F.2d 247 (8<sup>th</sup> Cir. 1989); *Garcia-Munoz v. Ashcroft*, 376 F.3d 1061 (10<sup>th</sup> Cir. 2004); *United States v. Holland*, 876 F.2d 1533 (11<sup>th</sup> Cir. 1989). The Fifth Circuit has determined prejudice requires the defendant to show that but for the errors

committed there was a reasonable likelihood the alien would not have been removed. *United States v. Encarnacion-Galvez*, 964 F.2d 402 (5<sup>th</sup> Cir. 1992). By contrast the Ninth Circuit has at times dispensed with the requirement of prejudice in favor of a bright line rule. *United States v. Prova-Tovar*, 945 F.2d 1450 (5<sup>th</sup> Cir. 1991).

# **Derivative Citizenship Defense**

## **Introduction**

Most people assume that a person can be a United States citizen only if they were born in the United States or if they applied for and were granted US naturalization. In actuality, there are numerous other ways a person may be a citizen. Regardless of where a person was born, they may be United States citizens (USC) because of their parents citizenship or by certain conditions that occurred during their life. Often, an “alien” is really a USC without even realizing it. The Immigration and Nationality Act, contained in Title 8 of the United States Code, provides under Section 1400 scores of ways in which a person may have become a USC. This section deals with those ways that are commonly known as a “derivative citizenship.”

Derivative citizenship is key in 1326 cases because it goes to the first element of the offense “alienage.” If your client is a U.S. citizen, he cannot be convicted of 1326. So sometimes proving a person is a United States citizen is his only real defense to the offense.

A person who is a derivative citizen is a USC when all of the conditions are met. Often, this is at birth. Therefore a derivative citizen is often a USC their entire life, only they didn’t know it or couldn’t prove it. Citizenship and Immigration Service (CIS; formerly the “customer service” arm of the INS) may issue a Certificate of Citizenship but this is only official proof of the persons’ U.S. citizenship. It is not bestowing citizenship at the time the certificate is issued (unlike naturalization) but is instead only recognizing what has been true all along.

## **THE LAW OF DERIVATIVE CITIZENSHIP**

### **The Legal Elements Step By Step**

*Step 1 – Determine When the Client Was Born*

*Step 2 – Determine Who the Child’s Biological Parents Were*

*Step 3 – Determine if One or Both of the Parents or Grandparents are USC*

*Step 4 – Determine if the Client was Born In or Out of Wedlock*

*Step 5 – Determine if Any Special Conditions Apply*

### **The Steps in Detail**

*Step 1 – Determine When the Client Was Born*

Which version of the law you should use will depend on when your client was born. A client born in 1933 will have to meet very different conditions to derive citizenship than one born

in 1954.

### ***Step 2 – Determine Who the Child’s Biological Parents Were***

Citizenship can normally be passed along by the biological parents of the client. There are provisions that apply to adopted children but they are outside the scope of this paper.

### ***Step 3 – Determine if One or Both of the Parents or Grandparents are USC***

Derivative citizenship can be passed down through the generations. So even if both parents of the client are foreign born, if one of their parents is or was a USC, that parent may be a USC without even knowing it. And if the proper conditions are met, that USC status may have been transmitted to your client. For this reason, it is important to inquire about the citizenship not only of the parents, but the grandparents as well.

### ***Step 4 – Determine if the Client was Born In or Out of Wedlock***

Just like date of client’s birth matters, so to does a determination as to the marital status of the client’s parents at the time of the client’s birth. For immigration purposes, a child born out of wedlock is illegitimate.

### ***Step 5 – Determine if Any Special Conditions Apply***

See conditions below.

## **DATE OF CLIENT’S BIRTH**

The Immigration and Nationality Law that is to be used, along with the resulting conditions, is the law in effect at the time of your client’s birth. Below is a breakdown of the law by the date with the attendant conditions that must be met.

### **1. Dates and Conditions if Born *IN WEDLOCK***

#### ***Prior to May 24, 1934***

Either parent must be USC and have been present in the U.S. at any time prior to birth of the client.

*Jeannie was born in Mexico on July 2, 1929. Her father, Nelson, was born in Presidio, Texas and lived in the United States until he was 4 years old, at which time his family moved to Mexico, where he lived the rest of his life. Jeannie is a USC.*

***May 24, 1934 to January 1, 1941***

If both parents are USC, then one must have been present in the U.S. at any time prior to birth of the client.

If only one parent is a USC, the parent must have been present in the U.S. at any time prior to birth of the client. However, there is also a unique retention requirement for this time period when only one parent is a USC. The client has to have either had 5 years of continuous physical presence in the U.S. between the ages of 14 and 28 starting before the age of 23 or have two years continuous physical presence in the U.S. between the ages of 14 and 28 starting before the age of 26. An absence of less than 12 months in the aggregate during the 5 year period did not break continuity of residence or physical presence but an absence of 60 days or more in the aggregate breaks the continuity of physical presence for the 2 year period. Honorable service in the U.S. Armed Forces counts as residence or physical presence. Further, if at the time of child's birth, the USC parent was employed by a the U.S. Government or a specified U.S. international organization, the client is exempt from these retention requirements.

*Mallory was born in Mexico on December 23, 1936. Her father, Steven, is a USC but her mother Elise is not. Steven resided in the U.S. for a few months after his birth but Mallory will also have to meet the retention requirements. She was in the United States from the age of 18 until 25. However, she was gone a total of 3 months during this time to give birth to a child in Saltillo and therefore will not qualify under the 2 year period. However, she will qualify for the 5 year period and therefore is United States citizen.*

***January 13, 1941 to December 23, 1952***

If both parents are USC one must have resided in the US at any time prior to the birth of the client.

If only one parent is USC, that parent must have resided in the United States for 10 years and at least 5 of those years had to come after the age of 16. This requirement is met by time abroad if the U.S. parent was employed by the U.S. government or a specified U.S. international organization. 8 CFR 316.20. Further, the same retention requirements as above apply.

*Lisa was born in Mexico on October 9, 1945. Her father, Homer is USC but her mother Marge is not. Homer resided in the United States until he was 8 years old when his parents took him back to their village in Mexico. As a young man, he came to work in the fields when he was 17. He worked in the fields until he was 24 and then returned to Mexico, where he met Marge and they had three children. Homer then brought his family to the U.S. when Lisa was 12. Lisa was in the U.S. until she left when she turned 18. She never left the U.S. during this time. As she has two years after fourteen, she is a USC.*

***December 24, 1952 to November 13, 1986***

If both parents are USC one must have resided in the US at any time prior to the birth of the client.

If only one parent is a USC, that parent must have been present in the U.S. for 10 years prior to the child's birth, at least 5 of which were after the age of 14. This requirement is met by time abroad if the parent was employed by the U.S. government or a specified U.S. international organization. 8 CFR 316.20. There are no retention requirements.

*Jethro was born on April 1, 1969 in Mexico. His mother, Granny, was born in Los Angeles on October 13, 1938. She lived in the United States from birth until she was 13 years old. She then left to Mexico, never to return. Jethro is not a USC. Even though she lived here for more than 10 years, at least 5 have to be after she was 14.*

### ***November 14, 1986 and after***

If both parents are USC one must have resided in the US at any time prior to the birth of the client.

If only one parent is a USC, that parent must have physically present in the US at least five years prior to the child's birth, at least 2 of which were after the age of 14. This requirement is met by time abroad if the parent was employed by the U.S. government or a specified U.S. international organization. 8 CFR 316.20. There are no retention requirements.

*Arnold was born on August 23, 1988 in Mexico. His older brother Willis was born on July 1, 1983. Their father, Drumond, was born in New York City on February 23, 1957. He lived in the United States from birth until he was 10. He then went to live in Mexico, returning to work in the US from age 19 to 22. Arnold is a USC as his father was present in the US at least 5 years including 2 years after he was 14. However, Willis is not, as he needs his father to be present at least 5 years after the age of 14 and he was present only 3 years.*

## **2. Dates and Conditions if Born OUT OF WEDLOCK**

The rules change if your client was born out of wedlock or illegitimately. In some cases, the conditions become easier to meet. But for the case of a person trying to claim citizenship through a father, the conditions are often onerous. In the case of a USC father, paternity is often at issue, especially if the father does not appear on the birth certificate.

### ***Prior to May 24, 1934***

#### ***USC Mother***

Mother must have been present at any time in the US prior to birth.

### ***USC Father***

Father present in US at any time prior to birth AND legitimated child at any time under the laws of the father's domicile.

*Jeannie was born in Mexico on July 2, 1929. Her father, Nelson, was born in Presidio, Texas and lived in the United States until he was 4 years old, at which time his family moved to Mexico, where he lived the rest of his life. While living in Mexico, he legitimated Jeannie according to Mexican law. Jeannie is a USC.*

### ***May 24, 1934 to January 1, 1941***

#### ***USC Mother***

Mother must have been present at any time in the US prior to birth.

#### ***USC Father***

Father present in US at any time prior to birth AND legitimated child at any time under the laws of the father's domicile. Further, child must meet retention requirements as above.

*Mallory was born in Mexico on December 23, 1936. Her father, Steven, is a USC but her mother Elise is not. Steven resided in the U.S. for a few months after his birth. He legitimated Mallory at the time she was born in Mexico. Mallory will also have to meet the retention requirements. She was in the United States from the age of 18 until 25. However, she was gone a total of 3 months during this time to give birth to a child in Saltillo and therefore will not qualify under the 2 year period. However, she will qualify for the 5 year period and therefore is United States citizen. Mallory is a USC.*

### ***January 13, 1941 to December 23, 1952***

#### ***USC Mother***

Mother must have resided in the US at any time prior to birth.

#### ***USC Father***

Father resided in the U.S. at least 10 years, at least 5 of which after the age of 16 (military service may count toward this requirement); before child turned 21 years of age child was legitimated by laws of father's domicile or paternity was established by court proceeding, and child meets retention requirements as above.

*Lisa was born in Mexico on October 9, 1945. Her father, Homer is USC but her mother Marge is not. Homer resided in the United States until he was*

*8 years old when his parents took him back to their village in Mexico. As a young man, he came to work in the fields when he was 17. He worked in the fields until he was 24 and then returned to Mexico, where he met Marge and they had three children. Homer then brought his family to the U.S. when Lisa was 12. Lisa was in the U.S. until she left when she turned 18. She never left the U.S. during this time. As she has two years after fourteen, she meets the retention requirements. However, her father must have legitimated her or established paternity through court proceedings prior to her turning 21 either in the U.S. or in Mexico for Lisa to be a USC.*

***December 24, 1952 to November 13, 1986***

***USC Mother***

Mother must have been physically present in the US for a continuous period of one year prior to child's birth.

***USC Father***

Father physically present in the US for 10 years, at least 5 of which after he turned 14. Child must have be legitimated prior to the age of 21 by the laws of the father's domicile and be unmarried at the time of legitimation. If born after November 14, 1968, the legitimation requirements that apply to persons born after November 14, 1986 may be used.

*Jethro was born on April 1, 1969 in Mexico. His mother, Granny, was born in Los Angeles on October 13, 1938. She lived in the United States from birth until she was 13 years old. She then left to Mexico, never to return. Jethro is a USC. Here his mother only needs one year of continuous presence because she was unmarried at the time of his birth. Note that if she were married at the time of his birth, Jethro would not be a USC because she would have to meet the 10 years/5 years after 14 requirements. Even though she lived here for more than 10 years, at least 5 have to be after she was 14.*

***November 14, 1986 and after***

***USC Mother***

Mother must have been physically present in the US for a continuous period of one year prior to child's birth.

***USC Father***

Father physically present in the US 5 years, at least 2 of which are after he turned

14 years of age; before child turns 18 was legitimated under laws of child's domicile, OR father acknowledged paternity in writing under oath, or paternity established by court adjudication AND father has agreed in writing to provide financial support until child reaches age 18 and child must be unmarried prior to acquisition of citizenship.

*Arnold was born on August 23, 1988 in Mexico. His older brother Willis was born on July 1, 1983. Their father, Drumond, was born in New York City on February 23, 1957. He lived in the United States from birth until he was 10. He then went to live in Mexico, returning to work in the US from age 19 to 22. Arnold is a USC if his father legitimated him prior to Arnold turning 18 as his father was present in the US at least 5 years including 2 years after he was 14. However, Willis is not, as he needs his father to be present at least 5 years after the age of 14 and he was present only 3 years.*

### **Basic Elements to Prove**

Remember it is always key to prove the following:

1. Paternity – The client must prove they are the natural born child of the USC from whom they are claiming citizenship through.
2. Citizenship of the Parent – The client must prove the parent is in fact a United States Citizen.

### **3. Child Citizenship Act of 2000**

This Act provides for additional means by which a client may have acquired U.S. citizenship. This is an additional means to acquire citizenship aside from the means noted above. The big requirement is the person must have been under 18 years of age at the time of its effective date, which is February 27, 2001. If so, then the following requirements must be met:

- 1) The child has at least one USC parent, either by birth or naturalization;
- 2) Live in the legal and physical custody of the USC parent; and
- 3) Be admitted as a lawful permanent resident.

US citizenship is acquired when all of the conditions are met.

*Theo was born on November 15, 1985. Both of his parents were born in Mexico. In 1986, Theo and his parents immigrated to the United States as legal permanent residents. In 1992, his mother became a naturalized citizen. He was living with her on February 27, 2001 as an LPR. On that day, he became a United States Citizen.*

The important date is February 27, 2001, with the critical birth date being on or after March 1, 1983. The Act applies only to persons born *after* this date. It may also apply to adopted children if they were adopted prior to reaching the age of 16 and have resided with the

adopted parent for at least two years. §1431, § 1101(B). Unlike the other provisions of the law regarding derivative citizenship, there are no physical presence or residency requirements for the parent.

### **THE NUTS AND BOLTS: PROVING THE DERIVATIVE CLAIM**

Even if a person qualifies under the law, the person must still prove the claim with the necessary claim. Even a strong claim may fail due to a lack of documentary proof.

One important consideration is deciding whether you want to apply for a certificate of citizenship with CIS or whether you prefer to wait until trial to prove your case before a jury. This is a strategic decision that is dependent on the facts of your case. You may prefer to apply directly to the CIS to avoid the need of going to trial or to obtain the added benefit to your client of actually providing him with a legal means to stay in the US. However, you may prefer to go to trial if you have a case that may not meet the CIS requirements to issue a certificate and thus will be denied, or if you prefer to withhold some of the evidence at trial (note, reciprocal rules of discovery will require you to turn most if not all, documentary evidence in your possession if you intend to use it in court. With that,

What you will need:

***N-600 Application:*** If you are applying to CIS for a Certificate of Citizenship, it all starts with the official CIS application for the certificate, known as the N-600. This form can be found under the “Forms and Fees” section of the CIS website and is in fill-in PDF format. The form should be filled out completely as possible. There will also be a filing fee that will need to be submitted with the application. Although photos are normally required, if your client is in jail, the application can be submitted without the photos.

Be sure to include a detailed cover letter explaining how your client meets the requirements for derivative citizenship.

Take note, Friday mornings are reserved for attorneys and their staff at the CIS offices at Hawkins and Montana. The offices are closed to the public and allows for much speedier filing of the N-600 by an attorney or staff person. Otherwise, the wait just for filing the application can last several hours.

***Birth Certificates:*** This is the basic document in any derivative case. You first need your client’s birth certificate. The birth certificate is necessary to show paternity. If a USC parent’s name is missing from the certificate, it will require an explanation, by way of affidavit from a witness or possibly a DNA test. If you cannot establish paternity, the person will not be able to claim derivative citizenship.

You also need the birth certificate of at least the USC parent to establish that person’s citizenship. Also, the birth certificates of siblings can be useful to demonstrate paternity (provided they are all from the same parent) and to support affidavits.

**Marriage Certificates:** Needed to prove your client was born in wedlock.

**Social Security Records:** SSI records can be very useful to prove the person's parent accrued the physical presence or residency in the United States required. The social security service maintains work records dating back to the 1930's for all persons who worked and whose wages were reported. For CIS purposes, these are the strongest proof possible of a person's presence in the U.S. The reason is the records show not just wages, but also where the person was employed and in what city. So if the records show the person worked in Chicago over a 20 year period, that will be strong evidence of the person's presence in the United States.

SSI records are not always the answer. A person may have never worked in the United States. Or the person worked but their wages were never reported. In that case, SSI records won't exist. Other common problems can include gaps in work history or dips in the amount a person was earning. This raises red flags with CIS as they often assume the person was just working seasonally in the U.S. and was returning to the foreign country for extended periods of time.

The exception to the strength of CIS records is when they show a person worked along the border. At times, CIS takes the position that the records fail to show the person actually lived in the United States, because the person could have been working in the United States while living in Mexico. There are two ways to address this. One is to show through other documents or affidavits that the person resided in the United States. The other is more elaborate. Even if a person did live in Mexico, the person may have still have spent enough time in the United States to qualify for physical presence purposes. Here, you must literally add up the hours worked and attempt to reach the figure you need. A sample request for SSI records is in the Appendix, pages 1-7.

**Military Records** – Another compelling form of evidence are military records of the USC parent. Any time the parent served in the military, including serving overseas, will count toward the presence requirement.

Even if the USC parent was not active service, military records regarding registering for the draft can still be useful to determine a parent was residing in a particular location.

**School Records** – Another very helpful form of documentary evidence. School records will often contain the address of the person and will frequently firmly establish a person's presence in the United States on a year to year basis.

CIS will expect school records if you are including school-age years as part of your claim of USC presence. If you are unable to obtain records (never went to school, records destroyed, etc.), explain their absence in your affidavits.

**Affidavits** – The catchall document in a derivative application. Affidavits should always be provided of all of the key witnesses. They should be detailed and as precise as possible and

focus on the elements necessary as well as address any holes in the other evidence. Especially effective are affidavits from witnesses without a stake in the case, such as a neighbor who recalls the USC parent living at a particular address.

***Employment Records*** – In addition to SSI records, work records, including pay stubs, commendation letters, etc. may have been kept and are excellent documentary evidence. Large companies, such as the railroad, or governmental entities also may keep employment records that date back decades.

***Mortgage/Rental Records*** – These are rarely kept but if they are, they are strong proof of a person residing at a particular location.

***Pictures*** – Often overlooked, pictures may have great evidentiary value. A wedding picture can be used to show that a person was born in wedlock, for example.

***Correspondence*** – Envelopes showing postmarks and US addresses or letters written to a person in the US can serve as evidence of physical presence or residence.

***Church records*** – Often persons registered important events, such as births and weddings, with the church but failed to do so with local governments. A church record can be very valuable in the absence of governmental records.

***Court and Criminal Records*** – What better proof of a persons' presence in the US than that they were serving time in prison? Other court records may establish other required elements.

***County Property Tax and Deed Archives*** – Helps prove residency and physical presence.

***Freedom of Information Act Request (FOIA)*** – Notoriously slow, the FOIA may nevertheless be crucial. Documents that are otherwise unavailable may be present in the immigration file of another person. For example, say a USC husband applied for residency for his wife years ago. Since then the couple have passed away and all of their documents have been lost. A FOIA request of the wife's A-File can contain such documents as birth certificates, proof of residency, employment, etc. A sample FOIA is in the Appendix, pages 8-12.

### **The N-600 Packet**

Once you have everything, put it together with the filing fee and cover letter and submit it to the CIS. It can be submitted through the mail but is preferable in person. Always get a receipt or send it certified return receipt as the CIS is notorious for losing documents. Make a copy of everything and never send originals, as they are notorious for losing those. Keep your originals and have them ready for request to be inspected by the CIS.

The packet will be assigned to an adjudication officer within CIS familiar with derivative citizenship law. That officer will review the packet.

## **Interview with CIS**

Often CIS will request to conduct an interview of the key witnesses to the application. The interviews are conducted by the adjudication officer of CIS working on the N-600 application. These interviews are conducted at the CIS office on Hawkins and Montana.

If CIS determines an interview is needed for adjudication then notice will be sent to the attorney and N-600 applicant. The interview notice will most often request to speak to a particular witness, most often the USC parent. The interview is supposed to be non-adversarial but care should always be taken. The witness will be placed under oath by the officer prior to the interview. The client's attorney can be present. Most often, the officer will look to fill in gaps of information or resolve questions that may have arisen. Generally they will start by requesting an overview of the person's life. They will compare the person's answers to any affidavits provided.

Obviously, witness preparation is important. This is especially true as many of the witnesses may be elderly and are being asked to recall facts that are decades old. Many may also be intimidated by the process. An attorney is allowed to accompany the person and is strongly encouraged to do so. The attorney can clear up any misunderstandings that may arise as well as ensure the civility of the interview. CIS officers may at times take the cynical position that an attempted fraud is taking place and counsel is critical.

The applicant will rarely, if ever, be asked to the interview, as they themselves are not privy to the facts.

## **Adjudication of the Application**

The N-600 application is reviewed by a CIS adjudication officer who can do one of three things: recommend approval, recommend denial or request further information. If the officer recommends either approval or denial, a supervisor reviews the officer's recommendation and is the person with the decision making authority to approve or deny. In most cases, the supervisor will follow the recommendation of the officer.

If the officer requests additional information then such request will be sent in writing to the attorney. This will be in the form of a letter that will list the additional evidence that must be submitted to support the application. A deadline for the submission of the evidence will also be noted. These requests must be answered promptly. CIS often denies applications on the basis the applicant failed to provide the additional information. For this reason, even if the evidence that is requested cannot be obtained, a written response stating the reasons for why the evidence is unavailable should be sent to CIS. This at least prevents CIS from claiming the applicant is not attempting to cooperate in the process.

Applications can take months, even years, to process. If the client is in criminal proceedings, it is a good idea to request the AUSA contact the CIS offices and request the application be expedited.

## **Denial of the N-600 Application**

Upon denial of the N-600 application, a person has two avenues for possible relief.  
NOTE: THE DENIAL OF THE N-600 DOES NOT PREVENT THE PERSON FROM RAISING HIS CITIZENSHIP AS A “DEFENSE” AT TRIAL!

One of the avenues is an administrative appeal to the Administrative Appeals Unit of the CIS. The AAU will review the case and issue a decision. The person must prepare a review sheet and file the appeal fee or request a waiver. A copy of the forms is provided in the Appendix, pages 18-21. AAU appeals are rarely successful and can also take years to run their course. The appeal takes place in Washington, D.C. Even though they are rarely successful, it may nonetheless be necessary to preserve your clients’ rights.

The other avenue is to file a petition for declaratory relief with the United States District Court. Under the provisions of the Immigration and Nationality Act, Section 360(a) of the Immigration and Nationality Act, 8 U.S.C. §1503, the District Court can order CIS to grant citizenship to your client, if the client meets all the requirements. This is a separate civil action. A model pleading is included in the Appendix at page 24.

## **Derivative Citizenship in Trial**

Derivative citizenship is a “defense” available at a 8 USC 1325 or 1326 trial. Specifically, the citizenship defense goes to rebut the government’s proof on the element of alienage. Although the Fifth Circuit pattern instruction for Section 1326 does not define “alien,” the pattern charge for transporting and harboring aliens under 8 USC Section 1324 defines an “alien” in the negative as “any person who is *not* a national or citizen of the United States.” Fifth Circuit jury instruction Section 2.03, 2.04, 1997 ed.; *see United States v. Gallardo-Mendez*, 150 F.3d 1240 (10<sup>th</sup> Cir. 1998).

In most 1326 trials, the government will have some kind of proof regarding the client’s alienage. This will usually take the form of either admissions by the client at the time of his arrest, statements made previously by a client to an immigration officer, statements on an immigration petition or even the birth certificate of the client. At this point, it is necessary to raise the issues of derivative citizenship to rebut the government’s proof. If the government cannot prove beyond a reasonable doubt the person is an alien, then the person cannot be convicted.

### ***Things to be aware of:***

Removal orders as proof of alienage: A removal order is not proof of alienage. *United States v. Meza-Soria*, 935 F.2d 166 (9<sup>th</sup> Cir. 1991); *United States v. Ortiz-Lopez*, 24 F.3d 53, 55-56 (9<sup>th</sup> Cir. 1994). A removal order is admissible only to show an alien was removed from the United States, not that he is an alien. Immigration authorities have deported USC’s in the past. A limiting instruction may be needed to prevent confusion by the jury.

Denial by CIS of an application: The denial of an application is not proof of alienage nor is it proof of the person is not a derivative citizen. First, remember the burden is different in each situation and the burden of proof is also different. For purposes of the N-600 application, the burden of proof will rest on your client and he must prove his USC by a preponderance of the evidence. But at trial, the burden is on the government to prove alienage and they must do so beyond a reasonable doubt. So that leaves a gap in the burdens of proof, where a person may be unable to prove their citizenship but there is still enough evidence to raise a reasonable doubt. It can lead to the situation of a person not being convicted of illegal re-entry due to questions about alienage but still not being able to show his USC and being deported.

Further, you should attempt to limine out any conclusions reached by an immigration officer. First, the conclusions reached are only an opinion of the prosecuting agency, and not an "expert" opinion. You can object under Federal Rules of Evidence 401, 402, 701 and 702. Second, these conclusions are actually questions of fact that are to be resolved by a jury. An immigration officer should not be permitted to tell the jury how to decide the ultimate question in the case.

Effect of a not guilty: A not guilty finding does not confer US citizenship on a person. In fact, there is nothing to prevent the immigration authorities from detaining and attempting to deport your client who has just been found not guilty. A client will have two options at this point. One option is to raise the citizenship issue with immigration authorities immediately. This may prevent the person from being deported and immigration authorities may be able to process citizenship for the person. The drawback is the person may be detained while the authorities try figure it out and the person may be deported in the end anyway. The other option is to allow the reinstatement order to be executed and apply for citizenship from the foreign country.

### **Common Issues That Arise in Derivative Cases**

#### ***Double Derivatives***

At times, a client's parent is not obviously a U.S. citizen. The parent was also born overseas. However, the client's grandparents are U.S. citizens. In this case, it may be possible the client is himself a U.S. citizen. However, for that to be true, the parent of the client must first be established to be a U.S. citizen.

In this circumstance, start with the parent. Determine the appropriate law by finding the parent's date of birth and then see if the person meets all of the conditions. If they do, they can apply for their U.S. citizenship certificate. The next step is to see if the client meets the requirements.

*Tabitha was born in Mexico in 1956. Her mother, Samantha, was also born in Mexico in 1934. However, Samantha's mother, Endora was born in Hatch, New Mexico in 1902. For*

As with a client, a parent may likewise be unaware they are U.S. citizens by virtue of derivative citizenship.

Both a parent's and child's N-600 application can be filed simultaneously. You do not have to wait for one to be adjudicated and then the other.

### ***Another Child Born During a Period of Presence in the United States***

A common issue that arises is a sibling born in the foreign country while at the same time the parent is attempting to claim presence in the United States.

*Gilligan is born in 1957 in Mexico. He must have his father, Thurston, establish at least 10 years presence prior to his birth. However, his older brother Skipper was born in Mexico in 1949 and his older sister Mary Anne was born in Mexico in 1955.*

This is a problem because the CIS will want to know how these children were being created while the parent was supposedly living in the United States. If children are being born overseas, especially over a prolonged period of time, it raises the idea the parent was really living in the foreign country. This must be addressed, most often through the use of an affidavit by the parent. Some common reasons, include:

- 1) If the parent lived along the border, it was not uncommon for a U.S. citizen parent to live and work in the United States during the week and visit the foreign spouse on the weekends in the neighboring border city. Beware, with this, as you may be cutting away at your presence requirement by admitting the person was living several days at a time overseas for an extended period. These days will literally cut away at the presence time.
- 2) If the U.S. citizen parent is a male, he may have been returning sporadically for visits with his family. It was during this time procreation took place.
- 3) If the U.S. citizen parent is a female, she may have preferred to have the birth take place in Mexico, for any variety of reasons. When she is closer to her due date, she returns to Mexico to give birth there.

Whatever the case, an explanation needs to be afforded. Otherwise, CIS will suspect fraud and may deny the application.

### ***The USC Parent is Dead***

The death of the USC parent will not prevent a person from obtaining their citizenship. On the contrary, it is common for a USC parent to be deceased. This only means further investigation to find other witnesses who can attest to the person's presence. It also permits your client to sign any release forms (such as with SSI) as next of kin.

If the USC parent is dead, CIS will require a death certificate. Otherwise, CIS will expect the USC parent to be available to interview regarding the application. Failure to provide a death certificate will lead CIS to suspect fraud.

### ***Citizenship by military service of the client***

There are various provisions that permit an alien to become a naturalized USC based on their military service, even if they have been deported or were not legal permanent residents at the time of their service. Section 1439 (dealing with three years or more of service) and 1440 (dealing with service during an armed conflict) exempt an honorably discharged alien veteran from residence and physical presence requirements that may otherwise apply. However, the person must still meet good moral character requirements. It may be possible to meet this requirement even with prior convictions if the convictions are old. Generally speaking, good moral character must be shown during the previous 5 years prior to the application, with any older convictions being left to the discretion of the CIS officer.

### ***Beware the Mexican Birth Certificate***

Mexican birth certificates are different from the birth certificate you may be used to in the US. For one, when you request a Mexican birth certificate from say, the *Servicio Civil*, you will often not get a copy of the original, but instead a sworn to computer form that lists the relevant information on it. In many cases this will be sufficient. However, there may be information on the original that is missing from the original. So if this information is missing, make a request from the officials to actually photocopy the original along with the computer printout.

Further, it is not uncommon for information to be added the birth certificate that has a legal impact. For example, the fact the child was legitimated may be noted on the back or in the margin. Literally, the birth certificate may be amended over time. See the Appendix, page 13 and 14 for examples.

### ***Common Law Marriages***

CIS defers to the state law to make a determination if a person's parents were married. Therefore in states where common law marriages are recognized, for immigration purposes, a person may have been born in wedlock even though there was no formal marriage.

#### **STATES THAT RECOGNIZE COMMON LAW MARRIAGE:**

Only a few states recognize common law marriages:

Alabama

Colorado

Georgia (if created before 1/1/97)

Idaho (if created before 1/1/96)

Iowa

Kansas

Montana  
New Hampshire (for inheritance purposes only)  
Ohio (if created before 10/10/91)  
Oklahoma (possibly only if created before 11/1/98. Oklahoma's laws and court decisions may be in conflict about whether common law marriages formed in that state after 11/1/98 will be recognized.)  
Pennsylvania (if created before 1/1/05)  
Rhode Island  
South Carolina  
Texas  
Utah  
Washington, D.C.

### ***DNA Testing***

More and more, CIS is requesting DNA testing to prove paternity, even if the father appears on the birth certificate or has legitimated the child. There are various companies that do DNA testing across the United States. The company we have used in the past is:

DNA Diagnostic Center  
DNA Technology Park  
205 Corporate Court  
Fairfield, Ohio 45014

Telephone: 1-800-330-7648  
Fax: (513) 881-7808  
[www.DNACENTER.com](http://www.DNACENTER.com)

The cost of the test is about \$500. The Center will contract a local nurse to obtain the needed DNA samples from the father and child. Once that is done, the results are usually ready five working days after receipt by the Center. A AABB Accredited Parentage Testing Facilities should be used.

## **1326 ILLEGAL RE-ENTRY ATTEMPTED CASES**

In an attempted re-entry case, inspectors usually encounter and arrest the defendant at the port-of-entry, not in-country. Whether defendant was on the bridge, in the indoor waiting area, at an information window inside, or in a primary inspection line, pedestrian or vehicular, or elsewhere, is important. Jurors may infer intent or plan to immediately "enter." Plus from a legal viewpoint, moving in the line to primary inspection is probably a "substantial step" toward commission of the offense, unless the defendant has a good, innocent explanation.

If your client is not in a line awaiting primary inspection there are many innocent reasons and intentions that may explain both your client's presence **and** his actions. For example, a person may approach the port-of-entry to ask for information as to how to re-apply for their legal permanent residency after having been removed. Or, they may be asking information about their legal status. Hence, his conduct arguably may not sufficiently corroborate a criminal intent as a matter of law. Further, he arguably has done nothing beyond "mere preparation," even if he had a criminal intent. It is important to stress throughout the trial the theme that an attempt must be an actual attempt to enter, not just preparation as to a possible course of action.

The jury needs to be given information as to how things can occur at a port-of-entry. They need to be made aware there is a difference between the information windows and the primary inspection areas. They need to be aware that different immigration officers hold different responsibilities. Visual aids can be instructive to the jury. Some visual defense exhibits include: (1) a diagram of the port-of-entry, (2) a more detailed diagram of the immigration waiting area, information booths, and offices, in relation to primary lanes, and (3) photos of the area, including the "Information" window and chairs in the waiting area.

### ***JURY INSTRUCTIONS.***

There are at least four likely areas of jury instruction issues:

(1) "OFFICIAL RESTRAINT" AT THE POE, "ENTRY" & "FOUND IN." Defendant has not "entered" the U.S. or been "found in" the U.S. within the meaning of 1326, because he is within the "official restraint" of the POE.

Submit a jury instruction defining "enter" and "found in" so a confused juror does not vote guilty just because the defendant is on the U.S. side of the bridge. See *United States v. Angeles-Mascote*, 206 F.3d 529 (5<sup>th</sup> Cri. 2000). Submit a strong one, where the judge tells jurors in no uncertain terms that the defendant did not "enter" and was not "found" in the U.S., and that they may not convict, even for "attempt," on that basis. Be ready with an alternative instruction that at least defines the terms so a rational juror should understand it cannot convict on this basis.

(2) An alien, even a deported one, may lawfully go to a port-of-entry to seek immigration related information, inquire about how to request an immigration benefit, or even

begin the application process. He just cannot "apply for admission" without the A.G.'s prior consent.

(3) DIFFERENCE BETWEEN APPLYING FOR ADMISSION AND OTHER IMMIGRATION BUSINESS. Submit a jury instruction explaining the difference between an "application for admission" and an application for a visa or other immigration document. 8 USC 1101(a)(4), (13). The two are distinct legal concepts. The deported alien may apply for a status or benefit at the POE. He cannot "apply for admission" without the A.G.'s prior consent to do so. Jurors may interpret ambiguous actions and questions by lay, uneducated aliens as constituting an application "for admission" when it is not. *United States v. Cardenas-Alvarez*, 987 F.2d 1129, 1133 (5<sup>th</sup> Cir. 1993)(citations omitted).

(4) BUSINESS OTHER THAN APPLYING FOR ADMISSION IS LAWFUL. Submit a jury instruction explaining that even deported aliens may lawfully come to a port-of-entry to transact business with CIS or ICE. Specifically, you may be able to add reference to the lawful, but bureaucratic process called an Application to the Attorney General for Permission to Reapply for Admission. (Form I-212, 8 CFR 212.2). This further illustrates to jurors that the law permits aliens, even deported aliens, to come to a port-of-entry to transact business with CIS or ICE, to request information, to apply for a benefit such as consent to reapply. Of course, few people come up to the information window at the POE and state, "I would like to file a form I-212 for the Attorney General's consent to reapply for admission into the U.S. Do you have a blank I-212 for me to fill out?" The only restriction, of course, is that the alien may not "apply for admission" without first getting the A.G.'s consent to do so.

### ***Closing Argument***

For closing argument this brings to mind a chicken and egg argument. How can the alien request permission (legalese = "the A.G.'s consent to reapply") to be excepted from 1326's prohibition on attempted reentry, without first going to the POE, where the law says he may go, and being accused of violating 1326 by attempted reentry?

Another excerpt for an instruction:

"The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law."

*United States v. Oveido*, 525 F.2d 881, 885 (5<sup>th</sup> Cir. 1976).

### ***Entrapment Instruction***

ENTRAPMENT INSTRUCTION. An entrapment instruction may be supported by the evidence. Defendant goes to "Information" window to ask in simple, lay terms, how or whether he can get permission or documents to enter. Inspector, having sworn to be a faithful public servant, gives defendant forms or asks questions to set him up for a charge of attempted entry, instead of handing him a form I-212 and doing the honest thing.

## ***LIMINE MOTIONS.***

### (1) "FACTS PLEASE, NOT OPINIONS OR CHARACTERIZATIONS."

This may be the subtitle of a limine motion. In their testimony agents and inspectors try to describe the defendant's conduct with opinions and loaded characterizations instead of facts. A common example of a sentence of testimony loaded with pure opinion & no facts:

"Mr. Defendant came to my booth and applied for admission into the U.S."

The same event described factually: "Mr. Defendant walked up to my window and said, "I have lost my *mica*. Do you know how I can get another one?"

In written Q&As signed by the defendant inspectors insert these loaded legal terms like "application for admission" on unwary aliens. Whether a person "applied for admission" is a conclusion. You can argue that it is in fact an expert legal opinion. "Application for admission" is a specific legal term of art defined at 8 U.S.C. § 1101(a)(4). Opinion testimony should only be admissible under FRE 701 and 702 with prior notice and when the court finds it helps, not confuses, the jury, and when there is a factual foundation for its admission.

The jury is entitled to hear the facts, not just the opinions, and make credibility choices. The legal significance of the facts comes from expert witnesses, with prior notice, or from the court.

### (2) "FACTS PLEASE, NOT MIND READING OPINIONS."

Agents and inspectors may try to describe the defendant's state of mind, intent, purpose, plan, etc. "Mr. Defendant wanted to enter the U.S." This is also an opinion. Agents' testimony should be to describe the evidentiary facts, not editorialize or argue inferences from them. The jury's job is to infer. Further, the inspectors' state of mind or opinion of the defendant's state of mind is usually not relevant. Again, lay opinion testimony is admissible, if at all, only under FRE 701- 702, if the court finds it helps the jury and factual testimony is inadequate.

### (3) MOTION TO ELECT & STRIKE.

The offenses of entry, found in, and attempted entry are three different offenses. *United States v. Martinez-Espinoza*, 299 F.3d 414 (2002). So it seems an indictment containing all three is duplicitous. BEFORE the trial make the following motions:

(a) to compel the government to elect its theory of guilty (found in, entered, or attempted to enter),

(b) to strike from the indictment theories the government drops, and,

(c) strike any theory the evidence presented to the grand jury does not support as a matter of law. (Yes, thanks to word processing forms and the its reliance on the U.S. Attorney for clerical support, the grand jury indicts defendants under "found in" and "entered" theories without the slightest notion of what it has done.)

No later than at the close of the evidence assert the Rule 29 motion for acquittal.

## **People not Papers Defense**

So you have a 1326 client. He is belligerent and believes it is wrong for the court to consider his 3 drug trafficking, sexual abuse of a child, 2 aggravated assault and 11 domestic violence convictions against him at sentencing. You've checked and he has no derivative citizenship claim, his stop and arrest were lawful and his deportation hearing was fair (he even filed habeas petitions). You check the A-file and all of paperwork is in there. He has no legal defense you can think. You counsel him to that effect. So does another attorney from your office. Of course, he demands to go to trial. You can roll over or you can throw a hail mary: the people not papers defense.

This is a jury-tailored defense that is a last resort defense used when you basically have nothing else. What you are counting on is the prosecutor relying simply on the case agent and the paperwork in the case to convict your client. The fewer witnesses they call, the better. Because then you can argue to the jury that your client should not be convicted on the basis of just some pieces of paper but instead on actual, live witnesses, which the prosecutor has failed to produce. Hence, its people, not papers.

The analogy for the defense, and one that is stressed to juries at all aspects of the trial, is traffic court. When someone gets a ticket and fights it, does the municipal judge just allow the prosecutor to call the custodian of records to come out and introduce your ticket to convict you. No, they actually have to call the cop who pulled you over and saw you commit the same infraction. If that cop can't recall the event, you walk. Yet in federal district court, we allow the prosecutor to convict on just some pieces of paper. That just can't be right.

### ***Voir Dire***

Start with the traffic ticket analogy during voir dire. You want a jury that will want to see live witnesses being presented. Some questions could include how people feel about being accused but never being able to see the person accusing them face to face. Obviously, questions regarding persons feelings regarding immigration (a very hot topic right now) are important but also look for people who have gone to traffic court and what their experiences were there.

### ***Cross Exam on the Documents***

You're going for broke so go after them on each of the documents. This is where its important to know what to look for in the I-205 and Certificate of Non-existence.

For the element of removal establish the agent testifying didn't create the I-205 and was not present to witness the alleged deportation. Ask him if he knows who that agent who supposedly witnessed the departure is. Ask if the agent has talked to that person. Ask if there are cameras on the border and if he has reviewed the videotape from the day of the removal. What about the agent who verified the departure. If there are blanks where there should be signatures, hammer them on this point.

If by some miracle they produce the agent who witnessed the removal, brush up on your traffic court crosses. These agents remove hundreds of people. Do they remember the number of persons, the weather, the time, other agents working, what the client was wearing, etc.

As to alienage, the arresting agent will often testify that the client admitted alienage. But sometimes, the government doesn't have fresh statements and has to rely on older prior statements. Its fine if the judge lets in prior admissions by your client without having the agent who heard them testify. Its one less witness. Again, if the agent does testify hammer them on their recollection of the events.

As to consent to reapply, ask them about the Certificate of Non-existence. Have they talked to Mike Quinn, who always signs these things. Ask them if they know who the attorney general is. What about the Secretary of Homeland Security. Have they talked to them to make sure that they haven't given consent to reenter. The statute does not say permission to reenter from CIS, ICE or INS. It says from the Attorney General or Secretary, so has the agent talked with Alberto Gonzalez or Michael Chertoff to see if they have given their ok?

### ***Closing***

You want to appeal to the jury's sense of fairness. Hit them again with the traffic analogy. Would it be right to convict you for speeding if the officer who saw you speeding never came into court to testify. Only the prosecutor pulling out the ticket and having some witness testify that its how that record is normally created. Yet here you are in federal district court facing a felony conviction and that is what the government is trying to pull. Keep it simple and not too technical. You're not trying to get your client off on a technicality. You're trying to create doubt in the jury because they just don't feel its right to convict someone on some pieces of paper.

This is obviously a last ditch defense that borders on jury nullification and is not an argument you should count on for appeal. In fact, courts have tended to reject it when raised as a sufficiency of the evidence argument on appeal. *United States v. Melendez-Torres*, 420 F.3d 45 (1<sup>st</sup> Cir. 2005) (finding testimony regarding the procedures of deporting individuals and a complete I-205 sufficient to support conviction even though agent who signed I-205 could not recall the specific of the defendant's actual deportation).



one parent was a citizen and met the physical presence requirements of the statute, he is a United States citizen. He seeks a declaration that his father meets the physical presence requirement of the applicable statute. He seeks a declaration that he acquired United States Citizenship from his father as of the date of his birth, and is a United States Citizen.

**II.**

**PARTIES**

Petitioner WEV is an individual who resides in El Paso, El Paso County, Texas. He will be referred to hereinafter as “Petitioner”.

Respondent Citizenship and Immigration Service is an agency of the United States Department of Justice.

**III.**

**JURISDICTION**

This Court has jurisdiction over the claims of Petitioner’s claim for declaratory relief under the provisions of 28 U.S.C. §2201 and the Section 360(a) of the Immigration and Nationality Act, 8 U.S.C. §1503.

This Court has jurisdiction over Petitioner’s claim for Injunctive Relief pursuant to 28 U.S.C. § 1331.

**IV.**

**VENUE**

Venue is proper in this Court in accordance with the provisions of 28 U.S.C. §1391 (e).

V.

**ALLEGATIONS**

1. Petitioner's biological father, JV, was born in El Paso, Texas, on July 29, 1964. He resided in the United States from the age of five to the present. On August 29, 1984, the Petitioner's father married PG, the biological mother of Petitioner, in El Paso. Petitioner's mother was born in Mexico.
2. Petitioner's father began living in the United States in 1969, and attended various schools until he was 17 years of age. During this time, he lived with his aunt Lorenza Navarro-Valles in El Paso. He then worked and lived in the United States including residing with his aunt, until the present. In 1984, Petitioner's father and mother married in El Paso, Texas. Petitioner's father worked at various jobs in and around El Paso, Texas, including working for his father at this car lot, Fito's Auto Sales. For financial reasons, some of the children of Petitioner's father and mother were born in Mexico.
3. On February 26, 1985, Petitioner was born to JV and PV in Ciudad Juarez, Chihuahua, Mexico.
4. After his birth, Petitioner's father brought Petitioner to the United States. Petitioner and his family resided in El Paso, Texas.
5. Petitioner has resided in the United States since he entered the United States at the age of a few weeks in 1985.
6. On April 6, 2005, an Immigration Judge in El Paso, Texas ordered Petitioner removed from the United States as an alien who had entered without inspection. That order became final when the Petitioner did not pursue an appeal to the Board

of Immigration Appeals from the decision or order of the Immigration Judge.

Petitioner's citizenship was not an issue in these removal proceedings.

8. On December 7, 2005, Petitioner was indicted for the offense of Reentry after Removal, in violation of Title 8, United States Code, § 1326. Petitioner asserted his citizenship in these criminal proceedings. On April 24, 2006, the Petitioner filed an Application for Certificate of Citizenship (N-600) with the Citizenship and Immigration Services District Director in El Paso, Texas.
9. On October 24, 2006, the District Director of the Citizen and Immigration Service issued a Decision on Application for Certificate of Citizenship denying the Petitioner's request for issuance of a certificate of citizenship. On November 8, 2006, Petitioner appealed the decision of the District Director to the Administrative Appeals Unit of the Citizenship and Immigration Service.

**VI.**

**STATUTES INVOLVED**

On the date of the Petitioner's birth, Sections 301 of the Immigration Act of 1952, 8 U.S.C. §§ 1401, was in effect in the form in which it was originally enacted on June 27, 1952, ch. 477, Title III, ch. 1, Sec. 301. At that time, Section 301(g) read as follows:

“The following shall be nationals and citizens of the United States at birth:

.....

(g) A person born outside of the geographical limits of the United States and its outlying possessions of parents One of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possession for a period or periods totaling not less than

ten years, at least five of which were after attaining the age of fourteen years...”

## VII.

### STATEMENT OF THE CLAIMS

Petitioner submitted credible and corroborated evidence proving his father met the requirements of the statute allowing the transmission of United States Citizenship to Petitioner.

The affidavits and documentation submitted by the Petitioner to the District Director of the Citizenship and Immigration Service proved that Petitioner’s father was a citizen of the United States by virtue of having been born in the United States, and had accrued the required ten year period of living in the United States prior to the birth of the Petitioner.

Respondent ignored certain evidence and misconstrued other evidence and thus erroneously denied his application for a certificate of citizenship.

Petitioner is a citizen of the United States as of the date of his birth.

## VIII.

### **PRAYERS FOR RELIEF**

Petitioner prays the Court to enter a Declaratory Judgment declaring that Petitioner’s father meets all the requirements of the statutes for transmission of U.S. Citizenship to his son at birth, and that Petitioner is a citizen of the United States.

Petitioner prays for general relief.

**IX.**

**DEMAND FOR TRIAL BY JURY**

Petitioners demand Trial by Jury as to any contested issue of fact in this cause.

Respectfully submitted,

LUCIEN B. CAMPBELL  
Federal Public Defender

EDGAR H. HOLGUIN  
Assistant Federal Public Defender  
700 E. San Antonio Street, Suite D-401

El Paso, Texas 79901

Telephone (915) 534-6525

ATTORNEY FOR PETITIONER

By: \_\_\_\_\_  
Edgar H. Holguin  
State Bar No.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

UNITED STATES OF AMERICA )  
 )  
v. ) CAUSE NO. EP-03-CR-1148-DB  
 )  
JORGE EDUARDO X-MARTINEZ )

**DEFENDANT'S MOTION TO DISMISS THE INDICTMENT  
AND SUPPRESS EVIDENCE OF PRIOR REMOVAL**

Comes now Mr. X, by and through undersigned counsel, and respectfully submits this motion to dismiss the indictment and suppress evidence of his prior removal, because the removal order cannot be used to establish an element of the offense charged under 8 U.S.C. 1326(d) and United States v. Mendoza-Lopez, 481 U.S. 828, 837 (1987). Mr. X requests that the Court grant this motion, or in the alternative that the Court allow him a hearing in support of it. At such a hearing, he would show as follows.

**Statement of Facts**

1. The government has charged Mr. Jorge Eduardo X-Martinez with a violation of 8 U.S.C. §1326. The indictment alleges that he was previously removed from the United States on September 14, 2001.
2. Mr. X is a native and citizen of Guatemala. He was born in that country in 1970, and fled during its bloody civil war after his family received death threats. He arrived in the United States in 1990.

3. Mr. X applied for asylum in January, 1991.<sup>1</sup> Exhibit 1. At that time, the INS was systematically denying asylum to Guatemalans and El Salvadorens based on considerations relating to United States foreign policy, without proper regard for whether or not the individuals in question met the statutory requirements for refugee protection. See generally Carolyn P. Blum, The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers, 3 INT'L J. REFUGEE L. 347, 355 (1991) (discussing terms of the settlement).<sup>2</sup>
4. Shortly after Mr. X filed his application, extensive litigation over the INS's discriminatory policy culminated in a settlement agreement which stayed the removal of various aliens, including certain Guatemalan asylum seekers. See American Baptist Churches, et al. v. Thornburgh, 760 F.Supp. 796 (N.D. Cal. 1991) (hereinafter "ABC Settlement") (attached as Exhibit 2).
5. Under the agreement, the INS conceded that foreign policy concerns and the United States government's policy in support of a particular country's government were not relevant

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<sup>1</sup>Because Mr. X does not speak or write English, his application was skeletal in nature. It is not uncommon for refugees to file such skeletal applications and then explain their claims in detail during the interview, at which they have the assistance of an interpreter.

<sup>2</sup>See also Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 Colum. L. Rev. 1625, 1675-76 (1992) ("American Baptist Churches was a lawsuit by a group of over eighty churches, other religious organizations, and refugee advocacy groups, which challenged the government's treatment of Salvadoran and Guatemalan asylum seekers and its prosecutions of those who were providing the asylum seekers with sanctuary. The constitutional challenges in American Baptist Churches were openly substantive. Most relevant to this discussion are plaintiffs' claims that the government's treatment of the Salvadorans and Guatemalans violated equal protection, particularly because INS policies and practices regarding requests for asylum, withholding of deportation, and extended voluntary departure were discriminatorily restrictive on the basis of national origin. With some discovery completed and much more extensive discovery looming ahead, the American Baptist Churches case was settled before trial, with the government agreeing to allow the plaintiffs to reapply for asylum in new proceedings.") (footnotes omitted).

considerations in adjudicating asylum applications. ABC Settlement, 760 F.Supp. at 799. To rectify the injustices done to those who had sought asylum, the INS agreed to re-adjudicate the applications of many refugees from El Salvador and Guatemala and to stay their removal pending this re-adjudication process. Id. at 799, ¶ 2; 805, ¶ 19.

6. Mr. X became a member of the ABC class and thereby gained the protections of the agreement. See ABC Settlement, 760 F.Supp. at 800; ¶ 3; id. at 815, Appendix (authorizing entry into class by submission of form); Exhibit 3 (X's form).

7. The ABC Settlement provided Mr. X with various protections related to his immigration status. First, the agreement required the government to entertain his asylum application subject to certain procedural constraints designed to ensure a fair and impartial adjudication process.

ABC Settlement, 760 F. Supp. at 799, ¶ 2; 803, ¶ 13. Under the agreement, a stay was entered barring the INS from removing class members such as X without first giving them “the opportunity to effectuate his or her rights under this agreement.” Id. at 805, ¶ 19. The agreement also authorized employment for class members. Id. at 804-05; ¶ 18.

8. Under the agreement, the INS could remove people from membership in the class if they were convicted of an aggravated felony, id. at 799, ¶ 2. However, the agreement created detailed procedural requirements for notices concerning membership in the class. Most important for present purposes, the agreement required that such notices had to be provided “in English and Spanish.” Id. at 800, ¶ 3. Thus, under the Agreement, the INS could not remove Mr. X from the class and deport him without either reconsidering his application for asylum or excluding him from the class for a valid reason after informing him in Spanish that he was no longer a class member.

9. On November 16, 2000, Mr. X was convicted of felony DUI under South Dakota Code Section 32-23-1, for which he received a sentence of 365 days. Exhibit 4 (judgment of conviction, abstract of judgment, and statute of conviction).

10. While Mr. X was incarcerated, the INS issued a letter, in English only, purporting to remove him from the class on the basis of this conviction, which the INS described as an aggravated felony. Exhibit 5. Although the certificate of service states that an INS officer served X personally on June 18, 2001, no address is listed for the personal service. Exhibit 6. At a hearing Mr. X would show that he does not recall receiving the form and that no one ever explained the form to him in Spanish.<sup>3</sup>

11. After he served his sentence, the INS placed Mr. X in removal proceedings and deported him to Guatemala. Exhibit 7 (I-205 from September 14, 2001). The INS never provided him with an asylum interview or adjudicated his application.

12. After his deportation, Mr. X re-entered the United States and was charged with illegal entry under Section 1326.

### Summary of Argument

Evidence of Mr. X's removal cannot be used against him under Section 1326(d) and Mendoza-Lopez. Mr. X had a right to remain in the United States under the terms of the ABC Settlement and controlling regulations governing asylum applications. The INS improperly

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<sup>3</sup>He would also show that he does not speak English.

violated this right both by erroneously concluding that he no longer qualified for class membership based on his DUI conviction and by failing to provide him with notice of this erroneous decision in Spanish (if he received the notice at all), as required by the agreement. Its removal of him in violation of the ABC Settlement and its own regulations governing the adjudication of asylum applications was fundamentally unfair. Mr. X also meets the other requirements for collaterally attacking a prior order.

### **Argument**

Section 1326(d) and United States v. Mendoza-Lopez, 481 U.S. 828, 837 (1987) limit the circumstances under which the government may rely on a removal order in criminal proceedings. The statute provides that Mr. X may collaterally attack his removal order if he can show that entry of the order was fundamentally unfair, that the government improperly denied him an opportunity to obtain meaningful judicial review of the order, and that he exhausted his administrative remedies. 8 U.S.C. 1326(d). In addition, the Fifth Circuit has held that an alien must demonstrate that he or she suffered prejudice from the error. United States v. Lopez-Vazquez, 227 F.3d 476, 483 (5th Cir. 2000). Here, Mr. X meets all four criteria.

### **Fundamental Unfairness**

Entry of the order against Mr. X was fundamentally unfair as both a substantive and procedural matter.

### **Substantive Unfairness**

The INS's attempt to remove Mr. X from the ABC class and then deport him was fundamentally unfair because Mr. X was never convicted of an aggravated felony. As caselaw from several circuits makes clear, for a crime to qualify as an aggravated felony by virtue of its being a crime of violence it must (1) be committed with at least a reckless mental state and (2) carry a substantial risk that the perpetrator will use force in its commission. For this reason, felony DUI is not a crime of violence and therefore not an aggravated felony. In Re Ramos, 23 I&N Dec. 336 (BIA 2002); United States v. Chapa-Garza, 243 F.3d 921, 926 (5th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600, 611 (7th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200, 207-08 (2d Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001). Mr. X's conviction for simply felony DUI involved neither the requisite mental state nor the requisite use of force to qualify as an aggravated felony. See Exhibit 4.<sup>4</sup>

Because Mr. X's conviction was not an aggravated felony, the INS had no authority to remove him from the ABC class. See ABC Settlement, 760 F.Supp at 799, ¶ 2 (only aggravated

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<sup>4</sup>The government may argue that under the law in effect at the time, felony DUI was an aggravated felony. However, as the Fifth Circuit explained in United States v. Lopez-Ortiz, 313 F.3d 225, 230 (5th Cir. 2002) (in the discretionary relief context), a court's interpretation of a statute determines what the statute has always meant. Although the BIA and the circuit courts adopted their interpretation that DUI is not an aggravated felony after Mr. X's removal order became final, those courts reached their decisions through statutory interpretation. As such, they only made clear what Congress itself had intended at the time it passed the relevant statute. This Court has recognized the general rule that "a court's interpretation of a statute may be applied retroactively." Girosky, 176 F.Supp.2d at 710 (citing, inter alia, United States v. McPhail, 112 F.3d 197 (5th Cir. 1997) (applying Bailey v. United States retroactively); Rivers v. Roadway Express, Inc., 511 U.S. 298, 311 (1994) (stating that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.")). The fact that the Justice Department misinterpreted the statute should not be used against X again.

felons not eligible for membership). As a member of the class, a court-ordered stay barring his removal remained in effect. Id. at 805, ¶ 19.

The deportation of an alien in violation of a court ordered-stay is fundamentally unfair. The Constitution does not permit the INS to remove someone when a court has forbidden it to do so. Deportation implicates fundamental interests "basic to human liberty and happiness," Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950), and thus, the Supreme Court has long held that deportation must comport with the procedural protections mandated by due process. See Galvan v. Press, 347 U.S. 522, 531 (1954); Bridges v. Wixon, 326 U.S. 135, 154 (1945). That the INS must follow a court's orders is obviously the most fundamental of all such procedural protections. Indeed, procedural guarantees are meaningless if the results of court-imposed orders to enforce them may be disregarded by the INS. Where the INS enters an order and removes someone in violation of a court-imposed stay, that order is fundamentally unfair.

In addition, wholly apart from the ABC Settlement, Mr. X's removal was fundamentally unfair because he was not legally removable at the time of his deportation. He had a right to remain in the United States until the INS adjudicated his application for asylum and withholding. 8 C.F.R. 208.9 ("The Service shall adjudicate the claim of each asylum applicant.") (emphasis added).<sup>5</sup> While a conviction for a removable offense may have terminated or altered this right,

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<sup>5</sup>All applications for asylum are construed as applications for withholding as well. 8 C.F.R. 208.3(b). Withholding of deportation or removal is a mandatory rather than discretionary form of relief. 8 C.F.R. 208.16; INS v. Doherty, 502 U.S. 314, 322 (Scalia, J., concurring in part and dissenting in part). Thus, the INS was barred by statute from removing Mr. X without first determining that he was ineligible for withholding.

but see 8 U.S.C. 1231(b)(3)(B)(ii) (aliens eligible for withholding of removal unless convicted of “particularly serious crime”), Mr. X was never convicted of a removable offense.

The illegal removal of an alien – i.e. the removal of an alien who has a statutory right to remain in the United States – is fundamentally unfair. See Garcia v. INS, 7 F.3d 1320, 1326 (7th Cir. 1993) (noting in immigration context that “statutes can create entitlements which cannot then be taken away except through the use of fair procedures.”). This is particularly true of an alien who may face persecution upon return to his home country. Torres v. INS, 144 F.3d 472, 474 (7th Cir. 1998) (“while an alien has . . . no constitutional right to judicial review of a denial of asylum . . . if Congress confers on the alien a right to seek judicial relief from such a denial . . . the deprivation of that right without due process of law infringes the alien’s constitutionally protected liberty or property. Such a case would be like any other case in which a right to liberty was conferred by statute; the denial of such a right without due process of law violates the due process clause.”).

Finally, Mr. X notes that the INS’s obligation to allow him to remain in the United States was in no way discretionary. The ABC Settlement imposed a mandatory stay. Similarly, the requirement that an alien’s application for asylum and withholding be adjudicated prior to removal is phrased in mandatory terms. Thus, there is no sense in which his argument here turns on a denial of the right to obtain discretionary relief. The government had no discretion to remove him. For this reason, Mr. X’s claim is stronger than the claim rejected by the Fifth Circuit in United States v. Lopez-Ortiz, 313 F.3d 225, 230 (5th Cir. 2002) (holding that because Section 212(c) relief is discretionary, wrongful denial does not rise to the level of fundamental fairness).

### **Procedural Unfairness**

Mr. X's removal also suffered from a critical procedural defect. Under the terms of the Court's order enforcing the ABC Settlement, the INS could not remove Mr. X without first providing him notice, in English and Spanish, that it was attempting to remove him from the class of ABC plaintiffs. See 760 F.Supp at 800, ¶ 3. As explained above, Mr. X never received the requisite notice.

Adequate notice is one of the root requirements of due process. United States v. Benitez-Villafuerte, 186 F.3d 651, 657 (5th Cir. 1999) (citing Yamataya v. Fisher, 189 U.S. 86, 101 (1903)). See also Chike v. INS, 948 F.2d 961, 962 (5th Cir. 1991) (failure to provide alien notice of briefing schedule violated due process). Where, as here, Mr. X failed to receive notice sufficient to explain INS's action in the only language he understood, and where such notice was required by the court-ordered agreement, entry of the order was procedurally defective and fundamentally unfair. See United States v. Lopez-Ortiz, 313 F.3d 225, 230-31 (5th Cir. 2002) (recognizing that procedural defects can constitute fundamental unfairness).

### **Denial of Judicial Review**

Mr. X also meets the second criterion, because the INS improperly denied him the right to obtain judicial review of his order. X relied on the agency's erroneous assertion that he was deportable and therefore sought no review of his removal order. The Supreme Court, the Fifth Circuit, and this Court have all held that where an alien receives improper legal advice and incorrectly believes that removal is inevitable, he is denied any meaningful opportunity to seek review of his order. See Mendoza-Lopez, 481 U.S. at 842 (holding that because "the Immigration judge . . . failed to advise respondents properly of their eligibility to apply for

suspension of deportation . . . respondents were deprived of judicial review of their deportation proceeding.”); Lopez-Ortiz, 313 F.3d at 229 (relying on Mendoza-Lopez to find that failure to advise alien as to possibility of avoiding removal constituted effective denial of judicial review); United States v. Girosky-Garibay, 176 F.Supp.2d 705, 712 (W.D. Tex. 2002) (erroneous removal based on DUI conviction effectively denied alien right to judicial review).

### **Exhaustion of Administrative Remedies**

Mr. X exhausted his administrative remedies. Although he did not appeal the Immigration Judge’s decision finding him deportable on the basis of his DUI conviction, any such appeal would have been futile because the Board’s position at the time was that DUI constituted a removable offense. See Matter of Puente-Salazar, Interim Decision 3412 (BIA 1999) (holding that DUI is an aggravated felony because it is a crime of violence) disapproved by In re Ramos, 23 I&N Dec. 336 (2002) (holding that DUI is not an aggravated felony unless “it is committed at least recklessly and involves a substantial risk that the perpetrator may resort to the use of force to carry out the crime”). The exhaustion requirement is satisfied where appeal would be futile. McCarthy v. Madigan, 503 U.S. 140, 148 (1992); Garner v. United States DOL, 221 F.3d 822, 825 (5th Cir. 2000). In addition, under Mendoza-Lopez, Mr. X need not exhaust his remedies, because the aliens in that case did not exhaust their administrative remedies but still obtained relief. Mendoza-Lopez, 481 U.S. at 830.

### **Prejudice**

Mr. X suffered prejudice as a result of the unfairness. As explained above, had Mr. X not been erroneously removed from the ABC class, he would have been entitled to remain in the United States under the court-ordered stay imposed as part of the agreement. In addition, the immigration laws gave Mr. X a right to remain until his asylum application was adjudicated. Thus, if not for INS's errors, Mr. X could not have been removed at all. As he was not removable, it is clear that there is more than "a reasonable likelihood that but for the errors complained of the defendant would not have been deported." United States v. Benitez-Villafuerte, 186 F.3d 651, 658 (5th Cir. 1999).

### **Conclusion**

Mr. X would not have been deported had the INS not improperly treated his DUI conviction as an aggravated felony and removed him from the ABC class without proper notice. His removal was fundamentally unfair, and he has met the other requirements to collaterally attack his removal order. Because there is a reasonable likelihood that he would not have received a removal order but for the government's illegal conduct, the government may not use evidence of that removal order against him in this case.

WHEREFORE, Defendant respectfully requests this Court grant his motion to dismiss the indictment and suppress evidence, or in the alternative that the Court grant a hearing on the motion.

Respectfully submitted,  
LUCIEN B. CAMPBELL  
Federal Public Defender

AHILAN T. ARULANANTHAM  
Assistant Federal Public Defender  
Western District of Texas  
700 E. San Antonio, D-401  
El Paso, Texas 79901  
915.534.6525  
Attorney For Defendant

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was furnished to the United States Attorney, Second Floor, Federal Building, 700 E. San Antonio, El Paso, Texas 79901, on this \_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
AHILAN T. ARULANANTHAM

1010 East Whatley Road  
Oakdale, LA 71463

File No: A0: \_\_\_\_\_

Date: October 20, 2006

To any officer of the United States Immigration and Naturalization Service:

Luis Alex

(Full name of alien)

aka:

who entered the United States at Lukeville, Arizona on or about 2002  
(Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- an immigration judge in exclusion, deportation or removal proceedings
- a district director or a district director's designated official
- the Board of Immigration Appeals
- a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

Section 212(a)(6)(A)(i) of the INA.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

Transportation company which brought him to the United States, if practicable; otherwise at the expense of the appropriations, "Salaries and Expenses, Immigration and Naturalization Service, 2006" including the expense of an attendant if necessary.



Scott L. Sutterfield  
(Signature of INS official)

Assistant Field Office Director  
(Title of INS official)

10/23/06

Oakdale, Louisiana  
(Date and office location)

**RETURN EXECUTED I-205 TO:**

Immigration and Customs Enforcement  
1010 East Whatley Road  
Oakdale, LA 71463

To be completed by Service officer executing the warrant:

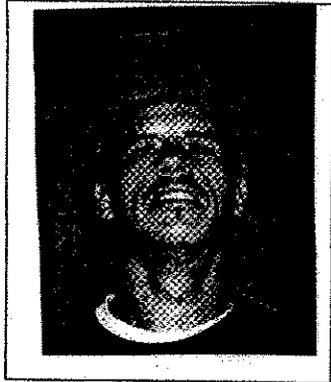
Name of alien being removed:

Luis Alex

A...

Port, date, and manner of removal:

BROWNSVILLE TEXAS 10-30-06 AFoot MEXICO



Photograph of alien removed



Right index fingerprint of alien removed

Luis Alex  
(Signature of alien being fingerprinted)

ABerndt / A B / IEA  
(Signature and title of INS official taking print)

Departure witnessed by:

Richard Rodriguez IEA  
(Signature and title of INS official)

If actual departure is not witnessed, fully identify source or means of verification of departure:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If self-removal (self-deportation), pursuant to 8 CFR 241.7, check here.

Departure Verified by:

\_\_\_\_\_  
(Signature and title of INS official)

# Notice to Alien Ordered Removed/Departure Verification

File No: YST0605000128  
098664290

Date: 05/09/2006

Alien's full name: Bernardo

You have been found to be inadmissible to the United States under the provisions of section 212(a) of the Immigration and Nationality Act (Act) or deportable under the provisions of section 237 of the Act as a Visa Waiver Pilot Program violator. In accordance with the provisions of section 212(a)(9) of the Act, you are prohibited from entering, attempting to enter, or being in the United States

- for a period of 5 years from the date of your departure from the United States as a consequence of your having been found inadmissible as an arriving alien in proceedings under section 235(b)(1) or 240 of the Act.
- for a period of 10 years from the date of your departure from the United States as a consequence of your having been ordered removed in proceedings under any section of the Act other than section 235(b)(1) or 240, or of your having been ordered excluded under section 236 of the Act in proceedings commenced prior to April 1, 1997.
- for a period of 20 years from the date of your departure from the United States as a consequence of your having been found inadmissible and of your having been previously excluded, deported, or removed from the United States.
- at any time because in addition to having been found inadmissible, you have been convicted of a crime designated as an aggravated felony.

After your deportation or removal has been effected, if you desire to reenter the United States within the period during which you are barred, you must request and obtain permission from the Attorney General to reapply for admission to the United States. You must obtain such permission before commencing your travel to the United States. Application forms for requesting such permission may be obtained by contacting any United States Consulate or office of the United States Immigration and Naturalization Service.

**WARNING: Title 8 United States Code, Section 1326 provides that it is a crime for an alien who has been removed from the United States to enter, attempt to enter, or be found in the United States without the Attorney General's express consent. Any alien who violates this section of law is subject to prosecution for a felony. Depending on the circumstances of the removal, conviction could result in a sentence of imprisonment for a period of from 2 to 20 years and/or a fine of up to \$250,000.**

SARABIA, David G.

(Signature of officer serving warning)

SENIOR PATROL AGENT

(Title of officer)

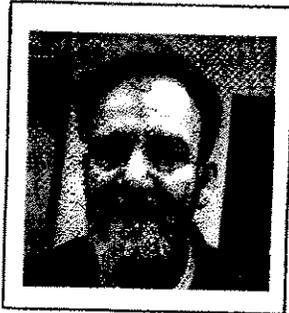
YST

(Location of INS office)

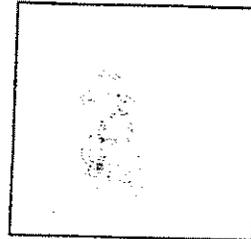
## Verification of Removal

(Complete this section for file copy only)

Departure date <u>6/9/06</u>	Port of departure <u>PDN</u>	Manner of departure <u>at foot</u>
Signature of verifying officer <u>May E. Hud</u>		Title of Officer <u>IEA</u>



Photograph of alien removed



Right index fingerprint of alien removed

(Signature of alien whose fingerprint and photograph appear above)

(Signature of official taking fingerprint)

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

File No: A  
Case No: XLS0608000002  
FIN #: 19444951

In the Matter of:

Respondent: Luis M

currently residing at:

EL PASO PROCESSING CENTER 8915 MONTANA AVE  
EL PASO TEXAS 79925

(Number, street, city state and ZIP code)

(915) 225-1905

(Area code and phone number)

- 1. You are an arriving alien.
- 2. You are an alien present in the United States who has not been admitted or paroled.
- 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

- 1) You are not a citizen or national of the United States;
- 2) You are a native of MEXICO and a citizen of MEXICO;
- 3) You arrived in the United States at or near El Paso, Texas, on or about January 1, 1997;
- 4) You were not then admitted or paroled after inspection by an Immigration Officer.

RECEIVED  
DEPARTMENT OF JUSTICE  
2006 AUG 23 AM 11:04

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

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

- This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- Section 235(b)(1) order was vacated pursuant to:  8 CFR 208.30(f)(2)  8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: Executive Office For Immigration Review, Service Processing Center, 8915 Montana, El Paso, Texas 79925

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

Tony Singleton  
RESIDENT AGENT IN CHARGE  
(Signature and Title of Issuing Officer)

Date: August 11, 2006

Las Cruces, New Mexico  
(City and State)

See reverse for important information

## Notice to Respondent

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

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

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

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

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

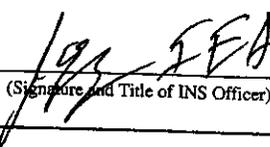
You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

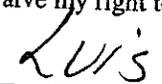
**Failure to appear:** You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided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

### Request for Prompt Hearing

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

Before:

  
(Signature and Title of INS Officer)

  
(Signature of Respondent)

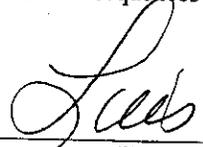
Date: 8-11-06

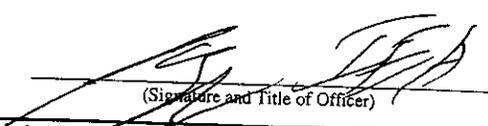
### Certificate of Service

This Notice to Appear was served on the respondent by me on August 11, 2006, in the following manner and in compliance with section 239(a)(1)(F) of the Act: (Date)

- in person       by certified mail, return receipt requested       by regular mail  
 Attached is a credible fear worksheet.  
 Attached is a list of organizations and attorneys which provide free legal services.

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

  
(Signature of Respondent if Personally Served)

  
(Signature and Title of Officer)

UNITED STATES DEPARTMENT OF JUSTICE  
Immigration and Naturalization Service

No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

File No. A22

In the Matter of

, Bernardo

Respondent.

Service Processing Center, El Paso, Texas

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You entered the United States ~~at~~ near El Paso, Texas on August 23, 1978; (date)
4. You were not then inspected and admitted by an immigration officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

22

~~RECORD~~ OF HEARING CONTAINED IN FILE A \_\_\_\_\_

**Section 241(a)(2) of the Immigration and Nationality Act, in that you entered the United States without inspection.**

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at Service Processing Center, El Paso, Texas on August 31, 1978 at 9:00 a.m., and show cause why you should not be deported from the United States on the charge (s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: August 23, 1978  
4:00 p.m.

[Signature]  
W. F. MAYBERRY (signature and title of issuing officer)  
Asst. District Director, Investigations  
(City and State)  
El Paso, Texas

Alien deported on 8-29-78  
BoTA VIA On Foot

Charlotte M. [Signature] AUG 29 1978  
Asst. Director

Deport to Mexico - AUG 29 1978  
M. E. [Signature]  
S. I.

AUG 29 1978  
(Initials)



NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

- Detained in the custody of this Service.  Released on recognizance.
- Released under bond in the amount of \$ 2,500

You may request the Immigration Judge to redetermine this decision.

- I do  do not request a redetermination by an Immigration Judge of the custody decision.

(signature of respondent)

(date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

[Signature]  
(signature of respondent)

By [date] delivery to respondent and explained in the Spanish language

CERTIFICATE OF SERVICE

Served by me at [Signature] on August 23, 1978 at 6:00 p m.  
[Signature]  
(signature and title of employee or officer)



U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services

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## HQ Records Services Branch Certificate Of Nonexistence Summary Sheet

Certificate ICN #: 20070108103829

Date requested: 1/5/2007

Approved: YES

Date approved/denied: 1/12/2007

Searcher: LJ

Type: I-212

A-file #: A92

Subject Last Name:

This Certificate of Nonexistence should be shipped as follows:

Ship via: USPS

CBP

Attention: Senior Patrol Agent/Prosecutions Officer Kenneth Reza

8901 Montana Avenue

El Paso, Texas 79925

Contact numbers:

Primary: 915-834-8636

Alternate:

Fax: 915-782-4365



U.S. Citizenship  
and Immigration  
Services

## Interoffice Memorandum

To: Officer In Charge  
El Paso, Texas

Attention: CBP  
Kenneth Reza  
Senior Patrol Agent/Prosecutions Officer

From: Office of Records, Headquarters, (HQREC)

Re: Certification Request(s) for 1/5/2007

Attached is (are) Certificate(s) of Nonexistence of Record(s) relating to the following subject(s):

<u>File Number</u>	<u>Subject</u>
A92	Luis Manuel

As Chief of the Records Services Branch, Office of Records, I am duly authorized to make such certification and to delegate such authority in my absence.

A handwritten signature in black ink, appearing to read "Mike Quinn", written over a horizontal line.

MIKE QUINN  
Chief  
Records Services Branch

1/12/2007

I, Mike Quinn, certify to the following:

1. That I am the Chief in the Records Services Branch, Office of Records, Headquarters, Citizenship and Immigration Services, United States Department of Homeland Security, and by virtue of the authority contained in Section 475(b)(1) of the Homeland Security Act of 2002, Section 290(d) of the Immigration and Nationality Act and 8 CFR 103.7(d)(4), I am authorized to certify the nonexistence of an official Service record.
2. That Citizenship and Immigration Services maintains centralized records relating to immigrant aliens who entered the United States on or after June 30, 1924, to nonimmigrant aliens who entered on or after June 30, 1948, and a centralized index of all persons naturalized on or after September 27, 1906.
3. That I, or an agency employee acting at my direction, performed a search for records relating to the subject identified below. Specifically this office searched Deportable Alien Control System (DACS), Computer Linked Application Information Management System (CLAIMS), and the Central Index System (CIS).
4. That after a diligent search was performed in these database systems, no record was found to exist indicating that the subject listed below obtained consent at anytime prior to March 1, 2003, from the Attorney General of the United States, or at anytime after February 28, 2003 from the Secretary of the Department of Homeland Security, for re-admission in the United States in accordance with the 6 U.S.C. §§ 202(3) and (4) and U.S.C. § 557.

File No: A92

Subject: Luis Manuel

Also known As (AKA):

Born on: 12/25/

Country of Birth: Mexico



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MIKE QUINN  
Chief  
Records Services Branch

[Return to the USDOJ/OIG Home Page](#)

## Immigration and Naturalization Service Institutional Removal Program

**Report No. 02-41**  
**September 2002**  
**Office of the Inspector General**

### APPENDIX II

#### CRIMINAL ALIENS: THE REMOVAL PROCESS

The removal process involves four phases: identification and processing, case preparation, administrative proceedings, and removal. Aliens convicted of committing an aggravated felony are subject to removal. Depending on the immigration status of the criminal alien, the type of removal proceedings may be one of the following: administrative, reinstatement of a prior removal order, or a hearing before an immigration judge.

**Administrative Removal:** Under section 238(b) of the Act, no relief from removal exists once a case meets the criteria for administrative removal proceedings. Upon initiation of the proceedings, the criteria include that the individual must be an alien who is not a lawful permanent resident (LPR) and the individual must have a final conviction for an aggravated felony. When processing the alien for this procedure, each of these elements as well as the alien's identity must be established.

1. Establish alienage. An alien is any person who is not a citizen or national of the United States. In determining if a person is an alien, the INS officer (i.e. Immigration & Special Agent) must consider place of birth, the nationality of the person's parents at birth, and/or subsequent naturalization by the person or his parents. Those items that would cause an individual to be an alien must be explored during questioning. If the facts indicate that the person is an alien, they must be documented in a Record of Deportable/Inadmissible Alien (Form I-213), sworn statement, and printouts of records checks. The time and date that the alien was questioned should be noted on the Form I-213, and this evidence must be placed in the record of proceeding (ROP).
2. Verifying immigration status (not a LPR). In order to establish the alien's immigration status at the time the process begins, the alien must be interviewed and all pertinent INS records systems should be checked. All evidence collected must be placed in the ROP. The Form I-213, sworn statement, printouts of records checks, i.e. CIS, DACS, & ENFORCE systems, should be used as evidence that the alien is not a LPR. Evidence of LPR status is available both on INS automated record systems and hard copy A-files.
3. Establishing conviction of an aggravated felony. The record of conviction must be placed in the ROP. The types of documentary evidence constituting proof of conviction in immigration proceedings include the following:
  - a. A record of judgment and conviction;
  - b. A record of plea, verdict and sentence;
  - c. A docket entry from court records that indicates the existence of a conviction;

- d. Minutes of a court proceeding or a transcript of a hearing that indicates the existence of a conviction;
  - e. An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a state official associated with the state's repository of criminal justice records, that indicates the following: the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence; or
  - f. Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
4. Verifying identity. When questioning the alien and checking records and documents to determine whether the case meets the criteria for administrative removal, special care must be taken to verify his identity. The encountering officer is responsible for making absolutely certain that all information is completely consistent and there is no question whatsoever about the identity of the person or upon whom the Notice of Intent to Issue a Final Administrative Removal Order (NOI) will be served.

The law specifically requires a determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI. When the NOI is served in person, the INS officer serving the NOI verifies the identity of the person on whom it is served, and signs a statement to that effect in the Certificate of INS on the NOI.

The NOI shall set forth the preliminary determinations and inform the alien of the INS's intent to issue a Form I-851-A, Final Administrative Removal Order, without a hearing before an immigration judge. The NOI shall constitute the charging document. The NOI shall include allegations of fact and conclusions of law. It shall advise the alien has the privilege of being represented at no expense to the government by counsel of the alien's choosing, as long as counsel is authorized to practice removal proceedings; may request withholding of removal to a particular country if he or she fears persecution or torture in that country; may inspect the evidence supporting the NOI; may rebut the charges within 10 calendar days after INS of such Notice (or 13 calendar days if Notice was by mail).

A detainer should be served on the appropriate authorities at the correctional facility after the INS officer verifies the identity and immigration status of a criminal alien amenable to removal.

Review for legal sufficiency. INS attorneys are available to provide advice regarding all aspects of cases being processed under Section 238(b) of the Act. Cases must be reviewed for legal sufficiency in accordance with outstanding instructions.

Executing final removal order of deciding INS officer: Upon the issuance of a Final Administrative Order, the INS shall issue a Warrant of Removal and be executed no sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien knowingly, voluntarily, and in writing waives the 14-day period at the time of issuance of the NOI or at any time thereafter and up to the time the alien becomes the subject of a Warrant of Removal. The warrant is served when the alien is released to the INS. The alien is taken into custody under the authority of a Warrant of Arrest issued by a deciding INS Officer (District Director, Assistant District Director for Deportation, IRP Director).

5. Determining applicability of withholding of removal. While no relief from removal is available in these proceedings, cases may arise in which removal to a particular country must be withheld under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or

Degrading Treatment or Punishment (CAT). However, an alien sentenced to an aggregate term of imprisonment of at least five years for his aggravated felony conviction(s) is considered to have committed a particularly serious crime and statutorily ineligible for withholding of removal. In addition, Article 3 of the CAT prohibits an alien's removal to a country where he or she is more likely than not to be tortured. There are no exceptions to this prohibition. Therefore, an alien with an aggravated felony conviction(s) may be entitled to protection under Article 3, even if he or she has been sentenced to five or more years' imprisonment.

6. Determining applicability of a waiver under Section 212(h) of the Act. An alien in administrative removal proceedings under section 238(b) of the INA is ineligible to apply for any discretionary relief. However, the Board of Immigration Appeals held that an alien not previously admitted to the United States as a LPR is statutorily eligible to seek a section 212 (h) waiver despite an aggravated felony conviction. Based on this decision, a NTA must be served on the alien to begin removal proceedings before an immigration judge (see Section on Hearings Before an immigration judge).

**Reinstatement of Final Orders:** Section 241(a)(5) of the Act provides that the Attorney General will reinstate (without referral to an immigration court) a final order against an alien who illegally reenters the United States after being deported, excluded, or removed from the United States under a final order. Before reinstating a prior order, the officer (Immigration or Special Agent) processing the case must determine:

- A. that the alien believed to have reentered illegally was previously deported or removed from the United States. The processing officer must obtain the alien's A-file or copies of the documents contained therein to verify that the alien was subject to a final order and that the previous order was executed.
- B. that the alien believed to have reentered illegally is the same alien as the one previously removed. If, in questioning an alien, he or she admits to being previously deported or removed, the Form I-213 and the sworn statement must so indicate. If a record check or fingerprint hit reveals such prior adverse action, that information must be included in the INS file. The alien should be questioned and confronted with any relevant adverse information from the A-file, record check or fingerprint hit, and such information must be included in the I-213 and sworn statement, if applicable.

If the alien disputes the fact that he or she was previously removed, a comparison of the alien's fingerprints with those in the A-file documenting the previous removal must be completed to document positively the alien's identity. The Forensic Document Laboratory via photo phone or a locally available expert must complete the fingerprint comparison.

- C. that the alien did in fact illegally reenter the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include check of INS data systems available to the officer.

In any case in which the officer is not able to satisfactorily establish the preceding facts, the previous order cannot be reinstated, and the alien must be processed for removal through other applicable proceedings, such as administrative removal under section 238 of the Act, or removal proceedings before an immigration judge under section 240 of the Act.

In all cases in which an order may be reinstated, the officer must create a record of sworn statement. The record of sworn statement will document admissions, if any, relevant to determining whether the alien is subject to reinstatement, and whether the alien expressed a fear of persecution or torture if returned on the reinstated order.

In addition to covering the normal elements (identity, alienage, and the required elements listed above), the sworn statement must include the following question and the alien's response thereto: "Do you have any fear of persecution or torture should you be removed from the United States?" If the alien refuses to provide a sworn statement, the record should so indicate. An alien's refusal to execute a sworn statement does not preclude the INS from reinstating a prior order, provided that the record establishes that all of the required elements discussed in the above paragraphs have been satisfied. If the alien refuses to give a sworn statement, the processing officer must record whatever information the alien orally provided that relates to reinstatement of the order or to any claim of possible persecution.

Once the processing officer is satisfied that the alien has been clearly identified and is subject to the reinstatement provision (and the sworn statement has been taken), the officer shall prepare Form I-871, Notice of Intent/Decision to Reinstate Prior Order. The processing officer completes and signs the top portion of the form, provides a copy to the alien, and retains a copy for the file. The officer must read, or have read the notice to the alien in a language the alien understands. The alien signs the second box of the file copy and indicates whether he intends to rebut the officer's determination. In the event that the alien declines to sign the form, the officer shall note the block that a copy of the form was provided, but that the alien declined to acknowledge receipt or provide any response. If the alien provides a response, the officer shall review the information provided and promptly determine whether reevaluation of the decision or further investigation is warranted. In not, or if no additional information is provided, the officer shall proceed with reinstatement based on the information already available.

Review for legal sufficiency. INS attorneys are available to provide advice regarding all aspects of cases being processed under Section 241a of the Act. Cases must be reviewed for legal sufficiency in accordance with outstanding instructions.

If, after considering the alien's response the processing officer is satisfied that the alien's prior order should be reinstated, the processing officer presents the Form I-871 and all relevant evidence to a deciding officer for review and signature at the bottom of the form. A deciding officer is any officer authorized to issue a Notice to Appear, i.e. District Directors, Assistant District Director for Investigations, Officers-In-Charge, IHP Directors.

After the deciding officer signs the Form I-871 reinstating the prior order, the INS shall issue a new Warrant of Removal, Form I-205, in accordance with 8 CFR 241.2. The officer should indicate on the I-205 in the section reserved for provisions of law that removal is pursuant to section 241(a)(5) of the Act as amended by the IIRIRA.

At the time of removal, the officer executing the reinstated final order must photograph the alien and obtain a classifiable rolled print of the alien's right index finger on the I-205. The alien and the officer taking the print must sign in the spaces provided. Once the final order has been executed, it must be attached to a copy of the previously executed documents, which establish the prior departure or removal. The officer executing the reinstated order must also serve the alien with a notice of penalties on Form I-294. The penalty period commences on the date the reinstated order is executed. Since this is his or her second (or subsequent) removal, the alien is subject to the 20-year bar, unless the alien is also an aggravated felon, in which case the

lifetime bar applies. The officer should route the I-205 and a copy of the I-294 to the A-file. A comparison of the photographs and fingerprints between the original I-205 and the second I-205 executed at the time of reinstatement may prove essential in the event the reinstatement order is questioned at a later date.

**Removal Hearing before an immigration judge (Section 240 of the Act):** There are three circumstances whereby a removal hearing may be initiated before an immigration judge:

1. If a Deciding INS Officer (District Directors, Assistant District Director for Investigations, IRP Director) finds that the record of proceeding, including the alien's timely rebuttal, raises a genuine issue of material fact regarding the preliminary findings of an alien who initially has been processed as an administrative removal, the deciding officer may issue a notice to appear to initiate removal proceeding under section 240 of the Act.
2. In general, all legal permanent residents are given the opportunity to present their case before an immigration judge.
3. Aliens who have entered without inspection (EWI) (section 212 of the Act) are entitled to a removal hearing before an immigration judge.<sup>17</sup> To initiate a hearing before an immigration judge, written notice, referred to as a Notice to Appear (NTA) (I-862), is either given to the alien in person or by mail if personal INS is not practicable.

The NTA will specify the following: the nature of the proceedings against the criminal alien, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of law, the charges against the alien, and the statutory provisions alleged to have been violated. No hearing date may be scheduled earlier than ten days from the date of INS of the NTA (to allow sufficient time to obtain counsel and prepare for the hearing). The NTA includes a waiver, which the alien may execute in order to obtain an earlier hearing date.

Prior to serving the NTA to an alien, the following steps must be taken in each case referred to an immigration judge for a removal hearing:

1. Search for existing INS records in CIS, DACS, or other appropriate automated systems. If an A-file exists, create a temporary file. If a file does not exist, follow local district procedures for creating an A-file.
2. Complete Form I-213, Record of Inadmissible Alien.
3. Complete Form I-826.
4. Complete applicable sections of Form I-214.
5. Provide photograph and fingerprints (2 sets) of the alien.
6. Review the A-file to ensure that necessary court records or other evidence needed for the hearing are available.

The INS Legal Division prepares a Transmittal Memorandum for filing the NTA with the EOIR. The EOIR receives the transmittal memorandum and schedules the case received on the Master

Calendar. The hearings are scheduled based on the institutional hearing site where the alien is incarcerated. The hearings are scheduled from 30 to 60 days from the receipt of the Transmittal Memorandum, depending on each site's hearing schedule. The EOIR sends copies of the Master Calendar to the Legal Division at the District Office. The Legal Division send notices of the hearing date to the alien respondent and/or their attorney. The Master Calendar hearing is held, and the alien respondent is advised by the immigration judge of the removal charges, the respondent's rights in a removal proceeding, and called upon to enter a plea. If, at the conclusion of the proceeding, the alien is found removable and a final order of removal is issued by the immigration judge, the A-File is forwarded by the Legal Assistant of the Detention and Removals Operations for removal processing following the completion of the criminal sentence to incarceration.

For a majority of removal hearings, more than one hearing may occur. The respondent may contest removal and request additional time to prepare a defense or secure representation. If the respondent contests removal, seeks representation, or is granted a continuance for other reasons, another hearing will be scheduled. A time period that may span from 30 to 60 days elapses between hearings whether they are Master Calendar hearings, subsequent Merit hearings, or Continuances.

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### Footnotes

17. If the subject entered without inspection and was convicted of burglary, robbery, theft, or a crime of violence, with a sentence of less than a year a Notice to Appear (I-862) must be issued. If the sentence is over a year then a Notice of Intent to issue an Administrative Removal (I-851) should be issued.



**U.S. Department of Justice**  
Executive Office for Immigration Review  
*Office of the Director*  
5107 Leesburg Pike, Suite 2600  
Falls Church, Virginia 22041

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## FACT SHEET

**Contact:** Office of Legislative and Public Affairs  
(703)305-0289 Fax: (703) 605-0365  
**Internet:** [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir)

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July 28, 2004

### **Types of Immigration Court Proceedings And Removal Hearing Process**

The Executive Office for Immigration Review (EOIR), an agency of the Department of Justice, oversees three components which adjudicate matters involving immigration law matters at both the trial and appellate level. Under the Office of the Chief Immigration Judge, more than 200 Immigration Judges located in 53 Immigration Courts nationwide conduct proceedings and decide individual cases. The agency includes the Board of Immigration Appeals (BIA), which hears appeals of Immigration Judge decisions, and the Office of the Chief Administrative Hearing Officer, which handles employment-related immigration matters.

This fact sheet summarizes the most common types of immigration court proceedings. These descriptions are not fully inclusive and do not encompass the many regulatory and court interpretations that may have bearing on the following information. Also, the descriptions that follow are subject to change since Congress may legislate new laws. Accordingly, the following summaries are intended only to assist the public's general understanding of the types of immigration court proceedings, and interested parties should therefore refer to controlling law and regulations for a precise and complete understanding of the topics presented.

Immigration Judges conduct removal proceedings, which account for approximately 80 percent of their caseload. Federal rules of evidence are inapplicable in Immigration Court; thus, an Immigration Judge has greater authority to receive most kinds of evidence in deciding a case. The types of proceedings an Immigration Judge may preside over are briefly discussed below.

**Removal Hearings** – Removal hearings are conducted to determine whether certain aliens are subject to removal from the country. Beginning April 1, 1997, the distinction between exclusion and deportation proceedings was eliminated, and aliens subject to removal from the United States were all placed in removal proceedings. Thus, the removal proceeding is now generally the sole procedure for determining whether an alien is inadmissible, deportable, or eligible for relief from removal.

The Department of Homeland Security (DHS), which absorbed the functions of the Immigration and Naturalization Service, is responsible for commencing a removal proceeding. If the DHS alleges a

(more)

## **Types of Immigration Court Proceedings**

### **Page 2**

violation of immigration laws, it has the prosecutorial discretion to serve the alien with a charging document, known as a Notice to Appear, ordering the individual to appear before an Immigration Judge. The Notice to Appear is also filed with the Immigration Court having jurisdiction over the alien, and advises the alien of, among other things, the nature of the proceedings; the alleged acts that violated the law; the right to an attorney at no expense to the government; and the consequences of failing to appear at scheduled hearings.

Removal proceedings generally require an Immigration Judge to make two findings: (1) a determination of the alien's removability from the United States, and (2) thereafter deciding whether the alien is eligible for a form of relief from removal. For more information on the types of relief available to an alien, please see Forms of Relief from Removal Fact Sheet at [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir).

**Bond Redetermination Hearings** – An Immigration Judge conducts a bond redetermination hearing for aliens who are in DHS detention. The alien makes a request to the Immigration Judge to lower or eliminate the amount of the bond set by the DHS. These hearings are generally informal and are not a part of the removal proceedings. This decision can be appealed by either the alien or by DHS to the BIA.

**Recission Hearing** – An Immigration Judge conducts a recission hearing to determine whether a lawful permanent resident (LPR) should have his or her residency status rescinded because he or she was not entitled to it when it was granted.

**Withholding-Only Hearing** – An Immigration Judge conducts a withholding-only hearing to determine whether an alien who has been ordered removed is eligible for withholding of removal under the law or the Convention Against Torture (CAT) (see below).

**Asylum-Only Hearing** – An asylum-only hearing applies to an individual who is denied a removal hearing under the law. These individuals include crewmen, stowaways, Visa Waiver Pilot Program beneficiaries, and those ordered removed from the United States on security grounds. An asylum-only hearing will be used to determine whether certain aliens who are not entitled to a removal hearing but claim a well-founded fear of persecution in their home country are eligible for asylum. In normal circumstances, asylum claims are heard by Immigration Judges during the course of a removal hearing.

**Credible Fear Review** – If an alien seeks to enter the United States without documents, or with fraudulent documents, and expresses a fear of persecution or an intention to apply for asylum, an DHS asylum officer will conduct a credible fear interview. An alien will demonstrate a credible fear of persecution if he or she shows that he or she could establish an asylum claim, or a claim based on withholding of removal or under the CAT. If an asylum officer decides that an alien does not possess a credible fear of persecution, an Immigration Judge will review that determination. If the Immigration Judge finds that the alien has a credible fear of persecution, the alien may apply for asylum, withholding of removal, or withholding under the CAT.

(more)

## Types of Immigration Court Proceedings

Page 3

**Reasonable Fear Review** – If an alien who is ordered removed during an expedited removal hearing expresses a fear of returning to his or her country, he or she must be given a reasonable fear interview by an asylum officer. Similar to the credible fear assessment discussed above, the asylum officer will determine whether the alien has a reasonable fear of persecution, or torture, based on a reasonable possibility that he or she will be persecuted due to his or her race, religion, nationality, membership in a particular social group, or political opinion, or due to a reasonable possibility that he or she would be tortured in the country of removal. If the interviewing officer determines that the alien has a reasonable fear of persecution based on any of the grounds noted above, or that the alien would be tortured in the country of removal, he or she will refer the alien for a hearing before an Immigration Judge. This hearing is known as a withholding-only hearing, given that the Immigration Judge will adjudicate only the issue of withholding of removal.

**Claimed Status Review** – If an alien in expedited removal claims under oath to be a U.S. citizen, to have been lawfully admitted for permanent residence, to have been admitted as a refugee, or to have been granted asylum, he or she can obtain a review of that claim by an Immigration Judge when DHS determines that the alien has no such claim.

**In Absentia Hearing** – If an alien does not appear for a scheduled hearing, he or she may be ordered removed *in absentia* (being absent for a hearing). The Immigration Judge will order an alien removed *in absentia* if DHS can demonstrate that the alien is removable, and he or she was served with a written notice to appear for the hearing, including an appraisal of the consequences of being absent for a hearing. *In absentia* hearings are not considered a distinct type of immigration proceeding.

In FY 2003, Immigration Courts completed more than 295,000 matters. Of that total, more than 250,000 were removal hearings. A chart of the removal hearing process is attached.

Statistics on BIA and Immigration Court matters can be found on the EOIR Web site at <http://www.usdoj.gov/eoir/statspub.htm>.

– EOIR –

Attachment: *EOIR Removal Proceedings Process*

# EOIR Removal Proceedings Process

