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EVIDENCE

I. OVERVIEW: Relevance and fundamental fairness are the only bars to admissibility of evidence in deportation cases. Matter of Ponce-Hernandez, 22 I&N 784 (BIA 1999); Matter of Toro, 17 I&N Dec. 340 (BIA 1980).

A. IN GENERAL

1. The strict rules of evidence are not applicable in deportation proceedings. Matter of Wadud, 19 I&N 182 (BIA 1984). Immigration proceedings are not bound by the strict rules of evidence. Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983); Dallo v. INS, 765 F.2d 581 (6th Cir. 1985); Longoria-Castaneda v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 854 (1977).

BIA: Deportation and Removal hearings are administrative proceedings that are civil in nature. Due process in such a proceeding ordinarily does not require adherence to judicial rules of evidence unless deviation would make the proceeding fundamentally unfair. The sole criterion in appraising documentary evidence lawfully obtained is whether it has probative value and whether its use is consistent with a fair hearing. Matter of Lam, 14 I&N Dec. 168 (BIA 1972).

Circuits: Administrative proceedings are not bound by the strict rules of evidence. Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983); Dallo v. INS, 765 F.2d 581 (6th Cir. 1985); Longoria-Castaneda v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977).

2. The general rule with respect to evidence in immigration proceedings favors admissibility as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law. Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980)), Matter of Toro, 17 I&N Dec. 340 (BIA 1980); Matter of Lam, 14 I&N Dec. 168 (BIA 1972); Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983); Tashnizi v. INS, 585 F.2d 781 (5th Cir. 1978); Trias-Hernandez v. INS, 528 F.2d 366 (9th Cir. 1975); Marlowe v. INS, 457 F.2d 1314 (9th Cir. 1972);

a. Relevant means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.Evid.R. 401.

3. 8 C.F.R. §§1240.7(a) and 1240.46(c) provide that an Immigration Judge "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."

a. However, 8 C.F.R. § 1003.19(d) provides that consideration by an Immigration Judge of an application or request regarding custody or bond shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. Therefore, it would seem that an Immigration Judge may be precluded from considering any evidence from a bond hearing in the course of a hearing on removability or deportability or relief from deportation unless, of course, the evidence is reintroduced and received in the deportation or removal hearing. DHS attorneys may introduce evidence and question the respondent regarding inconsistent statements.

b. The opposite is not true, however. See 8 C.F.R. § 1003.19(d). The determination of the Immigration Judge as to custody status or bond may be based upon any information available to the Immigration Judge (such as information from the deportation hearing) or upon any evidence that is presented during the bond hearing by the respondent or the DHS.

c. Hearsay is admissible, but its admission must be probative and not fundamentally unfair. Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823-24 (9th Cir. 2003); Guerrero-Perez v. INS, 242 F.3d 727, 729 n.2 (7th Cir. 2001); Bustos-Torres v. INS, 898 F.2d 1053 (5th Cir. 1990).

4. Since the rules of evidence are not applicable and admissibility is favored, the pertinent question regarding most evidence in immigration proceedings is not whether it is admissible, but what weight the fact finder should accord it in adjudicating the issues on which the evidence has been submitted.

5. Refer to Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997), regarding theresponsibilities of the parties and the Immigration Judge with respect to evidence in the record. Generally the Immigration Judge has the duty to make certain that the record is complete.

6. Refer to Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998), regarding credibility findings by an Immigration Judge. Detailed credibility findings are a must in asylum cases.

B. BURDEN OF PROOF AND PRESUMPTIONS

1. In Deportation Proceedings/ Removal Proceedings as Deportable

a. Deportation Proceedings: DHS bears the burden of establishing deportability. Deportability must be established by evidence which is clear, unequivocal, and convincing. Woodby v. INS, 385 U.S. 276 (1966). The Woodby standard has been applied to various elements of the deportability charge. Matter of Pichardo, 21 I&N Dec. 330 (BIA 1996) (Documents offered to prove firearm conviction do not specify weapon was firearm so INS failed to meet burden.)

i. While the government has the burden of proof to establish deportability by clear, unequivocal, and convincing evidence, a respondent in deportation proceedings may be required to go forward with the evidence when the government has made a prima facie case and the respondent has better control or knowledge of the evidence. Matter of Vivas, 16 I&N Dec. 68 (BIA 1977) (respondent had to go forward with evidence of proper ID of his alleged USC wife.)

ii. An exception to the “clear, unequivocal, and convincing” standard exists in deportation proceedings in which the alien is charged with deportability pursuant to INA § 237(a)(1)(D)(i)

(former 241(a)(1)(D)(i)) as an alien whose status as a conditional permanent resident has been terminated under INA § 216(b). Section 216(b)(2) of the Act provides that the DHS bears the burden of demonstrating "by a preponderance of the evidence" that a condition described in INA § 216(b)(1) of the Act is met. See Matter of Lemhammad, 20 I&N Dec. 316 (BIA 1991).

iii. The government cannot establish a prima facie case solely through inference drawn by the respondent's Fifth Amendment assertion of silence. Matter of Guevara, 20 I&N Dec. 238 (BIA 1991).

b. Removal Proceedings: In removal proceedings, DHS has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. INA § 240(c)(3)(A).

c. Once alienage is established, the burden is on the respondent to show the time, place, and manner of entry. INA § 291. If this burden of proof is not sustained, the respondent is presumed to be in the United States in violation of the law. Id. This provision becomes operative only after the government has established by prima facie evidence that the respondent is an alien. In presenting this proof, the respondent is entitled to the production of his visa or other entry document, if any, and of any other documents and records pertaining to his entry which are in the custody of DHS and not considered confidential by the Attorney General. Id.

i. This burden and presumption is applicable to any charge of deportability which brings into question the time, place, and manner of entry. Matter of Benitez, 19 I&N Dec. 173 (BIA 1984).

ii. In a case involving time, place, and manner of entry, DHS's

burden may only be to establish alienage.

In deportation proceedings there is no presumption of

citizenship. INS v. Lopez-Mendoza, 468 U.S. 1032

(1984); United States ex rel. Bilokumsky v. Tod, 263

U.S. 149 (1923). A person born abroad is presumed to

be an alien until he or she shows otherwise. See

Murphy v. INS, 54 F.3d 605 (9th Cir. 1995); Corona Palomera v. INS, 661 F.2d 814 (9th Cir. 1981);

United States ex rel. Rongetti v. Neely, 207 F.2d 281

(7th Cir. 1953); Matter of Ponco, 15 I&N Dec. 120

(BIA 1974); Matter of Tijerina-Villarreal, 13 I&N

Dec. 327 (BIA 1969); Matter of A-M-, 7 I&N Dec.

332 (BIA 1956).

d. In applications for relief from deportation, the burden of proof is on the respondent to show eligibility for the relief sought. See e.g. Matter of S-Y-G-, 24 I&N Dec. 247 (BIA 2007); Matter of Jean, 27 I&N Dec. 373 (BIA 2002).

2. In Exclusion Proceedings/ Removal Proceedings - Inadmissibility

a. Exclusion: The burden of proof in exclusion proceedings is on the applicant to show to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of the Act. INA § 291.

Once an alien has presented a prima facie case of admissibility, the

Service has the burden of presenting some evidence which would

support a contrary finding. See Matter of Walsh and Pollard, 20

I&N Dec. 60 (BIA 1988). The applicant for admission, however,

still retains the ultimate burden of proof. Id. See Matter of Y-G-, 20 I&N Dec. 794 (BIA 1994).

b. Whenever any person makes an application for admission or attempts to enter the United States, the burden of proof shall be upon such person to establish that he is not inadmissible under any provision of the Act. INA § 291. Such person shall not be admitted to the United

States unless he established to the satisfaction of the Attorney General that he is not inadmissible under any provision of the Act. Id.

c. Removal Proceedings: Under IIRIRA, the burden of proof is altered for persons who are charged with not being admitted or paroled (EWI). The burden of proof is now statutory. If the person is not an applicant for admission, DHS must first establish alienage. 8 C.F.R. § 1240.8(c). Unless respondent can show by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior lawful admission, he must show he is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2), 8 C.F.R. § 1240.8(b). If the person meets that burden, DHS has the burden to show by “clear and convincing evidence” that the person is deportable. INA §§ 240(c)(2)(B), (c)(3)(A), 8 U.S.C. §§ 1229a(c)(2)(B), (c)(3)(A).

d. An exception to the alien bearing the burden of proof occurs when the applicant has a "colorable" claim to status as a returning lawful permanent resident. In that case, the burden of proof to establish excludability is on DHS. Matter of Kane, 15 I&N Dec. 258 (BIA 1975). The DHS burden in such a case is to show by "clear, unequivocal, and convincing evidence" that the applicant should be deprived of lawful permanent resident status. See Matter of Huang, 19 I&N Dec. 749 (BIA 1988).

e. Another exception involves an alien "commuter" who is not

returning to an actual unrelinquished permanent residence in the

United States. Such an alien maintains the burden of proof to show

that he is not excludable. Matter of Moore, 13 I&N Dec. 711 (BIA

1971).

f. If the lawful permanent resident contends that exclusion

proceedings are not proper under Rosenberg v. Fleuti, 374 U.S. 449 (1963) (Fleuti), he bears the burden to prove that he comes within the Fleuti exception to the entry definition. See Molina v. Sewell, 983 F.2d 676 (5th Cir. 1993).

i. In exclusion proceedings where the applicant has no "colorable claim" to lawful permanent resident status and alleges that exclusion proceedings are improper because he made an entry and should therefore be in deportation proceedings, the burden is on the applicant to show that he has effected an entry. See Matter of Z-, 20 I&N Dec. 707 (BIA 1993); Matter of Matelot, 18 I&N Dec. 334 (BIA 1982); Matter of Phelisna, 18 I&N Dec. 272 (BIA 1982).

g. Under section 214(b) of the Act, every alien is presumed to be an immigrant. The burden of proof is on the alien to establish nonimmigrant status under INA § l0l(a)(15).

h. In cases in which the applicant bears the burden of proof, the burden of proof never shifts and is always on the applicant. Matter of M-, 3 I&N Dec. 777 (BIA 1949); Matter of Rivero-Diaz, 12 I&N Dec. 475 (BIA 1967). Where the evidence is of equal probative weight, the party having the burden of proof cannot prevail. Id. An applicant for admission to the United States as a citizen of the United States has the burden of proving citizenship. Matter of G-R-, 3 I&N Dec. 141 (BIA 1948). Once the applicant establishes that he was once a citizen and the INS asserts that he lost that status, then the INS bears the burden of proving expatriation. Id. The standard of proof to establish expatriation is less than the "clear, unequivocal, and convincing" evidence test as applied in denaturalization cases but more than a mere preponderance of evidence. The proof must be strict and exact. Id.

3. In Rescission Proceedings

a. In rescission proceedings the burden of proof is on DHS.

b. This is the same burden that DHS bears in deportation proceedings.

c. Rescission must be established by evidence that is "clear,

unequivocal, and convincing." Matter of Vilanova-Gonzalez, 13

I&N Dec. 399 (BIA 1969); Waziri v. INS, 392 F.2d 55 (9th Cir.

1968).

d. In rescission proceedings, the government must only prove ineligibility on grounds originally asserted for adjustment. It need not address any other grounds on which applicant could have sought adjustment. Shoo Hwan Kim v. Meese, 810 F.2d 1494 (9th Cir. 1987).

e. The rules of evidence are not binding in a rescission hearing. Matter of Giannoutsos, 17 I&N Dec. 172 (BIA 1979); Matter of Devera, 16 I&N Dec. 266 (BIA 1977).

f. In any proceeding conducted under this part, the immigration judge shall have authority to interrogate, examine, and cross-examine the respondent and other witnesses, to present and receive evidence, to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case. 8 C.F.R. § 1246.4.

4. In Removal Proceedings

a. Deportable: INS has burden of proving that alien is deportable by

evidence which is clear and convincing. INA § 240(c)(3); 8 C.F.R.

§ 1240.8(a).

b. Inadmissible - arriving alien: Alien has burden to prove clearly and beyond doubt that they are entitled to be admitted to the United States and not admissible as charged. 8 C.F.R. § 1240.8(b).

c. Aliens present in United States without being admitted or paroled Present Without Inspection: DHS has initial burden to establish the alienage of the respondent; once alienage is established, the respondent must establish by clear and convincing evidence that he was lawfully admitted to the United States. If the respondent cannot, the respondent must prove clearly and beyond doubt that he or she is entitled to be admitted and is not inadmissible. 8 C.F.R. § 1240.8(c).

4. In absentia Removal Proceeding

An alien who fails to appear shall be ordered removed in absentia if DHS establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable. INA § 240(b)(5)(A). An alien who, after being provided required written notice, does not attend a proceeding shall be ordered removed in absentia if the Service established by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable. Id. The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under INA § 239(a)(1)(F). Id.

5. Relief from Removal

a. The respondent has the burden of establishing eligibility for any requested relief, benefit or privilege and that it should be granted in

the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

b. Section 101(d) of the REAL ID Act of 2005, PL 109-13 (May 11, 2005) amended INA § 240(c) for applications for relief filed on or after May 11, 2005 to clarify that the applicant for relief or protection from removal has the burden to establish: (i) s/he satisfies the applicable eligibility requirements; and (ii) s/he merits a favorable exercise of discretion (where the exercise of discretion is relevant). The burden of proof to establish eligibility and to establish the privilege

of the relief is on the applicant even for applications filed before May 11, 2005. 8 C.F.R. §§ 1240.8(d), 240.11(e).

6. Credibility in Removal Proceedings

a. Pre REAL ID:

See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998), regarding credibility findings by an Immigration Judge. Detailed credibility findings are a must in asylum cases. Prior to the REAL ID Act of 2005, where an IJ did not make a credibility determination the court presumed credibility. Kayembe v Ashcroft, 334 F.3d 234, 237-39 (3d Cir. 2003). Also prior to the REAL ID Act, "absent an explicit finding that a specific statement by the petitioner is not credible we are required to accept her testimony as true." Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003).

b. Post REAL ID:

Post-May 11, 2005, cases have new, specific standards for credibility. Credibility is now determined by the "totality of the circumstances and all relevant factors." There is no presumption of credibility but the applicant has a rebuttable presumption on appeal if no adverse credibility determination is explicitly made. INA §§ 208(b)(1)(B), 240(c)(4)(C), 241(b)(3)(C).

II. SPECIFIC TOPICS IN EVIDENCE

A. DOCUMENTARY EVIDENCE

The decision to admit documentary evidence is a function committed to the discretion of the Immigration Judge. In order to assure clarity of the record, all documents should be marked and identified. Before a document may be admitted into evidence it must meet certain criteria. Opposing counsel should be given the opportunity to question the witness as to the identification and authenticity of a document. There may be also a question regarding relevance of a document. The Immigration Judge must then determine whether to admit the document. Even if a document is not admitted it must be preserved as part of the record. There are numerous requirements regarding the admission of official documents. See e.g., Matter of O-D-, 21 I&N Dec.1079 (BIA 1998).

1. Certification

a. Domestic Documents

i. Under 8 C.F.R. § 1287.6(a) an official record, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy.

ii. However, under 8 C.F.R. § 1003.41, the following documents are admissible to prove a criminal conviction:

(a) A record of judgment and conviction. 8 C.F.R. § 1003.41(a)(1);

(b) A record of plea, verdict, and sentence. 8 C.F.R.§ 1003.41(a)(2);

(c) A docket entry from court records that indicates the existence of a conviction. 8 C.F.R. § 1003.41(a)(3);

(d) Minutes of a court proceeding or a transcript of a hearing that indicates the existence of a conviction. 8 C.F.R. § 1003.41(a)(4);

(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 records which indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence. 8 C.F.R. § 1003.41(a)(5);

(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. 8 C.F.R. § 1003.41(a)(6).

iii. Pursuant to 8 C.F.R. § 1003.41(b) any document or record listed in ii above may be submitted if it complies with the provisions of 8 C.F.R. § 1287.6(a); i.e., attested by the custodian of the document or his authorized deputy, or it is attested by an immigration officer to be a true and correct copy of the original.

iv. In accordance with 8 C.F.R. § 1003.41(c) any record of conviction or abstract submitted by electronic means to the Service from a state court shall be admissible as evidence to prove a criminal conviction if:

(a) It is certified by a state official associated with the state's repository of criminal justice records as an official record from its repository, or by a court official from the court in which the conviction was entered as an official record from its repository. (8 C.F.R. § 1003.41(c)(1) provides that the certification may be by means of a computer-generated signature and statement of authenticity) and:

(b) It is certified in writing by a Service official as having been received electronically from the state's record repository or the court's record repository.

v. Lastly, 8 C.F.R. § 1003.41(d) provides that any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.

b. Foreign documents.

i. Documents from Canada may be introduced with proper certification from the official having legal custody of the record. An official record or entry therein, issued by a Canadian governmental entity within the geographical boundaries of Canada, when admissible for any purpose, shall be evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy. 8 C.F.R. § 1287.6(d). The same is true for countries that are a signatory to the Convention Abolishing the Requirement of

Legislation for Foreign Public Document (Convention). These documents must be properly certified under the Convention.

ii. Documents from countries who are signatory to the Convention Abolishing the Requirement for Legislation for Foreign Public Document

(a) Under 8 C.F.R. § 1287.6(c), a public document or entry therein, when admissible for any purpose, may be evidenced by an official publication or by a copy properly certified under the Convention.

(b) No certification is needed from an officer in the Foreign Service of public documents. 8 C.F.R. § 1287.6(c)(2). But to be properly certified they must be accompanied by a certificate in the form dictated by the Convention.

(c) Under 8 C.F.R. § 1287.6(c)(3), in accordance with the Convention, the following documents are deemed to be public documents:

(i) Documents emanating from an authority or an official connected with the courts or tribunals of the state, including those emanating from a public prosecutor, a clerk of a court, or a process server;

(ii) administrative documents;

(iii) notarial acts;

(iv) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures.

(d) Under 8 C.F.R. § 1287.6(c)(4) in accordance with the Convention, the following documents are deemed not to be public documents and are subject to the more stringent requirements of 8 C.F.R. § 1287.6(b):

(i) documents executed by diplomatic or consular agents;

(ii) administrative documents dealing directly with commercial or customs operations.

iii. Documents from countries not signatories to the Convention.

(a) There are more stringent requirements for

documents from a country not a signatory to

the Convention. Regulations provide that an

official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized. 8 C.F.R. § 1287.6(b)(1). This attested copy, with the additional foreign certificates, if any, must be certified by an officer in the Foreign Service of the United States, stationed in the country where the record is kept. 8 C.F.R. § 1287.6(b)(2). The Foreign Service officer must certify the genuineness of the signature and the official position of either:

i. the attesting officer, or

ii. any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.

The regulations at 8 C.F.R. § 1287.6(b)(1) provide that the copy attested by an authorized foreign officer may, but need not, be certified in turn by any authorized foreign officer both as to the genuineness of the signature of the attesting officer and as to his/her official position. The

signature and official position of this certifying officer may then likewise be certified by any other foreign officer so authorized, thereby creating a chain of certificates. In that situation, the officer of the Foreign Service of the United States may certify any signature in the chain.

2. Translation of Documents In accordance with 8 C.F.R. § 1003.33 any document in a foreign language offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed. Such certification must include a statement that the translator is competent to translate the document and that the translation is true and accurate to the best of the translator's abilities.

3. Copies

a. Under 8 C.F.R. § 1003.32(a), except for an in absentia hearing, a copy of all documents (including proposed exhibits or applications) filed with or presented to the Immigration Judge shall be simultaneously served by the presenting party on the opposing party or parties.

b. Service of copies shall be in person or by first class mail to the most

recent address contained in the Record of Proceeding. 8 C.F.R. §

1003.32(a).

c. A certification showing service on the opposing party on a date certain shall accompany any filing with the Immigration Judge unless service is made on the record during the hearing. Any documents or applications not containing such certification will not be considered by the Immigration Judge unless service is made on the record during a hearing. 8 C.F.R. § 1003.32(a).

4. Size and Format of Documents

a. Unless otherwise permitted by the Immigration Judge, all written material presented to Immigration Judges must be on 8 ½" x 11" size paper. 8 C.F.R. § 1003.32(b).

b. An Immigration Judge may require that exhibits or other written material presented be indexed and paginated and that a table of contents be provided. 8 C.F.R. § 1003.32(b).

5. Presumption of Regularity of Government Documents

The BIA has held that government documents are entitled to a presumption of regularity. Matter of P-N-, 8 I&N Dec. 456 (BIA 1959). It is the respondent/applicant's burden to overcome this presumption.

6. Similarity of Names

When documentary evidence bears a name identical to that of the respondent, an Immigration Judge may reasonably infer that such evidence relates to the respondent in the absence of evidence that it does not relate to him. See Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Leyva, 16 I&N Dec. 118 (BIA 1977); Matter of Li, 15 I&N Dec. 514 (BIA 1975); Matter of Cheung, 13 I&N Dec. 794 (BIA 1971); United States v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972);

7. Cases Regarding Specific Documents

a. Form I-213, Record of Deportable/Inadmissible Alien.

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

But see Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983) and other cases which hold that Form I-213s and affidavits, when the accuracy of the document is disputed by the alien, are not admissible when the right to cross-examination is thwarted, unless the declarant is unavailable and reasonable efforts were made to produce the declarant.

ii. In fact, the document would be admissible even under the Federal Rules of Evidence as an exception to the hearsay rule as a public record or report. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).

iii. Form I-213, Record of Deportable/Inadmissible Alien cannot be used where a minor made admissions without representation and was unaccompanied. Davila-Bardales v. INS, 27 F.3d 1 (1st Cir. 1994); See Matter of Amaya, 21 I&N Dec. 583 (BIA 1996) (Judge may not accept a minor's admission to a charge, but may accept a minor's admission to factual allegations).

b. Form I-130, Visa Petition - A Form I-130 and accompanying documents (birth certificate, marriage certificate, etc.) are admissible, even without identification of the Form I-130 by its maker, if there is an identity of name with the name of the respondent. Matter of Gonzalez, 16 I&N Dec. 44 (BIA 1976).

c. Form I-589, Request for Asylum in the United States - information provided in an application for asylum or withholding of deportation or removal filed on or after January 4, 1995, may be used as a basis for initiation of removal proceedings, or to satisfy any burden of proof in a exclusion, deportation, or removal proceedings. 8 C.F.R. § 1208.3(c).

8. Criminal convictions: Under INA §240(c)(3)(B), any of the following documents constitute proof of a criminal conviction: (a) an official record of judgment and conviction; (b) an official record of plea, verdict, and sentence; (c) a docket entry from court records that indicates the existence of the conviction; (d) official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction; (e) an abstract of a record of conviction; (f) any document or record prepared by or under the direction of the court indicating the existence of the conviction; or (g) any document or record maintained by a penal institution attesting to the conviction. Electronic records are also admissible if certified by state official and certified by DHS official as having been received electronically. INA §240(c)(3)(C). This list is not exclusive and the government may offer "any other evidence" to establish deportability. 8 C.F.R. §1003.41(d).

i. Aggravated Felony:

Divisible Statutes: When the conviction is under a statute that is divisible, it is necessary to look to the record of conviction (not the facts) “and to other documents admissible as evidence in proving a criminal conviction” to determine whether the specific offense is an aggravated felony. Matter of Sweetser, 22 I&N Dec. 709, 714 (BIA 1999).

The Supreme Court in Shepard v. U.S., 544 U.S. 13, 125 S.Ct. 1254, 1257 (2005) found that, in analyzing a generic conviction, the documents that may be considered are the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented.” Id.

9. Timeliness: 8 C.F.R. § 1003.31(c) states that the IJ may set and extend time limits for the filing of applications and related documents ... If an application or document is not filed within the time set by the IJ, the opportunity to file that application or document shall be deemed waived. This means that evidence may not be submitted after the close of a hearing. Where the IJ has closed the hearing, a party may not submit evidence except on a motion to reopen.

Each immigration court has local rules that define when evidence must be submitted to the court in advance of a hearing. Generally, the rules require that documents be submitted at least 10 days in advance of the hearing. However, the IJ may set his own time for the submission of documentary evidence even if it is outside of the local rules. 8 C.F.R. §1003.31(c).

10. Challenged Evidence: (1) An alien who raises the claim questioning the legality of evidence must come forward with proof establishing a prima facie case before the government will be called upon to assume the burden of justifying the manner in which it obtained evidence. Matter of Burgos, 15 I&N Dec. 278 (BIA 1975); Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988). Where an alien wishes to challenge the admissibility of a document, the mere offering of an affidavit is not sufficient to sustain his burden. Id. If the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence, then the claims must also be supported by testimony. Id.

B. ADMISSIONS MADE BY COUNSEL

1. There is a strong presumption that an attorney's decision to concede an alien's deportability ... [is] a reasonable tactical decision, and, absent a showing of egregious circumstances, such a concession is binding upon the alien as an admission. It is immaterial whether an alien actually authorized his attorney to concede deportability . . .for so long as the motion was prepared and filed by an attorney of record on behalf of his alien client, it is prima facie regarded as authorized by the alien and is admissible as evidence. An allegation that an attorney was authorized to represent an alien only to the extent necessary to secure a reduction in the amount of bond does not render inadmissible the attorney's concession of deportability in a pleading filed in regard to another matter, for there is no 'limited' appearance of counsel in immigration proceedings. Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986).

2. DHS should be held to the same standards as the respondent and is also bound by the admissions of counsel. Thus, if counsel for the DHS states at a master calendar hearing that they is not opposed to a grant of voluntary departure, the DHS cannot oppose that relief and argue that the respondent has failed to appear and establish his eligibility if the respondent is absent from a later hearing on another application for relief and his counsel withdraws the application and asks only for voluntary departure. DHS would have to present evidence of the respondent's ineligibility for voluntary departure to support its change in position concerning the relief.

C. TESTIMONIAL EVIDENCE

1. Calling the Alien to Testify

a. The government may call the respondent as a witness to establish deportability. Requiring the respondent to testify does not violate due process, absent a valid claim of self-incrimination. Matter of Laqui, 13 I&N Dec. 232 (BIA 1969), aff'd, Laqui v. INS, 422 F.2d 807 (7th Cir. 1970).

b. A valid claim to privilege against compulsory self-incrimination under the Fifth Amendment may be raised only as to questions that present a real and substantial danger of self-incrimination. Marchetti v. United States, 390 U.S. 39 (1968). Therefore, an Immigration Judge does not err in compelling nonincriminating testimony. Wall v. INS, 722 F.2d 1442 (9th Cir. 1984); Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975); Matter of Santos, 19 I&N Dec. 105 (BIA 1984) (stating that no crime is implicated when a nonimmigrant overstays his allotted time of admission).

c. Neither the Immigration Judge nor DHS counsel is in a position to offer immunity from criminal prosecution. This is an action which can only be authorized by the Attorney General or certain officials designated by him. Matter of King and Yang, 16 I&N Dec. 502 (BIA 1978); Matter of Exantus and Pierre, 16 I&N Dec. 382 (BIA 1977); Matter of Carrillo, 17 I&N Dec. 30 (BIA 1979).

2. Refusal by the Alien to Testify

Under certain circumstances, an adverse inference may be drawn from a respondent's silence in deportation proceedings. United States v. Sing Tuck, 194 U.S. 161 (1927) (exclusion proceedings; simple assertion of citizenship plus silence thereafter is not enough to avert exclusion and deportation); United States v. Alderete-Deras, 743 F.2d 645 (9th Cir. 1984); Matter of Carrillo, 17 I&N Dec. 30 (BIA 1979) (after burden of proof was shifted to respondent, silence was not enough to avert deportability). When confronted with evidence of, for example, the respondent's alienage, the circumstances of his entry, or his deportability, a respondent who remains silent may leave himself open to adverse inferences, which may properly lead in turn to a finding of deportability against him.

a. On the issue of deportability.

i. Refusal to testify without legal justification in deportation proceedings concerning the questions of alienage, time, place, and manner of entry constitutes reliable, substantial, and probative evidence supporting a finding of deportability. Matter of R-S-, 7 I&N Dec. 271 (BIA, A.G. 1956); Matter of Pang, 11 I&N Dec. 489 (BIA 1966).

ii. It is also proper to draw an unfavorable inference from refusal to answer pertinent questions where such refusal is based upon a permissible claim of privilege as well as where privilege is not a factor. Matter of O-, 6 I&N Dec. 246 (BIA 1954). The prohibition against the drawing of an unfavorable inference from a claim of privilege arises in criminal proceedings, not civil proceedings. Id. The logical conclusion to be drawn from the silence of one who claims his answers may subject him to possible prosecution or punishment is that the testimony withheld would be adverse to the interests of the person claiming the privilege. Id. Even if the refusal to testify is based on the Fifth Amendment privilege against self-incrimination, the refusal forms the basis of an inference and such inference is evidence. United States v. Alderete-Deras, 743

F.2d 645 (9th Cir. 1984) (citing Bilokumsky v. Tod, 263 U.S. 149 (1923)); Matter of M-, 8 I&N Dec. 535 (BIA 1960); Matter of V-, 7 I&N Dec. 308 (BIA 1956); Matter of P-, 7 I&N Dec. 133 (BIA 1956).

iii. 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 O-, 6 I&N Dec. 246 (BIA 1954); Matter of J-, 8 I&N Dec. 568 (BIA 1960). In deportation proceedings, the respondent's silence alone, in the absence of any other evidence of record, is insufficient to constitute prima facie evidence of the respondent's alienage and is therefore also insufficient to establish the respondent's deportability. Matter of Guevara, 20 I&N Dec. 238 (BIA 1990, 1991). Also, the record should show that the respondent was requested to give testimony, that there was a refusal to testify, and the ground of refusal. Matter of J-, supra.

b. On the issue of relief.

i. In the case of an alien who refused to answer the questions of a congressional committee on the grounds that the answers might incriminate him, the BIA held that it might well be inferred that what would be revealed by the answers to such questions would not add to the alien's desirability as a resident. Therefore, he was found not to be a desirable resident of the United States and his application for suspension of deportation was denied as a matter of discretion. Matter of M-, 5 I&N Dec. 251 (BIA 1953).

ii. An applicant for the exercise of discretion has the duty of making a full disclosure of all pertinent information. If, under a claim of privilege against self-incrimination pursuant to the Fifth Amendment, an applicant refuses to testify concerning prior false claims to United States

citizenship, denial of his application is justified on the ground that he has failed to meet the burden of proving his fitness for relief. Matter of Y-, 7 I&N Dec. 697 (BIA 1958).

iii. A respondent's refusal to answer questions pertaining to his application for voluntary departure prevented a full examination of his statutory (or discretionary, depending on the questions) eligibility for the relief sought, and such relief is properly denied. Matter of Li, 15 I&N Dec. 514 (BIA 1975). Since the grant of voluntary departure is a matter of discretion and administrative grace, a respondent's refusal to answer questions directed to him bearing on his application for voluntary departure is a factor which an Immigration Judge may consider in the exercise of discretion. Matter of Mariani, 11 I&N Dec. 210 (BIA 1965). The same applies to an application for registry under section 249 of the Act. See Matter of DeLucia, 11 I&N Dec. 565 (BIA 1966).

iv. 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 DeLucia, 11 I&N Dec. 565 (BIA 1966); Matter of

Y-, 7 I&N Dec. 697 (BIA 1958).

v. A respondent has every right to assert his Fifth Amendment

privilege against self-incrimination. However, as an

applicant for adjustment of status, he also is required to

provide information relevant to the exercise of discretion. In refusing to disclose such information, the respondent

prevents an Immigration Judge from reaching a conclusion

as to the respondent's entitlement to adjustment of status.

Therefore, the respondent has failed to sustain the burden of

establishing that he is entitled to the privilege of adjustment

of status and his application is properly denied. Matter of

Marques, 16 I&N Dec. 314 (BIA 1977).

D. THE EXCLUSIONARY RULE FOR EVIDENCE OBTAINED IN VIOLATION

OF THE FOURTH AMENDMENT PROHIBITION AGAINST UNLAWFUL

SEARCH AND SEIZURE

Deportation and Removal proceedings are civil, not criminal; therefore, the Fourth Amendment exclusionary rule is not applicable to those proceedings. Respondents/applicants cannot generally suppress evidence asserted to be procured in violation of the Fourth Amendment. See INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)[Fourth Amendment-based exclusionary rule inapplicable to deportation proceedings.]; Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). But if there was a policy or widespread abuse, or if there are egregious Fourth Amendment violations which transgress notions of fundamental fairness, the exclusionary rule might apply. Lopez Mendonza, supra at 1051-51 and n.5; Matter of Cervantes, 21 I&N Dec. 351, 353 (BIA 1996).

E. EVIDENCE OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE

OF THE FIFTH AMENDMENT

1. The BIA has held that evidence obtained by coercion or other activity

which violates the due process clause of the Fifth Amendment may be

excluded. Matter of Toro, 17 I&N Dec. 340 (BIA 1980). A coerced confession has been held to be suppressible. Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Bong Youn Choy v. Barber, 279 F.2d 642 (9th Cir. 1960). Also, evidence may be suppressed that is derived from illegal electronic surveillance. 18 U.S.C. §3504(a); Matter of Hemblen, 14 I&N Dec. 739 (BIA 1974).

2. However, a mere demand for a suppression hearing is not enough to cause

one to be held. In a claim that evidence was obtained in violation of due process, the burden is on the respondent to establish a prima facie case of illegality before the INS will be called upon to assume the burden of justifying the manner in which it obtained its evidence. Matter of Burgos, 15 I&N Dec. 278 (BIA 1975); Matter of Wong, 13 I&N Dec. 820 (BIA 1971); Matter of Tang, 13 I&N Dec. 691 (BIA 1971). There is no right to a separate suppression hearing. Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988).

3. To establish a prima facie case, statements alleging illegality must be specific and detailed, not general, conclusory, or based on conjecture. They must be based on personal knowledge, not merely the allegations of counsel. Matter of Wong, 13 I&N Dec. 820 (BIA 1971). There must be live testimony or a statement. Matter of Benitez, 19 I&N Dec. 173 (BIA 1984).

4. In addition to establishing a prima facie case, a motion to suppress evidence must enumerate the articles to be suppressed. Matter of Wong, 13 I&N Dec. 820 (BIA 1971).

5. Where a party wishes to challenge the admissibility of a document allegedly obtained in violation of the due process clause of the Fifth Amendment, the offering of an affidavit which describes how the document or the information therein was obtained is not sufficient to sustain the burden of establishing a prima facie case. If an affidavit is offered which, if accepted as true, would not form a basis for excluding the evidence, the contested document may be admitted into the record. If the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported

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

6. Even where certain evidence may have been acquired in violation of due process, the identity of the alien is not suppressible. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Bilokumsky v. Tod, 263 U.S. 149 (1923); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). Therefore, a respondent is not justified in refusing to identify himself at a deportation hearing.

In an unpublished decision, the BIA noted that neither the respondent nor his counsel objected at the outset of each of his hearings when the Immigration Judge identified the respondent by name and indicated that he was present each time. While counsel motioned the Immigration Judge to allow the respondent to refuse to identify himself, the Board held that such a motion does not effectively amount to a denial by the respondent of this true identity. The Board concluded that either the respondent's silence or lack of objection to the Immigration Judge's identifying the respondent by name are sufficient inferences that the respondent was correctly identified as the alien in the deportation proceedings.

F. THE DOCTRINE OF EQUITABLE ESTOPPEL

1. Equitable estoppel is a judicially devised doctrine which precludes a party to a lawsuit, because of some improper conduct on that party's part, from

asserting a claim or defense, regardless of its substantive validity. Matter of Hernandez-Puente, 20 I&N Dec. 335 (BIA 1991) (citing Phelps v. Federal Emergency Management Agency, 785 F.2d 13 (1st Cir. 1986)).

2. The Supreme Court has recognized the possibility that the doctrine of equitable estoppel might be applied against the government in a case where it is established that its agents engaged in "affirmative misconduct." INS v.Hibi, 414 U.S. 5 (1973); Montana v. Kennedy, 366 U.S. 308 (1961).

However, the Supreme Court has not yet decided whether "affirmative misconduct" is sufficient to estop the government from enforcing the immigration laws. INS v. Miranda, 459 U.S. 14 (1982).

3. Some federal courts have found "affirmative misconduct" and applied estoppel against the Government. Fano v. O'Neill, 806 F.2d 1262 (5th Cir. 1987); Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976).

4. Estoppel is an equitable form of action and only equitable rights are recognized. By contrast, the BIA can only exercise such discretion and authority conferred upon the Attorney General by law. The Board's jurisdiction is defined by the regulations and it has no jurisdiction unless it is affirmatively granted by the regulations. Therefore, the BIA and Immigration Judges are without authority to apply the doctrine of equitable estoppel against the INS so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. Matter of Hernandez-Puente, 20 I&N Dec. 335 (BIA 1991).

G. THE DOCTRINE OF COLLATERAL ESTOPPEL OR RES JUDICATA

1. In general

a. The doctrine of collateral estoppel precludes parties to a judgment on the merits in a prior suit from relitigating in a subsequent suit issues that were actually litigated and necessary to the outcome of the prior suit. Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984).

b. The doctrine of collateral estoppel generally applies to the government as well as to private litigants. Id.

c. The doctrine of collateral estoppel may be applied to preclude reconsideration of an issue of law, as well as fact, so long as the issue arises in both the prior and subsequent suits from virtually identical facts and there has been no change in the controlling law. Id.

d. The doctrine of collateral estoppel applies in deportation proceedings when there has been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect, the parties had a full and fair opportunity to litigate the issues resolved by and necessary to the outcome of the prior judgment, and the use

of collateral estoppel is not unfair. Id.

e. The language in section 242(b) of the Act, which provides that deportation proceedings shall be "the sole and exclusive procedure for determining the deportability of an alien," does not preclude the use of collateral estoppel in a deportation proceeding. Rather, this language was intended to exempt deportation proceedings from the provisions of any other law, most particularly the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, repealed by Pub. L. No. 89-554, 80 Stat. 378 (1966). Id.

f. Under the doctrine of collateral estoppel, a prior judgment conclusively establishes the "ultimate facts" of a subsequent deportation proceedings; i.e., those facts upon which an alien's deportability and eligibility for relief from deportation are to be determined. Collateral estoppel also precludes reconsideration of issues of law resolved by the prior judgment, so long as the issues in the prior suit and the deportation proceedings arise from virtually identical facts and there has been no change in the controlling law. Id.

2. Decisions in Criminal Proceedings

a. The adverse judgment of a court in a criminal proceeding is binding in deportation proceedings in which the respondent was the defendant in the criminal case and in which the issue is one that was also an issue in the criminal case. Matter of Z-, 5 I&N Dec. 708 (BIA 1954).

b. Where a respondent has been convicted in a criminal proceeding of a conspiracy to violate section 275 of the Act (entry without inspection or by willfully false or misleading representation or the willful concealment of a material fact) but the indictment does not contain an allegation that the respondent procured a visa by fraud, his conviction will not, under the doctrine of collateral estoppel, establish his deportability as an alien who procured a visa by fraud.

Matter of Marinho, 10 I&N Dec. 214 (BIA 1962, 1963).

c. An alien attempting to enter the United States by presenting a false Alien Registration Card, and who was paroled for prosecution and thereafter convicted in a criminal proceeding of a violation of section 275 of the Act (8 U.S.C. § 1325 - illegal entry), is not properly placed in exclusion proceedings. Although the applicant was paroled into the United States, he was prosecuted and convicted of illegal entry. Therefore, an exclusion proceeding will be terminated because, under the doctrine of collateral estoppel, the INS is prevented from denying that the applicant made an entry.

Matter of Barragan-Garibay, 15 I&N Dec. 77 (BIA 1974).

d. The definition of the term "entry" in former section l0l(a)(13) of the Act applies to both the criminal provisions of section 275 of the Act and the deportation provisions of (former) section 241(a)(2) of the Act. The definition of "entry" in section l0l(a) (13) of the Act was interpreted in Rosenberg v. Fleuti, 374 U.S. 449 (1963). Since the respondent was convicted of illegal entry in a criminal proceeding, that decision is dispositive of any possible Fleuti issue, and the respondent is collaterally estopped from relitigating the issue of illegal entry in a subsequent deportation proceeding. Matter of Rina, 15 I&N Dec. 346 (BIA 1975).

e. Where a respondent has been acquitted on a criminal charge, one of the essential elements of which was alienage, the doctrine of

collateral estoppel does not preclude litigation of the question of his alienage in subsequent deportation proceedings because of the

difference in the burden of proof applicable to criminal proceedings and to deportation proceedings. Matter of Perez-Valle, 17 I&N Dec. 581 (BIA 1980).

f. An applicant in exclusion proceedings is estopped from contending

that he was brought to the United States against his will where, in

criminal proceedings for attempted smuggling of heroin into the

United States, the court considered the same contention and found

that the applicant came to the United States voluntarily. An

applicant in possession of a visa for entry into the United States,

destined to the United States, voluntarily arriving in the United

States, and submitting his luggage for inspection by Customs

officials, must be considered an applicant for admission. Matter of

Grandi, 13 I&N Dec. 798 (BIA 1971).

g. Ordinarily a court decision may be res judicata or operate as a

collateral estoppel in a subsequent administrative proceeding. When a respondent presented a fraudulent offer of employment with his application for an immigrant visa, however, and was later convicted in a criminal proceeding of a conspiracy to violate 18 U.S.C. § 1001 (making false statements or using false writings), because of the issue of materiality the doctrine of collateral estoppel does not estop the respondent from denying that he was excludable at entry under (former) section 212(a)(19) of the Act [procured visa by fraud or willfully misrepresenting a material fact] or (former) section 212(a)(20) of the Act [immigrant not in possession of a valid immigrant visa]. A misrepresentation is material if the alien is excludable on the true facts or if it tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might have

resulted in a proper determination that he be excluded. See Matter of S- and B-C-, 9 I&N Dec. 436 (BIA 1960; A.G. 1961). In a criminal case (in those jurisdictions where materiality is required), the test of materiality is merely whether the false statement could affect or influence the exercise of a governmental function. An offer of employment is not legally required as an absolute condition for the issuance of an immigrant visa. The purpose of such a document is merely to assist the Consul in the determination of whether to issue the visa. Therefore, the respondent's misrepresentation was not material and he is not deportable for being excludable at entry. Matter of Martinez-Lopez, 10 I&N Dec. 409 (BIA 1962; A.G. 1964).

3. Decisions in Denaturalization Cases

a. Under the doctrine of collateral estoppel, a prior denaturalization judgment conclusively establishes the "ultimate facts" of subsequent deportation proceedings, i.e. those facts upon which an alien's deportability and eligibility for relief from deportation are to be determined. The doctrine precludes reconsideration of issues of law resolved by the prior judgment, so long as the issues in the prior suit and the deportation proceedings arise from virtually identical facts and there has been no change in the controlling law. Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984).

b. Where one of the principal issues in a denaturalization suit was whether the respondent had been a member of the Communist Party from 1930 to 1936, and this issue was litigated and was essential to the court's determination resulting in a judgment revoking citizenship, by the doctrine of collateral estoppel the finding by the court in the denaturalization suit was conclusive in the subsequent deportation proceeding involving a charge based upon a like period of membership in the Communist Party. Matter of C-, 8 I&N Dec. 577 (BIA 1960).

c. Under the doctrine of collateral estoppel, a finding by a

denaturalization court, which was essential to its judgment, that the

respondent was a member of the Communist Party from 1937 to

1945 is conclusive in subsequent deportation proceedings. Matter of T-, 9 I&N Dec. 127 (BIA 1960).

4. Decisions in Extradition Proceedings

Decisions resulting from extradition proceedings are not entitled to res judicata effect in later proceedings. The parties to an extradition proceeding are not the same as in a deportation proceeding since the real party in interest in extradition proceedings is the foreign country seeking the respondent's extradition, not the United States. Also, the res judicata bar goes into effect only where a valid, final judgment has been rendered on the merits. It is well established that decisions and orders regarding extraditability embody no judgment on the guilt or innocence of the accused, but serve only to insure that his culpability will be determined in another forum. While deportation proceedings also do not serve to decide an alien's guilt or innocence of a crime, those cases holding that extradition decisions do not bind judicial bodies in later criminal proceedings are also applicable to subsequent deportation proceedings. The issues involved in a deportation hearing differ from those involved in an extradition case, and resolution of even a common issue in one proceeding is not binding in the other. Therefore, a magistrate's decision in extradition proceedings that the crimes committed by the respondent in a foreign country were political crimes barring his extradition does not bind the BIA. Matter of McMullen, 17 I&N Dec. 542 (BIA 1980).

5. Decisions in Declaratory Judgment Cases

A suit under section 503 of the Nationality Act of 1940 for a judgment declaring the respondent to be a national of the United States is not the same cause of action as a proceeding to deport the respondent. Hence, the doctrine of collateral estoppel cannot be invoked in the deportation proceeding as settling the issue of alienage, notwithstanding the court's dismissal of the declaratory judgment suit. In his action for a judgment declaring him to be a national of the United States, the respondent has the burden of proving his case by a preponderance of the evidence. In deportation proceedings, the INS has the burden of proving alienage, and where it is shown that the respondent acquired United States citizenship by birth in the United States, the INS must prove expatriation by clear,

unequivocal, and convincing evidence. Because of the different burden of proof involved, the doctrine of collateral estoppel does not render conclusive in deportation proceedings the findings as to expatriation made by the court in dismissing the respondent's suit for a declaratory judgment. Matter of H-, 7 I&N Dec. 407 (BIA 1957).

6. Decisions in Prior Deportation Proceedings or Other Administrative Decisions

The doctrine of res judicata does not apply to administrative decisions of the Executive Branch. Matter of M-, 8 I&N Dec. 535 (BIA 1960); Matter of K-, 3 I&N Dec. 575 (BIA 1949). Therefore, an alien found not to be deportable by the BIA is subject to subsequent deportation proceedings by reason of a changed interpretation of the pertinent statutes together with an additional criminal conviction of the respondent. Matter of K-, supra.

7. Miscellaneous Cases

a. The fact that a respondent was inspected and erroneously admitted to the United States by an INS officer does not operate to estop the INS from instituting a deportation proceeding against the respondent if it is later discovered that he was excludable at the time of his admission. Matter of Khan, 14 I&N Dec. 397 (BIA 1973); Matter of Polanco, 14 I&N Dec. 483 (BIA 1973).

b. A respondent admitted for permanent residence in possession of an

immigrant visa issued to him as the spouse of a United States citizen upon the basis of a visa petition approved by the INS subsequent to the commencement but prior to the conclusion of deportation proceedings instituted against his wife which resulted in a determination, ultimately sustained by the United States Court of Appeals, that she was not in fact a citizen of the United States is not immune to deportation proceedings. Notwithstanding that the visa petition approval may have been an erroneous act, there was no "affirmative misconduct," and the INS is not estopped in subsequent deportation proceedings against the respondent from showing that his wife was not a citizen. The fact that a formal decision was made on the visa petition does not, by itself, give substantial weight to the respondent's estoppel argument. The approval of the petition was by no means a final determination of the citizenship claim of the respondent's wife. Matter of Morales, 15 I&N Dec. 411 (BIA 1975). This decision was based on a lack of equitable estoppel rather than on the doctrine of collateral estoppel. Under the doctrine of collateral estoppel, the respondent was not a party to the previous visa petition proceeding. As to the deportation proceedings brought against his wife, the doctrine of collateral estoppel might not apply because the burden of proof may be different in visa petition proceedings than in deportation proceedings.

c. Since applicants are not entitled to immediate relative status on the

basis of claimed adoption in the Yemen Arab Republic (which does not recognize the practice of adoption), the INS is not estopped from excluding them under (former) section 212(a)(20) of the Act as immigrants not in possession of valid immigrant visas

notwithstanding the erroneous approval of visa petitions according them immediate relative status. Not only is the INS empowered to

make a redetermination of an applicant's admissibility upon arrival

at a port of entry with an immigrant visa, it is under an absolute

duty to do so. See INA §§ 204(e) and 235(b); see also Matter of

Mozeb, 15 I&N Dec. 430 (BIA 1975).

H. ADMINISTRATIVE NOTICE

1. Although immigration proceedings are not bound by the Federal Rules of

Evidence, reference is made to the Federal Rules of Evidence for the

purposes of definition and background.

2. Rule 201(b) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

3. Rule 201(c) provides that judicial notice is discretionary and a court may take judicial notice, whether requested or not. Rule 201(d) discusses when judicial notice is mandatory and provides that a court shall take judicial notice if requested by a party and supplied with the necessary information.

4. Rule 201(e) discusses the opportunity to be heard and states that a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. It goes on to state that in the absence of prior notification, the request may be made after judicial notice has been taken.

5. The BIA has held that it is well established that administrative agencies and the courts may take judicial (or administrative) notice of commonly known facts. Matter of R-R-, 20 I&N Dec. 547 (BIA 1992) (citing Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937)).

6. The issue of administrative notice arises most often in the asylum context,

and the BIA has held that it may take administrative notice of changes in

foreign governments. Matter of R-R-, 20 I&N Dec. 547 (BIA 1992) (citing

Wojcik v. INS, 951 F.2d 172 (8th Cir. 1991)); Janusiak v. INS, 947 F.2d 46 (3d Cir. 1991); Kapcia v. INS, 944 F.2d 702 (10th Cir. 1991);

Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), cert. denied, 502 U.S. 981

(1991); Kubon v. INS, 913 F.2d 386 (7th Cir. 1990). The BIA may take administrative notice of "commonly known facts such as current events or the contents of official documents." 8 C.F.R. §1003.1(d)(3)(iv).

7. The circuits are split on the issue of administrative notice. The best practice is to advise the parties at the master calendar hearing when you are taking the application for filing whether or not you intend to take administrative notice of a change in country conditions. This avoids challenges later that the parties did not have a chance to furnish evidence relating to country conditions.

I. ITEMS WHICH ARE NOT EVIDENCE

1. The arguments of counsel and statements made in a brief or on a Notice of

Appeal are not evidence and therefore not entitled to any evidentiary

weight. See INS v. Phinpathya, 464 U.S. 183 (1984); Matter of M/V

"Runaway", 18 I&N Dec. 127 (BIA 1981); Matter of Ramirez-Sanchez, 17

I&N Dec. 503 (BIA 1980).

2. In an unpublished decision, the BIA held that a copy of an unpublished

BIA decision presented to an Immigration Judge for the purpose of

supporting the INS argument that certain published Board precedents

should be applied to a respondent's case, does not constitute "evidence" so that the alien has a right to examine it or object to it under 8 C.F.R. § 242.16(a) (1997). See 8 C.F.R. §§ 1240.10, 1240.32, 1240.48.

3. Evidence first submitted on appeal and not offered at the trial level is not considered by the BIA unless it is considered as part of a motion to remand. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Arias, 19 I&N Dec. 568 (BIA 1988); Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988); Matter of Estime, 19 I&N Dec. 450 (BIA 1987).