Quick Reference: Motions to Suppress and Alienage

SUPPRESSION – Fourth & Fifth Amendment

Case	Facts	Holding or Quote
INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)	INS agents entered a respondent's place of employment without a warrant or consent. In response to the agent's questions, respondent gave his name and indicated that he was from Mexico. Respondent was arrested and questioned further, ultimately admitted that he was a native and citizen of Mexico, and had entered the U.S. without inspection.	Absent an egregious violation of the 4th amendment, or other liberties that might transgress notions of fundamental fairness and undermine the probative value of evidence obtained, "evidence derived from such arrests need not be suppressed." Proving alienage "will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest."
Matter of Cervantes, 21 I&N Dec. 351, 353 (BIA 1996)	An IJ suppressed respondent's Form I-213, but relied on his submission of his employment authorization card to prove alienage. Respondent argues that the employment authorization card should have also been suppressed under the exclusionary rule, as fruit of the poisonous tree.	Alienage was proven by independence evidence where the respondent voluntarily submitted his employment authorization card to the court.
Almeida–Amaral v. Gonzales, 461 F.3d 231, 234 (2d Cir. 2006) (quoting *Lopez-Mendoza*, 468 U.S. at 1050-51)	Respondent approached by CBP agent in parking lot, asked for ID, showed his Brazilian passport. He was then arrested and made statements to the arresting officer, which became the basis of an I-213, stating he was from Brazil and entered the U.S. illegally. He argued it should be suppressed because his arrest was unlawful and because at the time of his statements he was a minor, which violated INS regs.	Respondent's statements admissible because the record contained a copy of his passport and an affidavit from his mother stating he was from Brazil. Exclusion for violations that are egregious are either because the violation "transgress[ed] notions of fundamental fairness," or because the violation "undermine[d] the probative value of the evidence obtained."
Matter of Garcia, 17 I&N Dec. 319, 321 (BIA 1980)	During his arrest, respondent was handcuffed and told he was being deported. He had his attorney's number written in ink on his arm and the INS officer grabbed his arm and rubbed it off. He was arrested without being told why and detained. He requested numerous times to contact his attorney, but was ignored. He finally made admissions and requested voluntary departure after he "lost hope" of speaking with attorney.	The use of admissions obtained from an alien involuntarily to establish removability is fundamentally unfair and the requirements of due process require their exclusion from the record.

Matter of Garcia, 17 I&N Dec. 319 (BIA 1980)	Respondent testified during a removability hearing as to the events that occurred during his arrest and detention, including that he made admission of alienage only after being led to believe by Service officers that his deportation was inevitable, that he had no rights, that he could not communicate with counsel, and that he could be detained without explanation of why he was in custody.	An objection to the admissibility of a statement on the ground that it was involuntarily obtained must be supported by specific and detailed statements based on personal knowledge or other evidence, and a *prima facie case* must be shown before the Service is required to justify the manner in which the statement was obtained.
Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505-06 (BIA 1980); *see also Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 761 n.5 (BIA 1999).	At his hearing, respondent pled the Fifth and refused to answer questions regarding deportability. DHS presented a Form I-213 & I-274 indicating that he entered U.S. without inspection by paying a smuggler. Respondent refused to identify the signatures on the form but did not deny that he signed them.	In order to rise to level of a Fifth Amendment violation, respondent's statements must include factual details from which the Court can conclude that there was physical or psychological coercion, intimidation, duress, or improper inducement, such that the respondent's will was overborne.
Maldonado v. Holder, 763 F.3d 155, 161 (2d Cir. 2014)	Respondents were day laborers picked up by police & ICE in sting operation. During processing, they made incriminating statements about their alienage, which were memorialized in Form I-213s.	Respondents did "not allege that they were treated in a particularly severe manner," as they did "not claim that [they were] subjected to physical abuse, threats, promises, denial of food or drink, or long hours of interrogation" thus their I-213s were not suppressed.
Cerros-Ramon v. Sessions, No. 16-3747-AG, 2018 WL 1916196 (2d Cir. Apr. 24, 2018)	Respondent argued that the contents of the Form I-213, which were derived from an illegal traffic stop, should be suppressed. He argued that traffic stops without reasonable suspicion "should be found inherently egregious" and that he established a *prima facie* case for suppression, which DHS failed to rebut.	Respondent did not establish a *prima facie* case for suppression of his Form I-213 where the record evidence did not show that the traffic stop, from which the contents of the Form I-213 were derived, was "an egregious violation that was fundamentally unfair."
Ramsameachire v. Ashcroft, 357 F.3d 169, 180 (2d Cir. 2004)	Respondent received an interview with the assistance of a translator in his native language.	"[I]f the alien's answers to the questions posed [during an airport interview] suggest that the alien did not understand English or the translations provided by the interpreter, the alien's statements should be considered less reliable."

BURDENS & CLEAR AND CONVINCING EVIDENCE STANDARD

Case/Statute/Regulation	Case Law/Holding
Woodby v. INS, 385 U.S. 276 (1966); *Matter of Guevara*, 20 I&N Dec. 238, 244 (BIA 1990, 1991); *Singh v. DHS*, 526 F.3d 72, 75 (2d Cir. 2008)	No removal order may be entered "unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."
Matter of Cervantes-Torres, 21 I&N Dec. 351, 354 (BIA 1996) (*citing Woodby*, 385 U.S. at 276).	The burden of proof in deportation proceedings "does not shift to the alien to show time, place, and manner of entry under section 291 of the Act, until after the respondent's alienage has been established by clear, unequivocal, and convincing evidence."
Matter of Rodriguez-Tejedor, 23 I&N Dec. 153, 164 (BIA 2001); *Matter of Tijerina-Villareal*, 13 I&N Dec. 327, 330 (BIA 1969).	Evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to overcome that presumption with a preponderance of credible evidence.
INA § 240(c)(3)(A)	No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.
Colorado v. New Mexico, 467 U.S. 310, 316 (1984)	The "clear and convincing evidence" standard requires an "abiding conviction" on the part of the fact-finder that the truth of a fact is "highly probable."
Matter of E-M-, 20 I&N Dec. 77, 80 (BIA 1989)	When something has to be proved by clear and convincing evidence, the proof must demonstrate that it is highly probably true.
Black's Law Dictionary 172 (6th ed. 1991)	Evidence is "clear and convincing" if it indicates that the truth of the fact to be proved is highly probable or reasonably certain.
Clear and Convincing Evidence, LII / LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu	The "clear and convincing" standard is a "medium level of burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. In order to meet the standard and prove something by clear and convincing evidence, a party must prove that it is substantially more likely than not that it is true."

BURDENS OF PROOF FOR REMOVABILITY

Category	Common Example	Burden	Burden of Proof	Case
Alienage	Alienage	DHS	Clear & Convincing Evidence	INA § 240(c)(3)(A); *Matter of Tijera-Villarreal*, 13 I&N Dec. 327 (BIA 1969)
Arriving alien (INA § 212)	Airports, ports of entry	Alien	"Clearly and beyond a doubt" that alien entitled to be admitted	INA § 240(c)(2)(A)
Aliens present in U.S. without being admitted or paroled (INA § 212)	EWI	Alien	"Clear and convincing evidence" that alien is entitled to be in the U.S.	INA § 240(c)(2)(B)
Alien admitted to U.S., but deportable (INA § 237)	Visa overstay, LPR with criminal issues	DHS	"Clear and convincing evidence" that alien is subject to removal	INA § 240(c)(3)(A)
Returning LPR charged as an arriving alien (INA § 212)	Abandonment; LPR commits crime, leaves U.S. then returns	Alien, then DHS	Alien: "colorable claim" to "returning resident" status; DHS: "clear and convincing" evidence that s/he abandoned status or that an LPR is to be regarded as seeking admission	INA § 101(a)(13); *Matter of Huang*, 25 I&N Dec. 749 (BIA 1988); *Ahmed v. Ashcroft*, 286 F.3d 611 (2d Cir. 2011); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011)

ESTABLISHING A PRIMA FACIE CASE FOR SUPPRESSION

Case	Case Law/Holding
Matter of Barcenas, 19 I&N Dec. 609, 611 (BIA 1988)	A motion to suppress may be granted when it is supported by a specific and detailed statement based on personal knowledge that establishes a *prima facie* case for suppression.
Matter of Wong, 13 I&N Dec. 820, 821-22 (BIA 1971); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971)	To set forth a *prima facie* case, the applicant bears the burden to assert a basis for suppression and must enumerate the articles to be suppressed.
Matter of Burgos, 15 I&N Dec. 278, 279 (BIA 1975)	If a *prima facie* case is established, the burden then shifts to the Department to justify the manner in which it obtained the evidence at issue.
Matter of Barcenas, 19 I&N Dec. 609, 611-12 (BIA 1988)	When challenging the admissibility of a document "the mere offering of an affidavit is not sufficient to sustain [respondent's] burden." Even if the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then those claims must also be supported by testimony.
Cotzojay v. Holder, 725 F.3d 172, 177 n.5 (2d Cir. 2013) (quoting *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988))	Second Circuit approved the BIA's burden-shifting framework for adjudicating suppression motions: "if the petitioner offers an affidavit that 'could support a basis for excluding the evidence in ... question,' it must then be supported by testimony. If the petitioner establishes a *prima facie* case, the burden of proof shifts to the Government to show why the evidence in question should be admitted."
Guillen-Jimenez v. Sessions, 685 F. App'x 15, 15–16 (2d Cir. 2017) (citing *Barcenas*, 19 I&N Dec. at 611-12)	"[A]n affidavit and testimony are both necessary elements of the *prima facie* showing; however, the affidavit must be sufficiently compelling for [respondent] to be allowed to offer supporting testimony at a suppression hearing."

RESPONDENT'S SILENCE REGARDING ALIENAGE

Case	Case Law/Holding
Matter of Pang, 11 I&N Dec. 489 (BIA 1966); *Matter of R-S-*, 7 I&N Dec. 271 (BIA 1956)	Where respondent does not claim privilege and refuses to testify regarding matters of alienage, time and place of entry, and lack of proper documents, his silence can give rise to an inference that his testimony would support the DHS charges.
Matter of O-, 6 I&N Dec. 246 (BIA 1954).	It is proper to draw an unfavorable inference from refusal to answer pertinent questions after a *prima facie* case of deportability has been established where such refusal is based upon a permissible claim of privilege, as well as where privilege is not a factor.
Matter of J-, 8 I&N Dec. 568 (BIA 1960); *Matter of O-*, 6 I&N Dec. 246 (BIA 1954)	Although it is proper to draw an unfavorable inference from a respondent's refusal to answer pertinent questions, the inference may only be drawn after a *prima facie* case of deportability has been established.
Matter of Guevara, 20 I&N Dec. 238, 238 (BIA 1990, 1991).	The respondent's silence alone in the absence of other evidence is insufficient to constitute *prima facie* evidence of alienage and therefore also insufficient to establish deportability.
Matter of DeLucia, 11 I&N Dec. 565 (BIA 1966)	An alien seeking a favorable exercise of discretion cannot limit the inquiry to the favorable aspects of the case and reserve the right to be silent on the unfavorable aspects.
Matter of Marques, 16 I&N Dec. 314 (BIA 1977)	In asserting his Fifth Amendment privilege against self-incrimination and refusing to disclose such information, respondent prevents an IJ from reaching a conclusion as to respondent's entitlement to adjustment of status, fails to sustain the burden of establishing that he is entitled to the privilege of adjustment status, and his application is properly denied.

ADMISSABILITY OF EVIDENCE OF ALIENAGE IN IMMIGRATION PROCEEDINGS

Case/Statute/Regulation	Case Law/Holding
Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996).	"[A] deportation hearing is a civil matter, and the heightened procedural protections of a criminal trial are not necessarily constitutionally required."
Matter of D-R-, 25 I&N Dec. 445 (BIA 2011)	In immigration proceedings, the "sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair."
Matter of Barcenas, 19 I&N Dec. 609, 611 (BIA 1988)	"[T]ests for the admissibility of documentary evidence in deportation proceedings are that evidence must be probative and that its use must be fundamentally fair."
Lin v. U.S. Dep't of Justice, 459 F.3d 255, 268 (2d Cir. 2006); *Zhen Nan Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 268 (2d Cir. 2006).	To satisfy due process, evidence in an immigration proceeding must be relevant, probative, and fundamentally fair. It must not violate the alien's right to due process of law.
8 C.F.R. § 1240.7(a)	"Immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial."
Matter of J-C-H-F-, 27 I&N Dec. 211, 212 (BIA 2018); *see also Felzcerek v. INS*, 75 F.3d 112, 116–17 (2d Cir. 1996)	"Generally, there is a presumption of reliability of Government documents."
Ramsameachire v. Ashcroft, 357 F.3d 169, 179 (2d Cir. 2004).	While many government records are often reliable documents, the Second Circuit has cautioned that IJs should rely on such documents only "if the record of the interview indicates that it presents an accurate record of the alien's statements."
Matter of D-R-, 25 I&N Dec. 445, 458 (BIA 2011)	Solely because a document is unauthenticated that is not a reason for its exclusion, as the federal regulations are not the exclusive means for the authentication of documents.

RELIABILITY OF EVIDENCE OF ALIENAGE

Form I-213

Case/Statute/Regulation	Case Law/Holding
Matter of Barcenas, 19 I&N Dec. 609, 611 (BIA 1988)	"Absent any indication that a Form I–213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability."
Matter of Mejia, 16 I&N Dec. 6, 8 (BIA 1976)	The Form I-213 "is inherently trustworthy and would be admissible even in court as an exception to the hearsay rule as a public record and report."
Gomez-Gomez, 23 I&N Dec. 522, 524 (BIA 2002)	The Board has "consistently held that absent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress, that document, although hearsay, is inherently trustworthy and admissible as evidence to prove alienage or deportability." The Form I-213 enjoys a "well-settled presumption of reliability" which is "necessary to the efficient enforcement of the immigration laws." In order to impugn the contents of a Form I-213, an IJ's finding must be sufficiently grounded in evidence of record.
Matter of J-C-H-F-, 27 I&N Dec. 211, 212 (BIA 2018)	"Generally, there is a presumption of reliability of Government documents."
Felzcerek v. INS, 75 F.3d 112, 116–17 (2d Cir. 1996)	A Form I–213 is "presumptively reliable," "at least when the alien has put forth no evidence to contradict or impeach the statements in the report," because it "contain[s] guarantees of reliability and trustworthiness that are substantially equivalent" to those required of business records admissible under the Federal Rules of Evidence.
Matter of Garcia, 17 I&N Dec. 319, 321 (BIA 1980)	If respondent establishes, through testimony during a removability hearing, that admissions reflected in a Form I-213 were involuntarily given, due process warrants their exclusion from the record.

RAP Sheet

Case/Statute/Regulation	Case Law/Holding
Francis v. Gonzalez, 442 F.3d 131, 142-43 (2d Cir. 2006)	RAP sheets do not qualify as clear and convincing evidence to prove a criminal conviction. RAP sheets "will usually fail to rise to the level of clear and convincing evidence" because they "lack the necessary information to describe the full record of conviction and do not necessarily emanate from a neutral, reliable source."
Fed. R. Evid. 803(8)	Whereas the business record exception may apply to RAP sheets where there is other evidence of a conviction, it only applies because the official who creates the RAP sheet has a "duty to report" information as it relates to their employment, namely, the facts of crimes and criminal history. Determination of alienage is not included in this duty, thus to rely on such documents for this purpose falls outside of the hearsay exception.

Pre-Sentence Investigation Report (PSIR)

Case/Statute/Regulation	Case Law/Holding
Dickinson v. Ashcroft, 346 F.3d 44, 53-54 (2d Cir. 2003) *Note:* The Second Circuit declined to decide "whether the PS[I]R may, under some circumstances, properly be considered by the BIA in determining whether an alien has been convicted of a removable offense" but "[held] only that the BIA may not rely on factual narratives in a PS[I]R to determine the crime for which an alien has been convicted."	It was improper to rely on a PSIR for its narrative statement of the facts underlying a respondent's criminal offense because the PSIR "may include allegations that were not proven at trial, as well as alleged facts that would have been inadmissible at trial had the prosecution attempted to present them." The Second Circuit did not indicate whether reliance on the personal information, such as place of birth or citizenship, would be improper, nor whether relying on narrative information for purposes other than the facts underlying an offense would be improper.
Hili v. Sciarrotta, 140 F.3d 210, 216 (2d Cir. 1998); *Dorman v. Higgins*, 821 F.2d 133, 138 (2d Cir.1987)	Inclusion of hearsay statements and inaccurate information in a PSIR is "virtually inevitable" Verification of the information contained in a PSIR is "desirable ... [but] not always possible."