UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
120 MONTGOMERY ST., SUITE 800
SAN FRANCISCO, CA 94104

MORRISON & FOERSTER, LLP
YANG, MIMI
425 MARKET STREET
SAN FRANCISCO, CA 94105

Date: Jul 13, 2011

File [redacted]

In the Matter of:
[redacted]

_____ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

__XX__ Enclosed is a copy of the decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

_____
Immigration Court Clerk UL

cc: EASH, SCOTT A.
120 MONTGOMERY STREET, STE 200
SAN FRANCISCO, CA 94104

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

Matter of	)	Date: JUL 13 2011
[redacted]	)	File Number: [redacted]
Respondent	)	In Removal Proceedings

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

Application: Motion to Suppress.

On Behalf of Respondent:
Mimi Yang and Jason Bartlett
Morrison & Foerster, LLP
425 Market Street
San Francisco, California 94105

On Behalf of the DHS:
Scott Eash
Office of the Chief Counsel
120 Montgomery Street, Suite 200
San Francisco, California 94104

DECISION OF THE IMMIGRATION JUDGE

The Court hereby incorporates the procedural history and findings of its July 6, 2009, and August 10, 2010, decisions and adds the following:

I. PROCEDURAL BACKGROUND

On June 1, 2009, Respondent, [redacted], filed a motion to terminate removal proceedings and suppress the Form I-213 in this case on the basis that the information contained within the document was gathered in violation of the United States Constitution and the Federal Regulations. On July 6, 2009, this Court held that Respondent's affidavit in support of her motion to suppress, if taken as true, set forth a *prima facie* case for suppression, subject to her testimony in accordance with the affidavit, and the Court set the case for a hearing pursuant to *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). On October 26, 2010, the Court held a hearing in compliance with *Barcenas* so that Respondent could support her claim with testimony and be cross-examined. Following Respondent's testimony, the Court found that Respondent established a *prima facie* case for suppression under *Barcenas*, 19 I&N Dec. 609; therefore, the Court shifted the burden of proof to the Department of Homeland

[redacted]

Security ("DHS") to justify the manner in which it obtained the evidence. *See id.* at 611.

On October 26, 2010, the DHS submitted a copy of a criminal search warrant for a number of [redacted] restaurants, including the [redacted], California, location, where Respondent was employed at the time of the May 2008 operation. The DHS also presented the testimonies of Immigration and Customs Enforcement ("ICE") Agents Mark Green and Hermila Flores on April 7, 2011. Respondent submitted a written closing argument on May 9, 2011, and the DHS submitted its written closing argument on June 6, 2011. Respondent replied to the DHS's closing argument on June 23, 2011, and the DHS filed a response to that reply on July 11, 2011.

For the reasons stated below, the Court admits the warrant into the record, but it finds that the DHS's evidence is insufficient to meet its burden, and the Court terminates proceedings.

II. EVIDENCE PRESENTED

A. Testimony of Respondent

On October 26, 2010, Respondent testified regarding her experience at the [redacted], California, [redacted] restaurant on May 2, 2008. That morning, she was in an outside storage area getting supplies with her manager. On cross-examination, she explained that the restaurant keeps items such as plates and cutlery in the storage area, and the restaurant had received a number of catering orders that day, so the workers were busy preparing for the orders. She testified that her main job at the restaurant was to assemble burritos on the "line" for customers. The DHS asked Respondent why her declaration states that she was working on the line heating tortillas on the morning of May 2, 2008, at around ten o'clock in the morning. *See* Exh. 9. When asked to explain why her declaration appears to conflict with her testimony that she was in the storeroom when the agents entered, Respondent testified that there were a number of large catering orders that day. She explained that while working, it was very common to be told to accompany someone to the storeroom to get additional supplies.

Respondent testified that while she and her manager were in the storeroom, agents entered the restaurant yelling "stop, police." There were five or six agents, and some of them had handguns. On cross-examination, she testified that she had not been in the storeroom for very long when the agents entered. On re-direct examination, Respondent testified that the lights were on at the time the agents entered. She testified that she saw police officers outside the restaurant before the agents entered, but their presence was normal because they were regular customers. On cross-examination, she testified that these officers were not the immigration agents who entered the restaurant later.

On cross-examination, Respondent testified that the storeroom did not have windows, and it had large cardboard boxes and bags on the floor. The DHS asked Respondent how she could see the agents enter the restaurant if she was in the storeroom. In response, Respondent explained that she considered the "restaurant" to include all of the [redacted] property. She

clarified that she did not personally see agents enter the front door of the main restaurant, and when she wrote in her declaration that the agents yelled "police" as they entered, she was referring to their statements as they entered the storeroom. She explained that she could see agents blocking the entries and exits of the restaurant after she was brought down from the storeroom.

When asked why she did not include in her declaration the fact that she was in the storeroom, Respondent testified that she did not think to include it because she did not know that she had to be that specific in her declaration. The Court clarified the question, explaining to Respondent that her declaration leads a reader to believe that Respondent was still on the line making tortillas when the agents entered. When asked again why her declaration does not mention that she went upstairs to the storeroom, Respondent testified that she did not think that it was very important that she was in the storeroom; she did not include it in her declaration because her declaration would be too long if she gave every detail.

On cross-examination, Respondent denied being in the storeroom in an attempt to elude ICE agents; rather, she was there because her manager told her to help her get supplies. She testified that she was standing with her back to the door of the storeroom when the agents entered. She denied that she was crouched down at the time, although she testified that she later crouched down when the agents told her to sit down. Respondent described the storeroom, stating that there were objects piled around, but she believed that one could nevertheless have seen her from the top of the stairs. According to Respondent, she was wearing an apron and a shirt supplied by [redacted].

Respondent testified that only she and her manager went to the storeroom to get supplies; however, at the time the agents entered, two male coworkers were in the storeroom too. She testified that she did not know when they got there, but when she turned around, she saw them lying on the ground. According to Respondent, she did not see the male workers enter, and she never learned why they came into the storeroom.

Respondent testified that agents asked her if she had any weapons on her, and she made a comment about not needing a weapon to make burritos. According to Respondent, when she said this, one of the agents became angry and asked her if she was trying to be sarcastic. He tried to push Respondent to the floor, but another agent stopped him and yelled at Respondent to sit down and be quiet. On cross-examination, Respondent testified that she complied and crouched down onto the ground. Respondent testified that the agent was male, and he was larger than Respondent. Another agent told Respondent to put her hands in the air, and he sent Respondent to the first agent. Another agent told Respondent to put her hands behind her and told her that she was under arrest because she was "illegal in this country." Respondent testified that at this point in the encounter, she had not said anything other than the comment about the burritos.

On cross-examination, she testified that she was transferred between several agents and then placed in plastic handcuffs. The handcuffs were tight, and Respondent asked for them to be

loosened several times before agents replaced them with metal handcuffs. Respondent testified she was not questioned before she was handcuffed. The agent who told her that she was under arrest because she was in the country illegally spoke in English, and Respondent was able to understand because Respondent has studied some English.

After Respondent was handcuffed, an agent brought her into the main part of the restaurant and had Respondent and the other people who the agents had encountered in the storage facility sit at tables. One of Respondent's coworkers told the agents that Respondent had a heart problem, and an agent asked Respondent if she needed to see a doctor. Respondent testified that she could not answer the agent because she was crying so hard. The agents did not tell Respondent that she had the right to remain silent or that she had the right to an attorney.

After Respondent was seated at a table, a Latina female agent came to the table. The Latina female agent left Respondent at the table, and a male agent sat with Respondent. The male agent told Respondent that she had to answer the questions that he would ask her, and he proceeded to ask her name, the names of her children and parents, where she was born, and where her children were born. Respondent answered the questions because she believed that she had no other choice. Respondent remained in handcuffs during the questioning, which lasted under an hour. On cross-examination, Respondent reiterated that she was questioned at the table, and not in the storage room where she first encountered agents. She testified that her mind was not focused during the questioning because she was worried about her children. Respondent denied that her concern could have led her to misunderstand some of the things that were said to her that morning.

While being questioned, Respondent could see her coworkers seated at the tables, handcuffed, and being questioned. In addition to Respondent and her coworkers, the owner of the restaurant, [redacted], and two secretaries were at the restaurant that day. Respondent testified that [redacted], who is Caucasian, and the secretaries were not questioned, and they were not held in handcuffs.

Around two o'clock in the afternoon, agents told Respondent that she was permitted to return home so that she could care for her children. Without asking Respondent's permission, an agent checked through Respondent's handbag before giving it to her. The agents then gave Respondent a paper directing her to report to their offices, and they allowed her to leave. Respondent testified that the agents never told her that the operation was directed at the owners of the restaurant.

Respondent testified that she went to the ICE offices on May 14, 2008, as she was directed to do in the paper she was given. Her attorney accompanied her, and, on her attorney's advice, she did not answer questions relating to her or her parents' nationality. On cross-examination, Respondent reiterated that at her interview on May 14, 2008, she did not provide any information regarding her alienage. She agreed that the only source of that information on ICE forms must have come from her interview at the [redacted] restaurant on May 2, 2008.

B. Testimony of Agent Mark Green

On April 7, 2011, ICE Agent Mark Green testified in support of the DHS. Agent Green is a DHS Special Agent, and he served as team leader of the execution of the search warrant at the [redacted] location on May 2, 2008. Agent Green described his training and experience, which includes employment with the DHS and its predecessor agency since 1988. He has been the lead agent during the execution of "dozens" of search warrants. On cross-examination, Agent Green testified that he had no specific recollection of encountering Respondent during the [redacted] operation. It was his understanding that Respondent was interviewed primarily by ICE Agent Hermila Flores, but he moved around during the operation, so he did not personally observe the interview.

On cross-examination, he described his training and understanding of Fourth Amendment law. He testified that there was not an arrest warrant for any individual at the [redacted] locatiom, and he was not aware of there being probable cause for an arrest warrant at the time the agents entered the restaurant. He also described the manner in which he prepared for his testimony, including reviewing the operation plan and the "scratch" Form I-213, which is a handwritten version of the Form I-213 that Respondent seeks to suppress.

In Agent Green's opinion, the warrant was facially valid, and it authorized the search of the premises of the [redacted] restaurant for evidence of hiring or harboring illegal aliens. Agent Green testified that he led a pre-operation meeting on May 1, 2008, where he discussed the procedure for the May 2 operation. Agent Green perceived the search to be a low-threat, low-key operation, so he advised his agents to avoid the use of excessive force or the display of weapons. On cross-examination, he added that he instructed the team to treat everyone with respect. On May 2, 2008, he led another short meeting at the site before the operation commenced. There were various roles assigned to different agents, and Agent Flores was one of two assigned interviewers because of her language skills. Agent Green did not interview any of the restaurant workers, though he did speak to [redacted] and a secretary. The secretary and [redacted] were permitted to leave the restaurant.

Agent Green testified that he led the entry of the restaurant by walking calmly into the restaurant, introducing himself to an employee, and asking to speak to the manager. The other agents proceeded to search the premises and ensure that the restaurant was under control by blocking the exits. Agent Green testified that he did not hear any agent running into the restaurant shouting "police."

Agent Green explained that because the agents were executing a criminal search warrant, they brought everyone on the premises into a common area for officer safety and in order to prevent destruction of evidence. Agent Green's role during the process was to move around the restaurant and ensure that the other agents were carrying out their duties appropriately. He described the environment as one of the most low-key search warrants he had participated in. Agent Green explained that people were not running, and the employees were cooperative. He

testified that he did not hear agents yelling, though he did hear a few agents in the attic giving instructions at a volume louder than a normal voice. When asked what occurred in the attic, Agent Green testified that one of the agents told him that some people were hiding there. After the lower level was secure, Agent Green went upstairs to look at the attic. He described it as a two-room storeroom for supplies, and he testified that the agents told him that people had crawled into the second room to avoid detection. Agent Green saw several [redacted] workers, including a female worker, being searched and moved about by the agents in the storeroom. He did not see anyone thrown to the ground. On cross-examination, he testified that the agents did not tell him who was in the crawl space in the attic. According to Agent Green, the employees who were in the attic were brought to the common area of the restaurant, where they were questioned about their employment, biographical data, and identification. Agent Green expressed his belief that this questioning was authorized by law as part of the execution of the search warrant.

When asked if it is typical for an agent to tell someone that she is under arrest because she is in the country illegally, Agent Green testified that such a statement is not standard because agents must have reasonable suspicion "to go there." He testified that a person in that situation would be detained for a reasonable amount of time "to determine if [the person] had evidence" and for officer safety, but the person would not be put under arrest at that point. On cross-examination, he testified that he did not arrest anyone during the [redacted] operation, but agents on his team did arrest some of the workers. He explained that the agents arrested the workers after interviewing them and determining that there was probable cause to arrest them. He testified that the probable cause was based on evidence that the workers were either in the United States illegally or there was no way for them to prove that they were in the United States legally.

Agent Green testified that the agents ran a records check and determined that two female workers did not have outstanding warrants, so the agents allowed the women to leave so that they could care for their children. Agent Green did not witness the search of Respondent's purse, but he testified that, for officer safety, it is standard procedure to search anything in the immediate reach of someone who is detained or arrested. Even where one is released, it is appropriate for an agent to search a bag if the agent feels something hard or has a suspicion that there might be a weapon.

Agent Green observed Agent Flores's behavior during the search, and he found her to have acted professionally and appropriately throughout the search. Agent Green testified that he was present throughout the search, and he was one of the last two people to leave the restaurant.

C. Testimony of Agent Hermila Flores

On April 7, 2011, ICE Agent Hermila Flores testified. Agent Flores has worked for the DHS and its predecessor agency since 1998. She described her training and experience, including courses at the federal law enforcement training center. She is a native Spanish speaker, and she has a degree in Spanish. Agent Flores participated in the May 2, 2008, operation at the

[redacted] restaurant. She explained that she was included in the operation because of her Spanish language abilities. According to Agent Flores, she tries to make people as calm as possible while executing a warrant. She first asks them if they speak English and then asks them, in Spanish, if they speak Spanish and, if so, if they would like to continue in Spanish. On cross-examination, Agent Flores testified that when she encounters someone who she believes might speak Spanish, she asks them "in our native language" if they speak Spanish, and if so, if they have immigration papers.

On cross-examination, Agent Flores testified that the May 2, 2008, operation was conducted pursuant to a criminal search warrant. She did not recall seeing any individual's name on the warrant because it was a warrant for documents, not people. When asked if she inquired of any of the workers if they had the types of documents listed in the warrant on their person, Agent Flores answered that if the workers claimed to have lawful resident status, Agent Flores would ask to see their green card. Agent Flores testified that she did not serve as the document custodian during the operation, and she did not remember if any documents were collected that day.

According to Agent Flores, the team of agents entered the restaurant on May 2, 2008, led by Agent Green, who was calm and methodical. She testified that people were not screaming, but she did observe that a woman was afraid. In the courtroom, Agent Flores looked at Respondent and stated that she did not recognize her; it was a different woman who Agent Flores recalled was crying, and that woman was not released as Respondent was following the search.

Agent Flores testified that after Agent Green announced why the agents were there, the workers calmly assembled in the dining room, as directed. Moving around the room, Agent Flores spoke with almost all of the workers. She asked each worker his or her name, nationality, parents' biographical information, date of birth, address, whether he or she had children, and whether he or she had a medical condition. She noted this information on a Form I-213. When asked if she fills out I-213s for United States citizens, Agent Flores stated that she would likely keep a record of her encounter with such an individual, along with biographical information relating to that person; however, she did not encounter any United States citizens on May 2, 2008. On cross-examination, Agent Flores testified that she did not recall encountering [redacted] on the day of the operation. She testified that she filled out an I-213 for everyone she spoke to who spoke Spanish and was not in the United States legally. She did not recall meeting anyone at the restaurant who spoke English that day.

At the [redacted] restaurant, Agent Flores interviewed Respondent and filled out a Form I-213 relating to her. She testified that she did not recognize Respondent in court, but she got the information on the I-213 from someone with Respondent's name. Agent Flores testified that, while she did not recognize Respondent's face, she remembered some of the interview with her. Regarding the statement, "hiding in upstairs room," written on the I-213, Agent Flores testified that individuals were found hiding in other places. She testified that she did not "venture out" of the main group in the restaurant. Agent Flores testified that she was not the agent who

encountered Respondent, and she did not know which agent encountered her. Agent Flores did not recall who told her that Respondent had been hiding. She testified that after everything was secure, she went upstairs "out of curiosity," as well as to retrieve the shoe of one of the female workers. She recalled that there were a number of boxes in the upstairs storage area.

When asked why she suspected that Respondent was an alien at the time she interviewed her, Agent Flores testified that Respondent was brought downstairs "from hiding," and her demeanor was "shameful" and "uncouth." On cross-examination, she elaborated that Respondent was demanding and expected to be released even before Agent Flores finished the records checks necessary to verify that Agent Flores could, in fact, allow Respondent to go home. Agent Flores testified that she did not consider Respondent to be under arrest at the time she was brought downstairs. In Agent Flores's view, Respondent was simply detained pending determination of her alienage. On cross-examination, Agent Flores testified that she would not have told Respondent that she was under arrest. When asked if she told Respondent that she was *not* under arrest, Agent Flores testified that she told Respondent that she was being detained while Agent Flores conducted the search. Agent Flores testified that she would make a distinction in Spanish between the word "arrest" and the word "detained." When asked specifically what words she would have used, Agent Flores stated, "If I used any, it definitely would have been 'arrested,' but I don't recall the conversation." On re-direct examination, Agent Flores testified that she misspoke, and she meant to say that she would have used the word "detained." She testified that if someone speaks Spanish, she asks to see the person's immigration papers; however, she does not view speaking Spanish as reasonable suspicion that the person is in the United States illegally or as probable cause to arrest the person. In the execution of a criminal search warrant like the one in question, Agent Flores believed it permissible to ask individuals she encountered about their nationality.

She testified that she would have looked through Respondent's purse prior to giving it to her so as to be sure that there was nothing in the purse that Respondent could use to harm herself or Agent Flores as Respondent left the restaurant. Agent Flores used only Respondent's statements, and no information from the purse, in compiling the Form I-213. On cross-examination, she agreed that there were things written in someone else's handwriting on the Form I-213, and she did not know who wrote those statements.

In Agent Flores's observation of the operation, she did not see agents ridiculing the workers or acting inappropriately.

III. ANALYSIS

A. Admission of Warrant

In reaching a decision in this case, the Court may consider evidence that is "probative and its use fundamentally fair, so as not to deprive an alien of due process of law." *Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785

(BIA 1999); *see also Lopez-Chavez v. INS*, 259 F.3d 1176, 1181 (9th Cir. 2001). When a respondent questions the legality of evidence, she must come forward with proof establishing a *prima facie* case that the Government's evidence was unlawfully obtained. *Barcenas*, 19 I&N Dec. at 611 (citations omitted). Only after a respondent makes a *prima facie* showing does the burden shift to the Government to prove that it obtained its evidence lawfully. *Id.*; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980) (citation omitted).

Here, Respondent submitted a declaration with her motion to suppress on June 1, 2009. Taking the declaration as true, the Court found that Respondent set forth a *prima facie* case for suppression, and the Court heard testimony on October 26, 2010. Based on the evidence before it at that time, the Court found that Respondent testified credibly. Therefore, the Court shifted the burden to the DHS to justify the manner in which it obtained the information contained in the Form I-213. That same day, the DHS submitted a copy of the criminal search warrant that authorized the May 2, 2008, operation at the [redacted] restaurant. Exh. 7.[1] Prior to the Court's October 26, 2010, order shifting the burden of proof to the DHS, the DHS was not required to submit any evidence. Therefore, the Court finds that its submission of the warrant on October 26, 2010, was timely. The Court finds that the warrant is probative, as it relates directly to whether ICE's search of the [redacted] restaurant and associated detention of Respondent was lawful. Furthermore, the Court finds that introduction of the warrant is fundamentally fair: the warrant was submitted in October 2010, and the parties have had the opportunity to present additional testimony and arguments since that time. Accordingly, the Court admits the warrant into evidence as Exhibit 7.

B. Suppression of the Form I-213

Fifth Amendment

While the exclusionary rule is not *per se* applicable in regard to allegations of Fifth Amendment violations in removal proceedings, evidence is nevertheless inadmissible if it was obtained in violation of the alien's privilege against self-incrimination, or if the statement was involuntary or coerced. *See Matter of Sandoval*, 17 I&N Dec. 70, 83 n.23 (BIA 1979); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980). The Board of Immigration Appeals ("Board") has held that evidence obtained by coercion or other activity which violates the due process clause of the Fifth Amendment may be excluded. *See Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980) (citations omitted); *Garcia*, 17 I&N Dec. at 321. A statement may also be excluded under the Fifth Amendment if the circumstances surrounding the interrogation were fundamentally unfair. *See Toro*, 17 I&N Dec. at 343.

The Ninth Circuit has concluded that the analysis of whether a statement was made voluntarily is "markedly different" in civil proceedings as compared to criminal trials. *Cuevas-*

[1] The document was previously marked for identification only as Exhibit 7. For the reasons explained below, the Court hereby admits Exhibit 7 into the evidentiary record.

Ortega v. INS, 588 F.2d 1274, 1277. In *Cuevas-Ortega*, it elaborated:

> [S]ince it is the alien's burden to show lawful entry, since he must answer non-incriminating questions, since his silence may be used against him, and since his statements are admissible despite lack of counsel, it is more likely than not that the alien will freely answer the government agent's questions. Thus, where there is nothing in the record indicating that the alien's statement was induced by coercion, duress or improper action on the part of the immigration officer, and where the petitioner introduces no such evidence, the bare assertion that a statement is involuntary is insufficient.

Id. at 1277-78 (internal citation omitted). Coercion and duress may be demonstrated by a showing that the statement was obtained through physical abuse, hours of interrogation, denial of food or drink, threats or promises, or interference with the respondent's attempt to exercise his rights. *See Ramirez-Sanchez*, 17 I&N Dec. at 506. The Board has found that a respondent's admissions were involuntary when he was led to believe that his return to Mexico was inevitable, he was detained without any explanation of why he was in custody, he could not communicate with his attorney, and all of his attempts to contact his attorney were actively interfered with by the immigration officer interrogating him. *Garcia*, 17 I&N Dec. at 320-21.

Fourth Amendment

A respondent cannot generally suppress evidence asserted to be procured in violation of the Fourth Amendment because of the civil nature of removal proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (finding the Fourth Amendment exclusionary rule inapplicable to deportation proceedings). However, the Supreme Court left open the possibility that the exclusionary rule might still apply in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050-51. In applying this exception, the Ninth Circuit has developed a two part test to determine when evidence should be suppressed in an immigration proceeding. *Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994). The Court first must determine whether the Government violated the Fourth Amendment. *Id.* If it did, then the Court must determine whether the agents committed the violations deliberately or by conduct a reasonable officer should have known would violate the Constitution. *Id.*

Where a search is based on a facially valid search warrant, "a defendant challenging a search will lose if either: (1) the warrant issued was supported by probable cause; or (2) it was not, but the officers executing it reasonably believed that it was." *Pearson v. Callahan*, 129 S.Ct. 808, 821 (2009) (citing *United States v. Leon*, 468 U.S. 897 (1984)). In *Michigan v. Summers*, the Supreme Court noted that the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search premises. 452 U.S. 692, 703 (1981); *see also Muehler v. Mena*, 544 U.S. 93, 98 (2005). The Court ruled that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the

occupants of the premises while a proper search is conducted." *Summers*, 452 U.S. at 705. The *Summers* Court reasoned that detention was warranted due to factors such as "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found," as well as officer safety and facilitation of "the orderly completion of the search." *Id.* at 702.

The Supreme Court elaborated on the *Summers* holding in *Muehler*, 544 U.S. 93. In that case, police officers obtained a warrant to search Mena's residence for weapons and evidence of gang membership. *Id.* at 95-96. Mena was asleep in bed, and officers handcuffed her at gunpoint. *Id.* at 96. Immigration officers, who were working in conjunction with federal agents, questioned Mena about her alienage and immigration status while she was detained in the garage. *Id.* The Court found that Mena's detention was "plainly permissible" under *Summers* because there was a warrant to search the premises, and Mena was on the premises. *Id.* at 98. The Court explained, "Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." *Id.* at 98-99. While the officers had detained Mena for several hours in handcuffs, the Court found the force reasonable based on the danger to the officers and level of contraband suspected at the location. *Id.* at 99. In addition, the *Muehler* Court found that it was permissible for the officers to question Mena regarding her immigration status during the search of her home. *Id.* at 100-01. The Court rejected as "faulty" the Circuit Court's finding that the "officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event." *Id.* It noted, "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Id.* at 101 (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)).

In *Dawson v. City of Seattle*, the Ninth Circuit applied the Supreme Court's reasoning in finding that the detention of residents of a boarding house was reasonable during a public health inspection executed pursuant to a warrant. 435 F.3d 1054 (9th Cir. 2006). During the inspection, the plaintiffs were kept for approximately two hours in a secure room. *Id.* at 1059. The Ninth Circuit noted that the detention of occupants of a building while officers execute a search warrant is permissible, so long as the length of detention is reasonable. *Id.* at 1065. In finding that the detention was reasonable, the court looked to the three rationales articulated by the Supreme Court in *Summers*: (1) prevention of suspects from fleeing; (2) minimizing the risk of harm to the officers or occupants; and (3) expediting the search. *Id.* at 1066. The court rejected the plaintiffs' argument that *Muehler* and *Summers* apply only to searches for contraband, rather than searches for evidence. *Id.* In addition, the court found that officer safety associated with the health conditions of the building, the risk of the tenants fleeing and thus rendering themselves unavailable for questioning as witnesses, and the tenants' potential impairment of the search all justified the officers' detention of the tenants. *Id.* at 1066-67.

[redacted]

Federal Regulations

In addition to serving as a direct remedy for constitutional violations, suppression may also be appropriate where agency regulations are violated. The violation of an agency regulation can compromise the Fifth Amendment's guarantee of fundamental fairness and undermine the respondent's due process rights. However, there is "no rigid rule . . . under which every violation of an agency regulatory requirement results in . . . the exclusion of evidence from administrative proceedings." *Matter of Garcia-Flores*, 17 I&N Dec. 325, 327 (BIA 1980), *superseded by statute on other grounds, as stated in Samayoa-Martinez v. Holder*, 558 F.3d 897, 902 (9th Cir. 2009). To exclude evidence based on officers' noncompliance with DHS regulations, an alien must meet a heavy burden of proving that: (1) the regulation was not adhered to; (2) the regulation was intended to serve a purpose of benefit to the alien; and (3) the violation prejudiced the alien's interest in that it affected the outcome of the proceedings.[2] *Garcia-Flores*, 17 I&N Dec. at 328-29, *superseded by statute on other grounds, as stated in Samayoa-Martinez*, 558 F.3d at 902; *see also United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979). Once the alien establishes a *prima facie* regulatory violation, the burden shifts to DHS to justify the manner in which the evidence was obtained. *Barcenas*, 19 I&N Dec. at 611.

In the instant case, Respondent has moved to suppress the Form I-213, including the scratch I-213, on the basis that the information contained within was obtained in violation of federal regulations and the Fourth and Fifth Amendments to the United States Constitution. *See* Resp't's Mot. to Sup. (June 1, 2009); Resp't's Closing Arg. (May 9, 2011). Respondent asserts that she was in an upstairs storeroom adjacent to the main [redacted] restaurant when a number of ICE agents entered the room yelling "police." According to Respondent, agents asked her if she had a weapon, and she made a comment about not needing a weapon to make burritos. Respondent asserts that, without asking her any additional questions, agents handcuffed her and told her that she was under arrest because she was in the United States illegally. The agents ultimately transferred Respondent to Agent Flores, who asked Respondent questions relating to her nationality and status, which Respondent answered. Respondent was then released to care for her children. As directed, she returned to ICE offices to answer additional questions. When she was questioned at the ICE offices, she did not answer questions regarding alienage, at the advice of her lawyer who was present at the time.

To rebut Respondent's assertion, the DHS presented the testimonies of Agents Green and Flores. Agent Green testified that the May 2, 2008, operation was low key and calm, but he asserted that he did not interact with Respondent individually because he was in the main part of the restaurant. Likewise, Agent Flores testified that she was told that Respondent was "hiding" in the attic, but was not the agent who first encountered Respondent, and she did not question Respondent until Respondent was brought to the main area of the restaurant. There, Agent Flores asked Respondent biographical questions in Spanish and filled out a scratch I-213 before

[2] A respondent will not have been prejudiced, for example, if evidence supporting a finding of removability arose prior to the regulatory violation. *Garcia-Flores*, 17 I&N Dec. at 329.

releasing Respondent. Agent Flores testified that Respondent was detained, not under arrest, throughout the operation.

While the testimonies of Respondent, Agent Green, and Agent Flores may reflect a different perception of events, it does not appear to the Court that the testimonies directly contradict one another. Agents Green and Flores were not percipient witnesses to Respondent's initial encounter with the agents in the storeroom; therefore, their testimony does not rebut Respondent's version of events. As to Respondent's remaining experiences during the operation, Respondent's version of events does not materially differ from Agent Green's and Agent Flores's versions of events. However, for purposes of appellate review, the Court will make an explicit credibility finding as to each witness.

1. Credibility

In assessing the credibility of the witnesses in this case, the Court must apply the provisions of the REAL ID Act of 2005. *See* INA § 240(c)(4)(C). Considering the totality of the circumstances and all relevant factors, a credibility finding may be based on the demeanor, candor, or responsiveness of the applicant or witness; the inherent plausibility of the account; the consistency between written and oral statements (whenever made, whether or not made under oath, and in consideration of the circumstances under which the statements were made); the internal consistency of each such statement; the consistency of such statements with other evidence of record; any inaccuracies or falsehoods in such statements; or any other relevant factor. *Id.* The REAL ID amendments further provide that this Court may make a credibility determination without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. *Id.*

a. Testimony of Respondent

This Court carefully observed Respondent's demeanor and analyzed her testimony for consistency, detail, specificity, and persuasiveness. The Court found Respondent to testify in a believable and detailed manner. The DHS has raised issues that it asserts undermine Respondent's credibility; however, for the reasons explained below, the Court finds that Respondent adequately addressed these issues.

First, Respondent testified that she was in a storeroom when agents found her; however, her declaration describes her working on the "line" and then it describes agents entering the restaurant, without mentioning that Respondent went to the storeroom. When asked about this omission, Respondent explained that she did not think that the detail was important, so she did not include it. The Court does not view this omission significant enough to find Respondent not credible. *See Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) ("[A] concern that the affidavit is not as complete as might be desired cannot, without more, properly serve as a basis for a finding of lack of credibility.") (internal quotation marks omitted). Furthermore, Respondent's assertion that she was in the storeroom when agents encountered her is consistent with Agents

Green and Flores's understanding of what transpired that day. As this fact is not in dispute, the Court does not find that Respondent's testimony on the issue undermines her credibility.

Respondent's perception of the tone of the operation also differed from that described by Agents Green and Flores. Respondent testified that agents entered the restaurant yelling "police," and they ordered some of Respondent's coworkers onto the floor. In contrast, Agents Green and Flores described the operation as "low-key." Based on Agent Green's calm and measured demeanor while testifying, the Court finds it probable that the operation was, indeed, generally calm. However, Respondent explained that she used the term "restaurant" to refer to all of the [redacted] premises, including the storeroom. It is important to note that neither Agent Green nor Agent Flores were present when Respondent first encountered agents in the storeroom. Therefore, Agent Green's and Agent Flores's pleasant demeanor in the main restaurant had no bearing on Respondent's experience in the storeroom. Likewise, Agents Green's and Flores's perception of the operation as a whole is not informative as to Respondent's experience in the storeroom, where different agents first encountered her. Indeed, Agent Green testified that he heard agents giving directions in voices that were louder than "normal" in the attic area. Therefore, the Court does not find Respondent's description of the manner that agents entered the storeroom as indicative of a lack of credibility.

The DHS suggests that Respondent fabricated her testimony that an agent told her that she was arrested in the storeroom, and it argues that it "cannot produce a witness to something that did not occur." DHS's Reply at 3 (July 11, 2011). However, the DHS does not dispute that Respondent was first encountered by an unknown agent who did not testify. The fact that the DHS did not produce the agent who encountered Respondent does not support a finding that Respondent's version of events simply did not occur.[3] The DHS also argues that Respondent "presented no corroborative evidence to her story" that she was told that she was arrested in the storeroom, and she did not "explain how she understood an agent informing her in English that she was 'under arrest because she was illegally in this country' despite the respondent having no substantive English language proficiency." *Id.* The Court notes that Respondent did, in fact, testify that she understood the agent because she has studied some English. Furthermore, the mere fact that Respondent did not corroborate every aspect of her testimony does not alone undermine Respondent's credibility. *See generally* INA § 240(c)(4)(C).

Finally, Respondent testified that she was in the storeroom because she was getting supplies rather than hiding there, while Agent Flores and Agent Green testified that another agent told them that Respondent was hiding in the storeroom. While hearsay evidence is admissible in immigration proceedings, the evidence must be probative and its admission fundamentally fair. *Barcenas*, 19 I&N Dec. at 611. In this case, Agent Flores and Agent Green's

[3] Contrary to the DHS's assertion that the burden of proof rests on Respondent, DHS's Reply at 4 (July 11, 2011), it is the DHS's burden, at this stage in the case, to justify the manner in which it obtained the evidence. *Barcenas*, 19 I&N Dec. 609. Therefore, the Court disagrees with the DHS's assertion that it would be a "misconstruction of the burden of proof" to require it to produce a percipient witness.

belief that Respondent was hiding came from the report of an unknown agent. The unknown agent did not testify, and the record does not contain a statement from that agent verifying that it was even Respondent, and not another employee, who was hiding. The sole percipient witness to Respondent's encounter is Respondent herself. As Respondent was subject to cross-examination, the Court gives her testimony on this issue more weight than the hearsay statements of an unknown officer who was not subject to cross-examination. In the absence of stronger evidence from the DHS, the Court does not find probative Agent Flores's and Agent Green's statements regarding another agent's perception that Respondent was "hiding" versus simply getting additional supplies, particularly where Respondent was only one of multiple individuals encountered in the storeroom.

Accordingly, the Court finds that Respondent testified credibly, and it affords her testimony full evidentiary weight.

b. Testimony of Agent Green

As with Respondent, this Court analyzed Agent Green's testimony for consistency, detail, specificity, and persuasiveness. Agent Green answered questions in a direct and thoughtful manner, and his demeanor was calm and sincere. He was forthright in discussing his own lack of personal knowledge of certain events that occurred during the operation. Agent Green's perception of the tone of the operation on May 2, 2008, differed from Respondent's in that he perceived it to be "low-key," while Respondent described feeling afraid and testified that there was yelling. However, Agent Green was not in the same area that Respondent encountered agents; therefore, it is logical that his experience differed from Respondent's. Furthermore, as one who had participated in "dozens" of search warrants, it is logical that Agent Green's perception of what constitutes a "low-key" search would differ from that of Respondent, who was experiencing the execution of a search warrant for the first time. In sum, the Court finds that Agent Green testified credibly, and it will afford his testimony full weight.

c. Testimony of Agent Flores

The Court also finds that Agent Flores testified credibly. While she, at times, answered a different question than the one asked or provided a narrative instead of a direct answer, the Court found her testimony to be overall credible. The Court notes, however, that Agent Flores lacked firsthand knowledge of some of the information that she testified about. Therefore, to the extent that Agent Flores testified about what another agent told her, the Court gives that testimony diminished weight.

2. Violations of Federal Regulations

Respondent asserts that agents violated her Fourth and Fifth Amendment rights, as well as federal regulations, during the May 2, 2008, operation at the [redacted] restaurant. The Court first examines Respondent's argument that ICE agents violated 8 C.F.R. § 287.8(c)(2).

Pursuant to this regulation:

> An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States. A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.

8 C.F.R. § 287.8(c)(2)(i)-(ii). According to the Ninth Circuit, "The phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause." *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980).

A permissible brief detention for investigatory purposes becomes an arrest "when a reasonable person would believe that he or she was under arrest." *Martinez v. Nygaard*, 831 F.2d 822, 828 (9th Cir. 1987) (citing *United States v. Patterson*, 648 F.2d 625, 632 (9th Cir. 1981)); *see also Matter of Yau*, 14 I&N Dec. 630, 633-34 (BIA 1974) (distinguishing between a "brief detention," even if physical restraint is employed by the officer, and a "full-blown arrest"). In *Martinez*, former Immigration and Naturalization Service ("INS") agents conducted a "sweep" of a factory. 831 F.2d at 824. After the lead INS agent showed a search warrant to the plant manager, agents were admitted to the plant while other agents remained outside and watched the exits. *Id.* At the lead agent's request, the manager shut down the machinery to facilitate questioning, and the agents systematically questioned workers who appeared to be of Latin American descent. *Id.* The agents neither displayed their weapons during the questioning nor barred the exits. *Id.* The Ninth Circuit's determination of whether an "arrest" occurred relied on the overall circumstances relevant to each individual worker. *See generally id.* at 828. One individual was held for twenty minutes, and the officers threatened to bind her hands; however, the court found that these circumstances "would not have led a reasonable person in [the individual's] position to believe that she was under arrest." *Id.* at 828. In making this finding, the court looked to the fact that the individual was not placed in a van with people who were arrested, and she was told that she would be released as soon as another person arrived with her immigration papers. *Id.* In contrast, the court found that a second person at the factory *was* arrested. *Id.* That person told the INS agents that her papers were at home, and an agent placed her with other detained workers in the plant. *Id.* After about fifteen minutes, agents took the second person to the van where the other arrested individuals were held. *Id.* Five minutes later, the agents released her when her husband arrived with her immigration papers. *Id.*

In this case, it is clear that the agents were permitted to briefly detain and question Respondent while conducting a search of the premises, as part of their execution of the criminal search warrant. *See Summers*, 452 U.S. at 705; *Muehler*, 544 U.S. at 98-01; *see also* 8 C.F.R. § 287.8(b)(1)-(2). However, Respondent asserts that the agents did more than detain her; they arrested her without probable cause or an arrest warrant. The Court first determines whether Respondent was arrested. Respondent testified that agents entered the storeroom yelling "police." They asked her if she had any weapons, and she made a comment about a burrito. In response, one of the agents warned her about being sarcastic and moved towards her. Another

agent stopped the first agent and told Respondent to follow directions. Without any further discussion, the agents placed Respondent in plastic handcuffs and told her that she was under arrest because she was in the United States illegally. The Court finds that a reasonable person, when placed in handcuffs and told that she was under arrest, "would believe that . . . she was under arrest." *Martinez*, 831 F.2d at 828. As in *Martinez*, the fact that Respondent was ultimately released after several hours does not change the Court's finding that she was placed under arrest in the storeroom. *Id.*

The DHS argues that Respondent was not arrested. It cites Agent Flores's testimony that she did not consider Respondent "arrested," rather, she considered her "detained" when she first encountered her. DHS's Reply at 2 (July 11, 2011). In addition, the DHS argues that Agents Flores and Green testified that it is not "DHS procedure" to place a person under arrest when first encountered. *Id.* at 4. The Court finds these arguments unpersuasive. As explained in *Martinez*, the proper test for determining if an arrest has taken place is whether "a reasonable person in [the individual's] position" would believe that she was under arrest, not whether an agent who later interviewed the person believed that the subject of the interview was under arrest. *See* 831 F.2d at 828. Furthermore, it is uncontroverted that it is not "DHS procedure" to place someone under arrest without probable cause. The basis of any allegation that federal regulations have been violated is that the DHS did not follow procedure; therefore, the argument that it was not "DHS procedure" to arrest Respondent at that stage of the operation does not disturb the Court's conclusion that Respondent was arrested.

Having determined that Respondent was arrested, the Court next considers whether the arrest was permitted by the regulations. Immigration officials may arrest a person where there is "reason to believe" that the person is an alien illegally in the country. 8 C.F.R. § 287.8(c)(2)(i). According to the Ninth Circuit, "The phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause." *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980). "The test for probable cause is whether facts and circumstances within the officers' knowledge are sufficient to warrant a prudent person, or one of reasonable caution, to believe, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *United States v. Thomas*, 835 F.2d 219, 222 (9th Cir. 1987) (internal punctuation and citations omitted), *cert. denied, Thomas v. United States*, 486 U.S. 1010 (1988). *See also United States v. Garza,* 980 F.2d 546, 550 (9th Cir. 1992) (holding that probable cause existed if "under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the arrested person] had committed a crime"). In the Constitutional context,[4] the Ninth Circuit has found that race is insufficient to constitute probable cause, and it has found that evidence should be suppressed where officers relied primarily on race in making a stop. *See Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994)

[4]As 8 C.F.R. § 287.8(c)(2)(i)-(ii) articulates the Fourth Amendment's guarantee against unreasonable searches and seizures, the Court looks to courts' interpretations of probable cause in the Constitutional context for guidance on what constitutes sufficient "reason to believe" for purposes of the federal regulations. *See* U.S. CONST. amend. IV (protecting "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.")

(holding that evidence had to be suppressed where Border Patrol stopped Hispanic person and all other reasons for the stop had low probative value); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (finding that apparent Mexican ancestry and presence in an area where illegal aliens frequently travel are not enough to justify a seizure by immigration officials); *see also Orhorhaghe*, 38 F.3d at 497.

In this case, the agents encountered Respondent in the storeroom of the restaurant, where she was getting supplies. According to Respondent's testimony, which this Court credits, she was standing and making no attempt to hide. The agents asked her if she had a weapon, and, after making a comment about burritos, she said that she did not. The agents arrested Respondent, telling her that they did so because she was in the United States illegally. The arresting agents did not testify or present a declaration, and the Court cannot speculate as to what evidence they relied on in deciding that they had probable cause to arrest Respondent. The Court notes that Respondent's physical appearance of Mexican ancestry is insufficient to constitute probable cause for her arrest. *See Brignoni-Ponce*, 422 U.S. at 886-87. Likewise, Respondent's mere presence in an area where illegal aliens were also suspected to be is insufficient to justify an arrest. *Id.* Absent more information regarding the evidence upon which the arresting agents relied, the Court cannot conclude that Respondent's arrest was supported by legitimately-derived probable cause. As the agents lacked probable cause to arrest Respondent, yet they proceeded to do so, without a warrant, the Court finds that the agents violated 8 C.F.R. § 287.8(c)(2)(i)-(ii).

The Court next considers whether 8 C.F.R. § 287.8(c)(2) was intended to serve a purpose of benefit to Respondent. *See Garcia-Flores*, 17 I&N Dec. at 328-29. The Board has found that regulations relating to the arrest and detention of aliens are promulgated in order to benefit the alien. *See, e.g., id.* at 329 (finding that former 8 C.F.R. § 287.3 was intended to serve a benefit to the alien), *superseded by statute on other grounds, as stated in Samayoa-Martinez*, 558 F.3d at 902. Consistent with the Board's finding, this Court finds it logical that the regulations at 8 C.F.R. §§ 287.8(c)(2)(i)-(ii) were intended to benefit an alien such as Respondent by protecting her from arrests lacking in legitimately-derived probable cause. It is precisely this injury that Respondent suffered when agents summarily arrested her with no apparent grounds to do so, and this injury that would have been avoided had the agents followed their own regulations.[5]

Finally, the Court considers whether Respondent was prejudiced by the violation of 8 C.F.R. §§ 287.8(c)(2). "To show prejudice, the [respondent] must establish more than that he would have availed himself of the procedural protections; he must produce 'concrete evidence' that the violation had the potential for affecting the outcome of the proceeding." *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989) (citation omitted). In general, prejudice occurs when evidence supporting removability arises after the alleged violation. *See Garcia-Flores*, 17 I&N Dec. at 329, *superseded by statute on other grounds, as stated in Samayoa-Martinez*, 558 F.3d at 902. In this case, prejudice is clear. Respondent was handcuffed and told she was under arrest for being in the United States illegally without any legitimate evidence to support such a claim.

[5] The issue of whether the Constitution encompasses aliens in its protection from unlawful seizures is irrelevant to the Court's analysis. It is clear that the federal regulations relating to immigration *are* directed at aliens.

Having been treated in such a manner, Respondent had no reason to think that she had any rights, and she answered Agent Flores's questions – an act that it is entirely possible she would not have done but for the intimidation caused by the illegal arrest. The Court cannot speculate as to whether Respondent in fact would or would not have provided answers sufficient to establish probable cause; Respondent answered Agent Flores's questions after she was arrested in violation of federal regulations and thus the answers were tainted by the regulatory violations. Relying on these answers, Agent Flores filled out a scratch I-213 and later the I-213, the evidence upon which the DHS now relies in attempting to establish Respondent's alienage. Based on the Board's reasoning in *Garcia-Flores* and the facts of the instant case, the Court finds that Respondent was prejudiced by the violation of 8 C.F.R. § 287.8(c)(2). *See id.*

The Court finds that the DHS has not met its burden in justifying the manner in which it obtained the evidence of alienage in this case. The agents violated 8 C.F.R. § 287.8(c)(2), the regulation was intended to serve a purpose of benefit to Respondent, and Respondent suffered prejudice from the violation. Accordingly, the Court will grant Respondent's motion to suppress the evidence contained in the Form I-213. Having determined that the evidence should be suppressed because it was obtained in violation of federal regulations, the Court need not consider Respondent's alternate theories of suppression under the Fourth and Fifth Amendments.

C. Removability

The Government bears the burden of proving alienage. *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 354 (BIA 1996) ("The burden of proof in deportation proceedings does not shift to the alien to show time, place, and manner of entry under section 291 of the Act . . . until after the respondent's alienage has been established by clear, unequivocal, and convincing evidence." (citing *Woodby v. INS*, 385 U.S. 276 (1966), and *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995)). Having suppressed the Form I-213 in this case, the Court finds that there is insufficient remaining evidence in the record to establish that Respondent is an alien. The DHS has therefore not met its initial burden. Accordingly, the Court will terminate removal proceedings.

In light of the foregoing, the following order shall enter:

ORDER

IT IS HEREBY ORDERED that Respondent's motion to suppress be and hereby is **GRANTED.**

IT IS FURTHER ORDERED that removal proceedings be **TERMINATED.**

Miriam Hayward
Immigration Judge

[redacted]