

## Pleadings to the Notice to Appear (or Other Charging Documents) and Contesting Removal

*Helen Parsonage (DL), Winston Salem, NC*  
*Dan Kesselbrenner, Boston, MA*  
*Francisco Ugarte, Immigration Specialist, San Francisco*  
*Public Defender Office, San Francisco, CA*  
*Claudia Slovinsky, New York, NY*

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## OVERVIEW of Topics

- Understanding the Notice to Appear (NTA)
- Service of NTA
- Reviewing and Challenging the Notice to Appear
- Contesting Charges
- Burdens
- Evidentiary Issues and Motions to Suppress
- Moving to Terminate

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Understanding a Notice to Appear

- What is an NTA?
- Did the client receive it?
- Who signed it?
- Do the charges appear to be correct?
- Has the NTA been filed in Court?

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

What is required on the NTA?  
INA § 239 / 8 C.F.R. § 239

- (A) The nature of the proceedings against the alleged noncitizen
- (B) The legal authority under which proceedings are conducted
- (C) The acts or conduct alleged to be in violation of law
- (D) The charges against the alleged noncitizen and the alleged violations

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

INA § 239 / 8 C.F.R. § 239

- (E) The respondent may be **represented by counsel and the respondent** will be provided a period of time to secure counsel and a current list of counsel
- (F) Respondent must provide an address and telephone number where he may be contacted
- (G) Notice will specify time and place of where proceedings are to be held

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---



2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

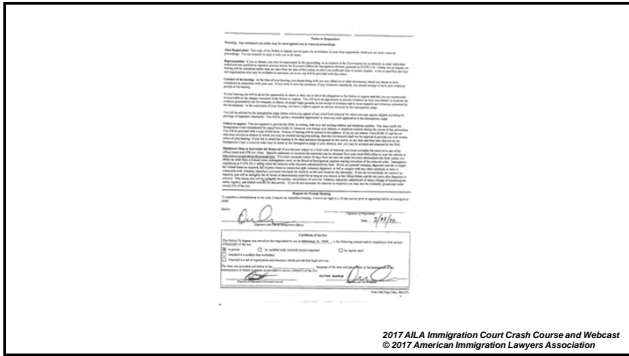
---

---

---

---

---




---

---

---

---

---

---

---

---

### What Constitutes Proper Service?

- Personal Service of NTA
- If not practicable-regular mail to last known address
- Service upon Counsel of record
- Presumption that if it was mailed, then received by Respondent. *Matter of M-D*, 23 I&N Dec. 540 (BIA 2002).
- Special rules for service on minors under 14. 8 C.F.R. § 236.2(a); 8 C.F.R. § 103.8(c)(2)(ii).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

### Last Known Address?

- Service to Last Known Address is Only Valid if Respondent has received “Change of Address” warnings of § 239(a)(1)(F) – i.e., mailing to an old address from USCIS records not sufficient if Respondent has moved.

*Matter of GYR*, 23 I & N Dec. 181 (BIA 2001)

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## What happens if there is mistake on the NTA?

- DHS gets a second shot: 1240.10(e)  
Additional charges in removal hearings.
  - “At any time during the proceeding, additional or substituted charges of inadmissibility and/or deportability and/or factual allegations may be lodged by the Service in writing.”

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Amended NTA, requirements

- Client must be served with a copy of the additional charges and allegations
- May be given a reasonable continuance to respond to the additional factual allegations and charges

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## When's the Hearing?

- Should receive Notice of Hearing in Removal Proceedings
- Call Immigration Court hotline
  - 1-800-898-7180; must have “A” number.
- Troubleshooting:
  - Have NTA, but not Notice of Hearing, no info on 1-800 #

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Notice to Appear

- Notice to appear is a charging document
- It is not evidence
- It should state that your client is not a citizen of the U.S.
- It should state whether DHS admitted your client to the United States or whether they are an "arriving alien" (*see* 8 CFR§1001.1(q)).
- It should state what DHS thinks your client did to make him or her subject to removal from U.S.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## The NTA Checklist (INA § 239)

- ✓ Does it explain the nature of the proceedings?
- ✓ Does it cite to legal authority for proceedings?
- ✓ Does it allege acts/ conduct in violation of law?
- ✓ Does it state charges and statutory provision violated?

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## The NTA Checklist, cont'd (INA § 239)

- ✓ Does it state the right to be represented by counsel?
- ✓ Does it state the requirement to provide notice of a change of address and consequences for failure to do so?
- ✓ Does it specify the time and place where proceedings will be held
- ✓ Was it properly served?

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## You' ve Got the NTA- Now what?

- Read all information very carefully
- Are the factual allegations correct?
- Does it contain all of the required information under the regulations?
- Was it signed by the right person?
- Is your client in §212 proceedings or §237 proceedings?
- Can the government sustain the legal charges against your client?
- Does the factual allegation relate to the alleged ground of removal/inadmissibility?

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Practice Tip

- Read statute
- Write up elements of ground of removability
- Does DHS have evidence to prove every element?
- Have you seen it?
- Is it admissible?
- Does it prove what it purports to prove?

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Rights to Ensure a Fair Hearing

- Due Process right to a full and fair hearing.
- Right to present witnesses.
- Right to present testimony.
- Right to consideration of all evidence in the record.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

### Do Not Admit or Concede Unless You Are Sure

- Don't assume the government is correct with their allegations
- Don't concede any fact or point of law unless you are positive that it is correct
- Don't assume the government has sufficient proof to sustain the charges against your client
- In a charge involving a conviction, don't assume your client has been convicted as charged because the NTA says so; double-check 101(a)(48)(A)(definition of "conviction")

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

### Responding to Charges

Some practitioners prefer to respond to the charges at the Master Calendar Hearing by saying:

- "The respondent neither admits nor denies the allegations but calls on the government to prove the allegation."

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

### Impact of Conceding

- There is a strong presumption that an attorney's concession of deportability binds a respondent, absent egregious circumstances. *Matter of Velasquez*, 19 I. & N. Dec. 377, 382 (BIA 1986).
- That being said, certain IJs may allow withdrawal of pleadings made before counsel's entry of appearance.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## When *might* you concede?

- Client is detained and wants quickest resolution possible.
- Clear case law on point for whether a particular conviction triggers a ground of removability & you can find no argument to assert against government's charge.
- Never concede removability without investigating the charges, researching case law, exploring potential arguments, and speaking with your client about risks associated with concession.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

The burden of proof is on different parties depending on the charges and the stage of the case in removal proceedings

## **BURDEN OF PROOF**

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

Initial Burden is on Government to Prove Respondent is not a U.S. Citizen

- In every removal proceeding, DHS bears the burden of proving the respondent is not a citizen or national of the United States.
- Proof of "alienage" is a threshold jurisdictional fact.
- Respondent can only be called to testify once Government has presented some evidence of alienage, *Matter of Tang*, 13 I & N Dec 691, 692-3 (BIA 1971). No proof, no case!

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---



**Burden of Proof**

Which party bears the burden of proof depends on various factors

- Is the client seeking admission?
- Is the client facing charges of inadmissibility?
- Is the client facing charges of deportability?

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

**Burden authorities**

- Deportability – 8 U.S.C. § 1229a(c)(3)(A); INA § 240(c)(3)(A).
  - Applicant for Admission in removal- 8 U.S.C. §1229a(c)(3)(A); INA §240(c)(2), 8 C.F.R. §1240.8(b).
  - Burden shift 8 U.S.C. § 1361; INA §291
- Once DHS produces evidence of alienage, burden shifts to respondent to show time, place, and manner of entry.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

**Burden of Proof- client lawfully admitted**

- If your client has been lawfully admitted and is facing deportability under INA §237, **the government has the burden of establishing deportability by clear and convincing evidence.** INA § 240(c)(3)(A).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Burden of Proof- Applicant for Admission

- An applicant for admission in removal proceedings, other than a returning resident, bears the burden to demonstrate that applicant is "is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212;" or "by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission."  
INA §240(c)(2).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## LPRs can face Inadmissibility: Sometimes

LPRs returning to the US from a trip abroad may be charged as inadmissible under INA §212(a)(2) if they have been convicted of certain crimes. INA § 101(a)(13)(C)(v). Government bears burden- *Matter of Rivenes*, 25 I&N Dec. 623 (BIA 2011).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Evidentiary Considerations & Rules

- The Federal Rules of Evidence (FRE) do not apply to removal proceedings.
- However, evidence is subject to a standard of fundamental fairness. *Bridges v. Wixon*, 326 U.S. 135 (1945); *Matter of DeVera*, 16 I&N Dec. 266, 268-69 (BIA 1977).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Legal Authority- Evidence

- INA §240(b)(4); and
- 8 C.F.R. § 1240.10(a)(4) (the IJ shall “[a]dvice the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her ... and to cross examine witnesses presented by the government”).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Government Evidence

The government will typically seek to prove deportability and criminal activity with the following documents:

- Form I-213;
- Certified copies of criminal dispositions;
- Extrinsic evidence (foreign documents; affidavits; reports).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## I-213 Presumed Reliable

In the absence of any proof that the Form I-213 contains information which is incorrect or which was obtained by coercion or force, this form is considered inherently trustworthy.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## How to Attack an I-213?

- Accuracy
- Authentication
- Is there evidence of alienage?
- Age of I-213

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Common Objections to Evidence

- Prejudicial and/or unreliable hearsay
- Lack of Foundation
- Lack of Authentication

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Hearsay

- An out of court statement used in court to establish the truth of the matter asserted
- Can be documentary or testimonial
- Test: Is the statement or document probative and is its admission fundamentally fair?
- Double, triple hearsay less likely to be admissible

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Due Process Evidence Test

- Fundamental fairness or due process violations require a defect in proceedings and that the noncitizen suffers prejudice as a result of that defect.

*Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008)(Admission in asylum case of DOS letter that lacked reliability and which noncitizen could not test because source of information was not clear violated fundamental fairness requirement.)

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Authentication

- INA § 240(c)(3)(B) (proof of convictions) and (C) (electronic records)
- 8 CFR §287.6 – Proof of Official Records
- 8 C.F.R. §1003.41 – Evidence of Criminal Conviction
- *See* FRE §901 – Authentication Requirement

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Don't be Afraid to Object

- If the government tries to bring in an irrelevant issue or evidence that is prejudicial and seems unfair-- then object.
- If the I-213 is not factually correct based on what your client is telling you--then object to its admission.
- If the conviction documents are not properly certified and don't meet the authentication requirements, then object to their admission.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Right Against Self-Incrimination in Removal Proceedings

- Individuals in removal proceedings can assert right against self-incrimination under 5th Amendment due to any potential criminal charges that may arise from admissions. See *Matter of Sandoval*, 17 I&N Dec. 70, 72 n.1 (BIA 1979); *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991)(an adverse inference drawn from silence is by itself insufficient to establish alienage).
- *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972) (privilege may be invoked "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.")

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Admissibility v. Reliability/Weight

### Admissibility

- Whether evidence should be in the record
- Test for admissibility: Whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process.

### Reliability/Weight

- How much the IJ should rely on the evidence, if admitted

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Statutory and regulatory authority for subpoenas

- INA §240(b)(1); 8 U.S.C. §1229a(b)(1) provides that the IJ has “authority to issue subpoenas for attendance of witnesses and presentation of evidence.”
- 8 C.F.R. §§1003.35(b), 287.4(a)(2), 1287.4(a)(2) implement the statute.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Motion to Suppress

- Make a motion to suppress evidence where ICE violates a right to benefit the noncitizen and noncitizen suffers prejudice. But if a right is mandated by the Constitution “prejudice may be presumed.” *Matter of Garcia-Flores*, 17 I & N Dec. 325, 328-329 (BIA 1980).
- *Matter of Barcenas*, 19 I. & N. Dec. 609, 611 (BIA 1988) (requiring noncitizen to make out prima facie case of illegality or coercion in obtaining evidence).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Motions to Suppress, cont'd

- Exclusionary rule available for “egregious Fourth Amendment violations.”  
*Yanez-Marquez v. Lynch*, 789 F.3d 434, 450 (4th Cir. 2015).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Motions to Terminate

- Agency bound by its own regulations and rules. *Morton v. Ruiz*, 415 U.S.199 (1974) ; *Accardi v. Shaughnessy*, 347 US 260 (1954); see also *Singh v. U.S. Department of Justice*, 461 F.3d 290 (2d Cir. 2006)

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Elements of a Motion to Terminate

- ICE violation of regulation
- Intended to benefit noncitizen (or, implicates fundamental rights in Second Circuit)
- Prejudice, where required

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---



## General BIA Prejudice Rule

- BIA generally requires prejudice. *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980), citing *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979).
- *Garcia-Flores* creates an exception for regulation compelled by U.S. Constitution.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Garcia-Flores Exception

- No prejudice required in Second Circuit. *Singh v. U.S. Department of Justice*, 461 F.3d 290 (2d Cir. 2006); *Waldron v. INS*, 17 F.3d 511 (2d Cir. 1994) (when a regulation is promulgated to protect a fundamental right derived from Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is invalid.)
- Maybe in Third Circuit too, see dicta in *U.S. v. Briscoe*, 69 F. Supp. 2d 738 (D.V.I. 1999).

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Possible Regulatory Violations

- No entry of non-public area of business or home w/o warrant or consent. 8 CFR 287.8(f)(2).
- No excessive force. 8 CFR 287.8(a); *see especially id.* 287.8(a)(1)(iii) (ICE officer “shall always use the minimum non-deadly force necessary to accomplish the officer’s mission”)

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## More Possible Violations

- No coercive questioning. 8 CFR 287.8(c)(vii)
- No detention without reasonable suspicion 8 CFR 287.8(b)(2).
- No arrest without probable cause. 8 CFR 287.8(c)(2)(i)

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

## Strategic Advantage of Termination

- Even if evidence admitted, respondent can pursue termination, thus especially valuable for cases in which ICE has other evidence of alienage (so a Motion to Suppress would not be effective).
- The full story can be told of the violation(s).
- Client need not take the 5<sup>th</sup> Amendment.

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---

Questions?  
Comments?

2017 AILA Immigration Court Crash Course and Webcast  
© 2017 American Immigration Lawyers Association

---

---

---

---

---

---

---

---