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

Matter of	Date: April 21, 2020
[redacted]	File Number: [redacted]
The 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.

Motion: Motion to Terminate

On Behalf of the Respondent:
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On Behalf of DHS:
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SUPPLEMENT TO THE SHORT-FORM ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

On August 12, 2019, the Department of Homeland Security ("DHS") initiated removal proceedings against the respondent by filing a Notice to Appear ("NTA") with the San Francisco, California, Immigration Court. Exh. 1. The NTA alleges that the respondent is a native and citizen of Mexico who arrived in the United States at an unknown location on an unknown date and who was not admitted or paroled after inspection by an immigration officer. *Id.* Based on these allegations, the NTA charged the respondent with removability under Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i). *Id.*

At a master calendar hearing on September 19, 2019, the Court asked the respondent, through a Spanish interprter, about the allegations and charge contained in the Notice to Appear. The respondent admitted the allegations and conceded the sole charge of removal. He expressed a fear of returning to Mexico, and the Court provided him a Form I-589 to complete and submit at a future hearing.

On October 23, 2019, the respondent appeared pro se for a master calendar hearing and submitted a Form I-589. However, at that hearing, after attempting to converse with the

respondent regarding substantive issues, the Immigration Judge determined it had bona fide doubt regarding the respondent's ability to represent himself in these proceedings. Accordingly, on October 25, 2019, DHS informed the Court that the respondent met the criteria for class membership pursuant to the litigation in *Franco-Gonzalez v. Holder*, CV 10-02211, 2013 WL 3674492, Partial Judgment and Permanent Injunction (C.D. Cal. Apr. 23, 2013). DHS Notice (Oct. 25, 2019) at 1–2. On November 8, 2019, the Court conducted a formal Judicial Competency Inquiry and found the respondent to be incompetent to respresent himself. The Court ordered that a Qualified Representative be appointed on his behalf. *See* IJ Order (Nov. 8, 2019).

On March 20, 2020, the respondent, through his appointed Qualified Representative, filed a Motion to Terminate, arguing that the Department has failed to meet its burden to establish the respondent's alienage. Specifically, the respondent argues that the Department's only evidence of alienage, the Form I-213, is unreliable because it does not specify the respondent's answers to ICE agents' questions. The respondent further argues that any statements attributed to the respondent are unreliable due to his documented cognitive disability, and deficits in expressive and receptive language skills, attention, concentation, and orientation. The Department filed an opposition, arguing that alienage has been established through the respondent's own pleadings and I-589, and further that the I-213 has not been shown to be unreliable or inadmissible. On April 10, 2020, the respondent filed a reply to the Department's opposition.

On April 17, 2020, at a master calendar hearing, the Court issued it's ruling, granting the Motion to Terminate and dismissing proceedings without prejudice. The Court issued a short-form order memoralizing the decision. The Department reserved appeal, and the respondent waived appeal. The Court hereby issues this written decision to supplement the short-form order for appeal purposes.

II. EVIDENCE PRESENTED

The Court will mark the following documents in the record as follows:

Exhibit 1:	Notice to Appear
Exhibit 2:	Form I-213, dated Aug. 6, 2019
Exhibit 3:	Form I-589
Exhibit 4:	DHS Notice of *Franco-Gonzalez* Membership
Exhibit 4:	Motion to Terminate, based on *Matter of E-S-I-*
Exhibit 5:	Department's Opposition
Exhibit 6:	Court's order denying MTT, dated February 14, 2020
Exhibit 7:	Motion to Terminate, based on DHS failure to establish alienage
Exhibit 8:	Department's Opposition
Exhibit 9:	Respondent's Reply to the Opposition

The Court will admit all evidence into the record, but assign appropriate weight to the evidence presented, as detailed more fully below.

[redacted]

As evidence attached to his Motion to Terminate, the respondent submitted a psychological evaluation conducted by Dr. Ariel Shidlo, PhD, regarding an evaluation he did of the respondent on February 2, 2020. *See generally* Resp't's Motion, Tab A. According to his evaluation, the respondent suffers from a Mild Neurocognitive Disorder, Substance Abuse Disorder, and hearing loss which likely results in deficits in receptive and expressive language skills. Dr. Shildo also observed that the respondent was a poor historian and had trouble remember basic biographical details, such as his date of birth, how long he lived in California, and the name of his ex-partner. The respondent reported that he has trouble hearing others and does not understand much of what people tell him. He also indicated that when someone talks to him, he answers by saying, "yes, yes," even though he does not know what someone has told or asked him. As Dr. Shidlo observed – "He has learned to cope with a lifelong hearing disability by feigning comprehension and responding with 'yes,' even when he does not understand a question." Even during the evaluation, Dr. Shildo had to ask the same question multiple times in different ways until the respondent was able to answer responsively.

In its opposition to the motion to terminate, the Department filed another Form I-213, allegedly pertaining to the respondent, dated February 17, 2005.

Finally, the Court has considered the other evidence in the record, including the Form I-213 dated August 6, 2019, the respondent's pro se Form I-589, and medical documents submitted by the Department.

III. ANALYSIS

The government bears the burden of proving that the subject of the removal proceeding is an alien who is removable under the Act by "clear, unequivocal and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 285–86 (1966); 8 C.F.R. § 1240.8(c). In immigration proceedings, evidence is generally admissible if it is probative and its use is fundamentally fair. *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999).

A. Admissibility and Evidentiary Weight of Evidence

1. Admissions in the Form I-213's

Generally, a presumption of reliability applies to government documents. *See Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995). A Form I-213 is generally admissible and the information contained therein is presumed inherently reliable. *See id.* at 310–11. However, a respondent who produces "probative evidence that contradicts anything material on the I-213 would cast doubt upon its reliability. . . . [and the Court] would be hard put to find the I-213 clear and convincing evidence of alien status." *Id.*; *see also Murphy v. INS*, 54 F.3d 605, 608 (9th Cir. 1995) (finding that a Form I-213 was unreliable in light of "numerous problems casting doubt on [its] validity").

The respondent asks this Court to give the I-213 no evidentiary weight, arguing that his statements recorded in the document are unreliable due to his mental health disorders and deficits. First, the Court finds the Form I-213 admissible because it is relevant to the issue of

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alienage and the respondent presented no evidence that the information therein was improperly obtained through coercion or duress amounting to an egregious violation of the Fourth Amendment or other regulation. However, the probative value of the Form I-213 is severely undermined by evidence indicating that the respondent suffers from a cognitive disorder, is an unreliable narrator, and has memory problems that affect his ability to recall basic biographic information. Furthermore, as the psychological evaluation notes, the respondent has impaired hearing abilities with which he copes by feigning hearing and simply answering "yes" when asked a question. *See* Resp't's Motion, Tab A.

Looking closely at the Form I-213, dated August 6, 2019, the respondent's date and place of birth is listed as "[redacted]73" and "D[redacted]Mexico," respectively. Exh. 2. The narrative states that an officer asked the respondent to state his full name and citizenship, and the respondent stated he is a citizen of Mexico with "no legal authorization or documentation to enter or remain in the United States." *Id.* Later in the document, it states: "[redacted] claims to have last entered the United States on an unknown date in 2005 through Arizona, eluding inspection by an Immigration Officer. [redacted] has no legal documents allowing him to work, reside, or remain in the United States." *Id.* Given the complicated and legal nature of this statement, the Court cannot find that these are the respondent's exact words, but instead a summary based on the officer's actual conversation with the respondent. In most cases, this would be a proper summary that holds evidentiary weight. However, here, it is unknown what questions were asked, how the questions were asked, and how the respondent responded. This is significant in this case, as the respondent has cognitive deficits, a poor memory, and issues with receptive and expressive language skills. Indeed, the Form I-213 contains no direct statements made by the respondent; rather, it contains only a summary of his purported statements. *See id.* Without this information, the Court cannot determine whether the respondent understood the questions and the legal consequences of his responses. *See Murphy*, 54 F.3d at 612. For these reasons, the Court is unable to conclude that the respondent was capable "of understanding, and in fact [understood]" that the admissions he made in the I-213 could establish deportability. *See Matter of Amaya*, 21 I&N Dec. 583, 587 (BIA 1996).

As Dr. Shidlo noted, the respondent had limited ability to be accurately responsive to questions. Dr. Shidlo had to ask the respondent questions multiple times in different ways in order to get a responsive answer. Therefore, without more than the bare summary of the respondent's alleged answers in the I-213, coupled with the respondent's documented mental, intellectual, and physical deficits, the Court gives little evidentiary weight to the statements attributed to the respondent in the I-213.

The respondent has also submitted evidence that contradicts some of the biographical information in the 2019 Form I-213. For example, the respondent submitted two criminal court documents, apparently in his name, that list two separate dates of birth, which conflict with the date of birth listed in the I-213. *See* Resp't's Motion, Tabs B & C. In his evaluation with Dr. Shidlo, the respondent relayed contradicting places of birth, including Mexico and California. *Id.* at Tab A. Furthermore, the Department's own evidence is internally contradictive. The Form I-213, dated [redacted] 2005, lists the respondent's place of birth as "H[redacted] Mexico," which differs from the recent I-213 which says his place of birth is in N[redacted]Mexico. *See* Dep't's Opposition, Tab A. These discrepancies, coupled with the issues identified

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previously, cause this Court to gives little to no evidentiary weight to the statements attributed to the respondent in the 2019 Form I-213. As such, it does not provide clear and convincing evidence of the respondent's alienage.

Turning briefly to the 2005 Form I-213, the narrative portion contains conclusory statements, such as, "[redacted] entered the United States on February 15, 2005 near Sasabe, Arizona by jumping the international boundary fence between the United States and Mexico." Dep't's Opp., Tab A. It also states that he "admits to being in the United States illegally." *Id.* However, the I-213 does not indicate what language the officers used to question the respondent or what questions were asked to illicit information. And again, some of the biographical information recorded in the form contradicts the information recorded in other forms and court documents. The Court therefore assigns this document limited evidentiary weight.

2. In Court Admission

The Court further considers that, in an earlier master calendar hearing, the Court asked the respondent about the factual allegations and charge. The respondent answered affirmatively when the Court asked the respondent if the information in the Notice to Appear was true, thereby admitting that he was born in Mexico. However, at that time, the respondent appeared in the courtroom by televideo (VTC), while he remained at the detention center, and it is unclear how much or how clearly the respondent was able to hear the Judge, given his documented hearing deficiencies. Of utmost concern is that according to Dr. Shidlo, the respondent has learned to cope with his hearing deficiencies by feigning comprehension and answering "yes." *See* Resp't's Motion, Tab A. Furthermore, at the time of the master calendar hearing, the respondent was not yet deemed "incompetent" by this Court; however, Dr. Shidlo's findings indicate that the respondent has been experiencing these symptoms and dealing with these mental and physical difficulties well before coming into immigration detention. The respondent was not represented by an attorney or legal representative at the time of pleadings, and the Court cannot therefore accept his legal admissions as they are unreliable. Accordingly, the Court is unable to accept the respondent's admission of a foreign birthplace. *See Pagayon v. Holder*, 675 F.3d 1182, 1190 (9th Cir. 2011); 8 C.F.R. § 1240.10(c); 8 C.F.R. § 1240.48(b) ("The immigration judge shall not accept an admission of deportability from an unrepresented respondent who is incompetent . . . and is not accompanied by a guardian, relative, or friend[.]").

3. Respondent's Form I-589

The Department argues that the Court should consider the respondent's Form I-589, as it contains his place of birth as "V[redacted] Mexico." According to Dr. Shidlo's evaluation, the respondent is unable to read or write and has very limited education. However, the application is written in English, and the preparer of the application did not sign the form. It is unknown how the form was prepared or what information was used. Furthermore, it was shortly after the respondent submitted his I-589, at a master calendar on October 23, 2019, when the Court formed bona fide doubt of the respondent's competency and set the case for a Judicial Competency Inquiry after attempting to ask him questions about his application. Therefore, because the respondent did not prepare his own application, it was not prepared by a legal

[redacted]

representative, and the Court subsequently deemed him incompetent based on pre-existing mental defects or deficits, the Court gives the statements in his application little to no evidentiary weight.

B. DHS's Burden of Establishing Alienage

Evidence of foreign birth gives rise to a rebuttable presumption of alienage. *See Murphy*, 54 F.3d at 609. However, merely setting forth a prima facie case of alienage based on circumstantial evidence of foreign birth does not shift the burden of persuasion to the respondent to show manner of time and place of entry. *Id.* at 608. DHS still bears the burden of establishing clear and convincing evidence of alienage as a precondition to the burden-shifting presumption. *Id.*

The Court finds that the evidence in the record is insufficient to establish the respondent's alienage by clear and convincing evidence. *See id.* at 612 (finding the government did not prove alienage where the government did not produce a foreign birth certificate and the record contained only statements of limited reliability). DHS relies only on the respondent's statements to establish alienage. However, as explained above, the reliability of these statements is undermined by extensive evidence in the record that respondent suffers from a condition that impedes his ability to communicate effectively and understand these proceedings. Additionally, DHS has had the opportunity to present evidence of the respondent's alienage, but the Department has failed to provide a birth certificate or any other properly authenticated document as evidence of alienage. Therefore, the Court finds that the respondent's statements alone, made as an incompetent, unrepresented respondent, are not clear and convincing evidence of his alienage. 8 C.F.R. § 1240.10(c); 8 C.F.R. § 1240.48(b). Because DHS has not met its burden to prove the respondent's alienage by clear and convincing evidence, the respondent's motion to terminate will be granted.

In light of the foregoing, the following orders entered:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to terminate be **GRANTED**.

IT IS FURTHER ORDERED that the respondent's removal proceedings are terminated without prejudice.

JULIE NELSON

Digitally signed by JULIE NELSON
Date: 2020.04.21 12:42:17 -07'00'

Julie L. Nelson
Immigration Judge

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