UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of:	**File No.: A 123-456-789**
Jane DOE	
In Removal Proceedings	**Immigration Judge Name**
	Master Calendar: date

RESPONDENT'S MOTION TO SUPPRESS EVIDENCE

Respondent, Jane Doe, by and through her representative, [Attorney Name], Esq. of [org], hereby submits this Motion to Suppress Evidence. Respondent moves for the suppression of Forms I-867A, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Immigration and Nationality Act (INA or Act), and I-867B, Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, as they were obtained in violation of 8 C.F.R.§ 235.3(b)(2).

FACTS AS KNOWN TO COUNSEL

Respondent is a lesbian from Jamaica, who entered the United States on DATE, 2013.[1] Respondent underwent a secondary inspection interview by Customs and Border Protection (CBP) Officer X on or about DATE, 2013.[2] During the interview, Respondent's strong Jamaican accent and tendency to slip into Patois created substantial communication barriers between the two individuals.[3] About two days later, Officer X returned to Respondent's cell and told her to sign Forms I-867A and I-867B.[4] Respondent did not read these forms and was not advised of any opportunity to respond to any errors in them.[5] Officer X did not present Respondent with a Form I-860, Notice and Order of Expedited Removal, which might have informed her, among other things, of the initiation of expedited removal proceedings and a finding of inadmissibility.[6]

When Respondent was transferred to X Correctional Facility, she was shown forms I-867A and I-867B and was surprised and upset to see that the forms contained errors and

[1] Exhibit A, Respondent's Declaration in Support of Motion to Suppress Evidence at 1.
[2] *Id.* at 2.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

attributed false statements to her.[7] Respondent was detained for six weeks before speaking with another immigration officer who told her she would be scheduled for a Credible Fear Interview.[8] A few days later, on DATE, 2013, Respondent was paroled out of detention.[9] Although the Notice to Appear designates Respondent an "arriving alien," she never received a Credible Fear Interview.[10] At no point did Respondent see, receive, or sign Form I-860.[11]

ARGUMENT

The exclusionary rule applies in immigration proceedings in some circumstances.[12] The United States Court of Appeals for the Second Circuit found that exclusion of evidence is appropriate "if record evidence establishe[s] either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute."[13] Regulatory violations by the Department of Homeland Security (DHS) can present a ground for suppression if the regulation violated provided a purpose of benefit to the respondent and violation prejudiced the interests of the respondent that were protected by the regulation.[14]

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[7] *Id*. at 3.
[8] *Id*.
[9] *Id*.
[10] *Id*. *See also* Notice to Appear which designates Respondent an arriving alien but where the box stating "This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture" has not been checked.
[11] *Id*. at 2-3.
[12] *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
[13] *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009) (citing *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131 (2d Cir. 2008)).
[14] *Matter of Garcia Flores*, 17 I&N Dec. 325 (BIA 1980) (holding that regulatory violations invalidate removal proceedings where (1) the regulation violated served to benefit the noncitizen and (2) the violation prejudiced interests of the noncitizen which were protected by the regulation).

I. DHS Violated 8 C.F.R. § 235.3(b)(2)

When initiating expedited removal proceedings, 8 C.F.R. § 235.3(b)(2) requires that Customs and Border Patrol Officers follow specific procedures:

> [T]he examining immigration officer shall create a record of the facts of the case and statements made by the alien. This shall be accomplished by means of a sworn statement using Form I–867AB, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act. The examining immigration officer shall read (or have read) to the alien all information contained on Form I–867A. Following questioning and recording of the alien's statement regarding identity, alienage, and inadmissibility, the examining immigration officer shall record the alien's response to the questions contained on Form I–867B, and have the alien read (or have read to him or her) the statement, and the alien shall sign and initial each page of the statement and each correction. **The examining immigration officer shall advise the alien of the charges against him or her on Form I–860, Notice and Order of Expedited Removal, and the alien shall be given an opportunity to respond to those charges in the sworn statement.** After obtaining supervisory concurrence in accordance with paragraph (b)(7) of this section, **the examining immigration official shall serve the alien with Form I–860 and the alien shall sign the reverse of the form acknowledging receipt.**

(emphasis added).

CBP Officer X interviewed Respondent and summarized his version of his conversation with Respondent and her responses in Forms I-867A and I-867B. Officer X asked Respondent to sign Forms I-867AB and did not read the statements to her. However, Respondent was at no time presented with Form I-860, Notice and Order of Expedited Removal. She was given no opportunity to respond to the determination of inadmissibility contained in Form I-860. She was also never served with this form and never signed the reverse of the form to acknowledge its receipt.

II. 8 C.F.R. § 235.3(b)(2) Is Intended to Provide a Purpose or Benefit to Respondent

To warrant suppression, the violated regulation must serve a purpose or benefit to the noncitizen.[15] The Supreme Court has held that Due Process as guaranteed by the Constitution protects noncitizens as well as citizens.[16] 8 C.F.R. § 235.3(b)(2) protects the due process rights of noncitizens being found inadmissible and placed in expedited removal proceedings at the border. The procedural protections provided allow the noncitizen the opportunity to read and respond to the charges and factual allegations contained in Forms I-867AB and I-860. The opportunity to review and respond ensures fairness to Respondent and bolsters the reliability of the documents. The Ninth Circuit has specifically recognized that Section 235.3(b)(2), including the service and signature of Form I-860, protects a noncitizen's due process rights in removal proceedings.[17]

III. Violation of 8 C.F.R. § 235.3(b)(2) Prejudices Respondent's Proceedings and Undermines the Reliability of Her Alleged Statements

The regulatory violation must prejudice the interests of Respondent that were protected by the regulation.[18] Where compliance with a regulation is mandated by the Constitution, prejudice may be presumed when the regulation is violated.[19] Additionally, prejudice can be presumed "where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency."[20]

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[15] *Garcia Flores*, 17 I&N at 329.
[16] *Matthews v. Diaz*, 96 S. Ct 1883 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.")
[17] *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014)
[18] *Garcia Flores*, 17 I&N at 329.
[19] *Id. See also U.S. v. Caceres*, 440 U.S. 741 (1979).
[20] *Garcia Flores*, 17 I&N at 329.

Here, prejudice has occurred. The Notice to Appear alleges that Respondent verbally made a false claim to U.S. Citizenship, a finding, that if sustained, risks making her permanently ineligible for adjustment of status and potentially subject to severe criminal penalties.[21] The purpose of this tripartite procedure is to ensure that Respondent had an immediate chance to contest such false claim charge when memories were fresh and witnesses readily available. Almost two years have elapsed since Respondent's secondary inspection interview, and in that time, unreliability has grown exponentially such that the only appropriate remedy is suppression.

Section 235.3(b)(2) creates a procedural framework designed to uphold fairness and reliability of evidence. However, here Respondent was not advised that the statements she made rendered her inadmissible. She has not had an opportunity to correct the inaccurate statements contained in Forms I-867A and I-867B, thus rendering them unreliable. Therefore, the admission of the evidence against Respondent renders the proceedings against her fundamentally unfair. *Singh v. Mukasey*, 553 F.3d 207, 215-16, (finding that unreliable interviews by immigration officers should be suppressed in removal proceedings).

In these proceedings, Respondent faces possible removal to Jamaica, a country where she faces a real risk of being murdered on account of her sexual orientation. Because the Respondent risks persecution if she is removed to Jamaica, Respondent should be provided her due process rights to fair removal proceedings in which only reliable evidence is submitted against her.

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[21] Immigration & Nationality Act 212(a)(6)(C)(ii); *see also* Exhibit B, U.S. Department of State Foreign Affairs Manual, 9 FAM 40.63 N11 Inadmissibility Under INA 212(a)(6)(C)(ii) stating "[T]he inadmissibility ground permanently bars an alien who . . . has falsely claimed U.S. citizenship."

CONCLUSION

Accordingly, Counsel moves on the Respondent's behalf to suppress from evidence Forms I-867AB, because they were obtained in violation of 8 C.F.R. § 235.3(b)(2).

Respectfully submitted,

[Attorney Name], Esq.
[Organization Name]
[Organization Address]
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