Practice Advisory

Requests for Arrest Reports in Immigration Matters[1]

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I. Introduction

Practitioners are increasingly seeing requests by U.S. Citizenship and Immigration Services (USCIS), consular officers, and immigration judges (IJs) for their clients' arrest reports. Requests for these reports are being made even where the client was never charged or convicted of a crime. Sometimes these reports contain extremely prejudicial or derogatory allegations against the client, which may be inaccurate or which were never proven in court. This practice advisory will discuss how arrest reports can impact immigration adjudications, how advocates can challenge the consideration of arrest reports, and practical considerations to keep in mind when filing applications and counseling clients about how to respond to requests for arrest reports.

II. Defining Arrest Reports

The term arrest report, as used in this practice advisory, refers to the records created by a law enforcement agency in the process of conducting an investigation or arrest. In most cases, this means the records maintained by the local or state police department, or occasionally the Federal Bureau of Investigation (FBI). A law enforcement encounter does not always result in a formal arrest where the client is brought to jail, or in charges being filed in court. But the police officer or agency will still typically create a record of the incident. These records can include reports written by the officer, statements made by the victim, witnesses, or the client, and reports relating to the evidence, such as lab results or breathalyzer tests.

Arrest reports are preliminary reports that sometimes lead to charges being filed in court. But they are not conclusive evidence of what transpired or what offense the client was found guilty of committing. They are separate from court dispositions, which show the result of the criminal case, if charges were filed.

III. Reasons Why Advocates Should Be Concerned About the Consideration of Arrest Reports

The potential consequences of an arrest report will be different in each case, depending on the type of benefit being sought as well as the information contained in the specific report. In some cases, an arrest report may not contain any negative information beyond what is already known to the adjudicator. In other cases, a report may even contain mitigating facts that are favorable to the client. In these situations, there may not be any concern with submitting the report to the adjudicator.

However, many arrest reports are highly prejudicial. As discussed below, arrest reports could be used by IJs, USCIS, or consular officers to find someone inadmissible or deportable, or to deny an application or benefit as a matter of discretion even though the information is often unsubstantiated. Under recent revisions to USCIS guidance on issuing Notices to Appear (NTA), an applicant for an affirmative benefit is likely to be placed in removal proceedings if the benefit is denied.[2] Once an arrest report has been submitted to USCIS or, for clients in removal

[2] For more information about USCIS policies for issuing NTAs, see *USCIS, Notice to Appear Policy Memorandum* (last reviewed/updated Feb. 26, 2019), https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum;

proceedings, served on the ICE Office of Chief Counsel, the document remains in the individual's "Alien File," and therefore could affect outcomes in subsequent applications for relief. Accordingly, practitioners should consider not only the impact of submitting an arrest report in the client's current application, but also how it might affect future applications.[3]

IV. The Relevance of Arrest Reports in Immigration Adjudications

A. Conviction-Based Grounds of Removability

Arrest reports alone cannot be used to find that an individual is inadmissible or deportable if the ground of removability requires a conviction.[4] For example, section § 237(a)(2)(B)(i) of the Immigration and Nationality Act (INA) states that an individual is deportable if he or she "has been convicted of a violation" of a law relating to a controlled substance. An arrest report alleging that an individual possessed methamphetamine could not be used to sustain that ground of deportability because the INA requires a conviction. Moreover, even where the arrest resulted in a conviction, adjudicators are strictly limited to looking at the official court record of conviction to determine what the individual was found guilty of, and whether the elements of that offense fall within a ground of removability.[5] Arrest reports are rarely part of the official record of conviction and should not be considered in determining whether an individual's offense falls within the definition of a ground of removability.[6]

There are extremely limited exceptions to the general rule that arrest reports cannot be considered in determining removability.[7] This might arise where the adjudicator is determining whether the amount of loss to the victim in a fraud case was $10,000 or more, or in determining whether a victim and defendant were in a domestic relationship for purposes of being a crime of domestic violence. In both of these examples, a conviction would still be required and the elements of the offense would still need to match the ground of removability. However, if the offense matched the ground of removability, the adjudicator could be allowed to review the arrest report to determine these limited facts.

B. Admission-Based Grounds of Removability

Arrest reports alone should not be used to sustain grounds of removability that could be triggered by the noncitizen admitting to committing an offense. An example of an admission-based ground

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CLINIC, *Practice Pointers: USCIS Issues New NTA Guidance Memo* (updated July 31, 2018), https://cliniclegal.org/resources/practice-pointer-usciss-new-nta-guidance-memo.

[3] Practitioners should even consider the potential impact of arrest reports on a client's ability to travel abroad and re-enter the United States in the future. The consideration of international travel is beyond the scope of this practice advisory.

[4] *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996).

[5] *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013).

[6] A discussion of the categorical approach (the process for determining if a conviction falls within a ground of removability) is beyond the scope of this practice pointer. For additional information, see Immigrant Legal Resource Center, *How to Use the Categorical Approach Now* (Apr. 10, 2017), https://www.ilrc.org/how-use-categorical-approach-now.

[7] This is commonly called the "circumstance-specific approach." For more information on the circumstance-specific approach, see Immigrant Legal Resource Center, *How to Use the Categorical Approach Now* (Apr. 10, 2017), https://www.ilrc.org/how-use-categorical-approach-now.

of removability is INA § 212(a)(2)(A)(i), which states that a noncitizen, "who admits having committed, or who admits committing acts which constitute the essential elements of (I) a crime involving moral turpitude, or (II) a violation of (or a conspiracy or attempt to violate) any law… relating to a controlled substance…is inadmissible." Even if an arrest report contained an admission by the client that he or she committed a crime, the admission in the arrest report alone would typically not be sufficient to sustain that ground of inadmissibility.[8] Longstanding Board of Immigration Appeals (BIA) precedent requires that certain procedures be followed at the time an admission is made in order for it to constitute an admission for immigration purposes.[9] At a minimum, the individual must be given an adequate definition of all the essential elements of the crime, must admit to all of the factual elements of the crime, and the admission must be voluntary.[10]

The Department of State (DOS) has adopted similar requirements. In addition to the BIA's requirements, the DOS Foreign Affairs Manual (FAM) requires that for an admission to satisfy the ground of removability, the individual must be placed under oath, be told the purpose of the questioning, and the proceedings must be reported verbatim.[11] These procedures are not typically followed during routine criminal arrests, so statements allegedly made by a client in an arrest report are not usually sufficient to sustain an admission-based ground of removability.[12]

However, where the arrest report itself may not meet the requirements to constitute an admission for immigration purposes, practitioners should be aware that an adjudicator could try to elicit testimony from a noncitizen based on the arrest report. Assuming the adjudicator follows the procedural safeguards required by the BIA or the FAM, the noncitizen's testimony may be sufficient for a finding of admission-based removability.

C. Conduct-Based Grounds of Removability

Arrest reports could lead an adjudicator to sustain a conduct-based ground of removability. Some common conduct-based grounds of removability include:

- INA § 212(a)(1)(A)(iv) and INA § 237(a)(2)(B)(ii) – the individual is a drug abuser or addict [13]

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[8] *But see Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) (finding that an admission to marijuana use during a routine medical exam constituted a valid admission and was sufficient to find that the petitioner was inadmissible at the time he entered the U.S.)

[9] *Matter of K*, 7 I&N Dec. 594 (BIA 1957); 9 FAM 302.3-2(B)(4)

[10] *Id*.; *Matter of C*, 1 I&N Dec. 14 (BIA 1941) (merely admitting to lying about his employment, and not admitting to the elements that make up the crime of perjury, was insufficient to find the applicant inadmissible); *Matter of G*, 1 I&N Dec. 225, 227 (BIA 1942) (admission was not voluntary where the applicant initially refused to admit to the commission of the offense, but subsequently did after persistent interrogation by the officer).

[11] 9 FAM 302.3-2(B)(4).

[12] One notable exception is a "caution" issued by a police officer in the United Kingdom, which the Department of State has said does constitute an admission under 9 FAM 302.3-2(B)(4). For more information, see American Immigration Lawyers Association Department of State Liaison Committee, *Practice Pointer: Dealing with U.K. Cautions at the U.S. Embassy* (Dec. 16, 2014), AILA Doc. No. 14021952, www.aila.org/infonet.

[13] An arrest report alone could not be used to sustain this ground of inadmissibility, as it requires a finding by a civil surgeon. However, arrest reports could lead an adjudicator to request a new medical exam and an opinion from the civil surgeon as to the applicant's admissibility.

- INA § 212(a)(2)(C) – "reason to believe" the individual is a drug trafficker
- INA § 212(a)(2)(D) – the individual engaged in prostitution and commercialized vice
- INA § 212(a)(2)(H) – "reason to believe" the individual engaged in human trafficking
- INA § 212(a)(2)(I) – "reason to believe" the individual engaged in money laundering
- INA § 212(a)(6)(C)(ii) and INA § 237(a)(3)(D) – false claim to citizenship
- INA § 212(a)(6)(E) and INA § 237(a)(1)(E) – the individual engaged in smuggling

For example, the FAM provides that a long report of drug-related arrests could be used by an adjudicator to make a finding that there is "reason to believe" the individual is a drug trafficker.[14] The "reason to believe" standard has been held to be akin to the probable cause standard in criminal court.[15] Prior to submitting an arrest report, practitioners should carefully consider what conduct-based grounds of inadmissibility could be raised by the contents of the report.

D. Good Moral Character, Bond, and Discretionary Decisions

Arrest reports can be used by IJs and officers when making discretionary decisions, in bond determinations, and when deciding if an individual is a person of good moral character.[16] For example, an IJ could find that a respondent is a danger to the community and deny bond based on allegations in an arrest report.[17] In conjunction with a U visa, USCIS could decline to grant a discretionary waiver of inadmissibility for entering without inspection because of derogatory information contained in an arrest report.[18] USCIS could also find that a naturalization applicant lacks good moral character based on arrest reports, even where the individual has not been convicted of an offense that is a per se bar to showing good moral character.[19]

V. Burden of Submitting Arrest Reports in Immigration Court

Whether a respondent is required to submit an arrest report in immigration court depends on the type of proceedings and the purpose for which the report is being requested. Where an individual in removal proceedings is being charged under INA § 237, the burden is on the Department of

[14] 9 FAM 302.4-3(B)(3).
[15] *Matter of U-H-*, 23 I. & N. Dec. 355, 356 (BIA 2002)
[16] INA § 101(f) ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."); *see Matter of Teixeira*, 21 I&N at 321 (finding that police reports could be helpful in determining whether a respondent merits a favorable exercise of discretion); *Matter of Gonzalez*, 16 I&N Dec. 134, 137 (BIA 1977) (finding that, although the conviction did not bar the respondent from establishing statutory eligibility for voluntary departure, he "is neither a person of good moral character nor a person who merits a favorable exercise of discretion."); *see also Paredes-Urrestarazu v. INS*, 36 F.3d 801, 810 (9th Cir. 1994) (the Board is permitted to consider evidence of conduct that did not result in a conviction when adjudicating a 212(c) discretionary waiver); *Parcham v. INS*, 769 F.2d 1001, 1005 (4th Cir. 1985) ("Evidence of an alien's conduct, without conviction, may be considered in denying the discretionary relief of voluntary departure.").
[17] *Matter of Guerra*, 24 I&N Dec. 37, 40–41 (BIA 2006) (finding that even though the respondent had not been convicted of the offense, unfavorable evidence of criminal conduct was relevant to the Immigration Judge's analysis of whether the respondent posed a danger to the community).
[18] *See, e.g., Matter of K-G-G-E-*, ID# 00150961 (AAO May 5, 2017) (unpublished) (overturning denial of application for adjustment of status through a U Visa that was based on the applicant's arrest for suspected gang membership).
[19] 8 CFR § 316.10(b)(3)(iii).

Homeland Security (DHS) to prove removability.[20] A respondent cannot be required to submit an arrest report to assist the IJ in sustaining a charge of removability. However, for proceedings brought under INA § 212, once alienage has been established, the burden is on the respondent to prove admissibility.[21]

When an individual seeks relief in removal proceedings, the burden is on the respondent to prove that he or she is eligible, including that he or she has been a person of good moral character, if that is an element of the relief being sought.[22] Where the record of conviction is inconclusive, meaning it is not clear whether the respondent been convicted of a disqualifying criminal offense, U.S. Courts of Appeal have been divided on whether this is sufficient to meet the respondent's burden of proving eligibility for relief.[23]

If an individual is seeking a form of relief that is discretionary, such as asylum or cancellation of removal, the burden is on the respondent to prove that he or she merits a favorable exercise of discretion. An IJ may wish to review arrest reports when deciding whether to exercise discretion favorably.

In bond proceedings, the BIA has held that the burden is on the respondent to prove that he or she is not a danger to the community or a flight risk.[24] An IJ may request that a respondent submit arrest reports for consideration in bond proceedings. However, in some jurisdictions, advocates have been successful in arguing that the burden should be on the government to prove dangerousness or flight risk by clear and convincing evidence.[25]

VI. Burden of Submitting Arrest Reports in Cases Before USCIS or a Consulate

An applicant seeking a benefit from USCIS or a visa from a consulate bears the burden of proving eligibility.[26] Failure to submit evidence that USCIS or the consulate believes has some bearing on the client's eligibility could result in a denial of that benefit. Often, a certified court report showing the final disposition of the case, or that no charges were filed, is all that is needed to establish eligibility. Charging documents, police reports, probation reports, and other similar reports are, arguably, not relevant to eligibility, although they can be considered relevant to good moral character determinations and discretionary decisions. Because USCIS and DOS are requesting these reports with increasing frequency at interviews or through requests for evidence (RFEs), practitioners should be prepared to argue against their consideration, particularly when

[20] 8 CFR § 1240.8(a); *Woodby v. INS*, 385 U.S. 276 (1966).
[21] INA § 240(c)(2)(A); 8 CFR § 1240.8(c).
[22] INA § 240(c)(4)(A); *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007).
[23] Compare *Behre v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006); *Martinez v. Mukasey*, 551 F.3d 113, 121–122 (2nd Cir. 2008); *Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005); *Marinelarena v. Barr*, No. 14-72003, --- F.3d ---, 2019 WL 3227458 (9th Cir. July 18, 2019), finding that an inconclusive record is sufficient to meet the respondent's burden of proof, with *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017), finding that an inconclusive record is not sufficient.
[24] INA § 240(c)(4)(A); *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009) (the burden is on the respondent in bond proceedings to demonstrate that he or she is not a flight risk or danger to the community).
[25] *See e.g.*, *Darko v. Sessions*, 342 F.Supp.3d 429 (SDNY 2018); *see also Singh v. Holder*, 638 F.3d 1196, 1205 (9th Cir. 2011).
[26] 8 CFR § 103.2(b)(1).

the arrest report may negatively influence a discretionary decision or showing of good moral character.

VII. USCIS Form Instructions That Request Submission of Arrest Reports

Several USCIS forms currently ask the applicant to submit arrest reports with their initial filing of the application. The form instructions ask for certified reports from any arrest, even if it did not result in criminal charges or a conviction. Practitioners should read the relevant form instructions carefully to determine exactly what is being requested, and stay up to date on the current versions, as form instructions frequently change.

In some instances, practitioners may choose to submit arrest reports at the outset in strict compliance with the form instructions. In other situations, practitioners may consider not submitting the reports initially and waiting to see if USCIS requests them. Where there has been a court disposition, practitioners could submit just the court record indicating the final disposition of the arrest. USCIS may or may not subsequently request the arrest report, at which time the practitioner can decide how to respond. Similarly, if no charges were filed, practitioners could just submit evidence of this, and wait to see if additional information is requested.

Practitioners should be aware that in 2018 USCIS issued a policy memorandum providing that, where required initial evidence is missing from an application, USCIS may choose to deny the application without first sending an RFE or Notice of Intent to Deny (NOID).[27] To help applicants understand what is required initial evidence, USCIS has posted checklists on its webpage for many application forms. Arrest reports appear in the list of required initial evidence on some forms.[28] While it appears that USCIS only intends to deny applications that are missing basic evidence establishing *prima facie* eligibility for the benefit, it remains to be seen whether an application would be denied, without the issuance of an RFE or NOID, for failure to submit an arrest report with the initial application.

VIII. Responding to a USCIS RFE or NOID Requesting an Arrest Report, or an IJ's Request for an Arrest Report

There are three principal responses to a request for an arrest report: (1) provide the report; (2) decline to provide the report and instead submit a letter or legal memorandum explaining why the report is not being provided; or (3) provide the report with a letter or memorandum arguing why it should not be relied on and/or mitigating evidence to counteract it.

A case-specific analysis is needed to determine which of these three strategies best serves the client's goals. As previously mentioned, if the arrest report does not contain any new, prejudicial information, then it may be in the client's best interest to simply comply with the request. More often, practitioners will need to consider employing one of the other two strategies.

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[27] USCIS Policy Memorandum, PM-602-0163, Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b) (July 18, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

[28] *See, e.g.*, USCIS, *Checklist of Required Initial Evidence for Form I-485 (for Informational Purposes Only)* https://www.uscis.gov/i-485Checklist (last reviewed/updated Sept. 10, 2018).

IX. Arguments for Objecting to the Submission or Consideration of an Arrest Report

Arrest reports are a form of hearsay, which means that they are statements made outside of the current interview or hearing, used to prove the truth of the statements. Hearsay is generally not admissible in federal and state courts under the Federal Rules of Evidence, because the person who made the statements is not available to be questioned about the accuracy of those statements in the current proceedings.[29] Unfortunately, IJs and USCIS are not bound by the Federal Rules of Evidence, and are generally permitted to consider hearsay, including statements contained in arrest reports.[30] In removal proceedings, the "'sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.'"[31] Merely arguing that an arrest report contains hearsay is unlikely to keep an immigration adjudicator from admitting or considering it.

However, practitioners can still object to the admission of arrest reports, and use the Federal Rules of Evidence as a guiding principle in arguing that an arrest report is not probative, is fundamentally unfair, or should be given little weight. Objecting to the admission of evidence or to evidence being given significant weight is important so that these arguments are preserved for later appeals. Below are some arguments to consider when evaluating an arrest report:

A. The arrest report lacks corroboration or the allegations have been disproven.

Where there is no evidence to corroborate the arrest report or the allegations have been disproven, practitioners can argue that it is not probative and should be given little or no weight. One common example is where the prosecutor declined to file charges or the grand jury found that there was not sufficient evidence to bring charges.[32] Similarly, if the client was acquitted of all or some of the charges at trial, practitioners can argue that any arrest report relating to those charges is not probative because a judge or jury determined there was not sufficient evidence of the client's guilt. Practitioners can argue that there is no corroboration where the client denies the

[29] Federal Rules of Evidence Article VIII.

[30] *See, e.g., Ogbolumani v. Napolitano*, 557 F.3d 729, 734 (7th Cir. 2009) (finding that USCIS properly relied on an immigration officer's hearsay summary of an individual's statements, noting that there was no indication that "the summaries are inaccurate or unreliable beyond the general 'inherent risks' that come with using a synopsis."); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003); *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995); *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990) (finding that the consular officer could deny a visa based on hearsay); *Sehgal v. Johnson*, 105 F. Supp. 3d 860 (N.D. Ill. 2015) (no due process violation where USCIS relied on ex-wife's unsworn letter written five years after marriage had ended and did not provide a copy to the applicant, noting that "[h]earsay is admissible in administrative proceedings . . . so long as the evidence is probative and its use is not fundamentally unfair.").

[31] *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986); *Olowo v. Ashcroft*, 368 F.3d 692, 699 (7th Cir. 2004).

[32] *See, e.g., Matter of Arreguin De Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995) ("Considering that prosecution was declined and that there is no corroboration, from the applicant or otherwise, we give the apprehension report little weight."); *Matter of Sotelo Sotelo*, 23 I&N Dec. 201 (BIA 2001) (declining to consider an outstanding arrest warrant as an adverse factor in the absence of a conviction); *see also Sierra-Reyes v. INS*, 585 F.2d 762, 764 n.3 (5th Cir. 1978) (police reports were not probative and should not have been considered as adverse factors where prosecutors declined to prosecute).

allegations in the arrest report,[33] but also where the client pled guilty but maintained their innocence.[34]

B. The arrest report is unreliable.

Some courts have found that police reports are inherently unreliable because of the manner in which they are created and the fact that they are one-sided.[35] There may also be evidence that a particular report is unreliable. For example, studies have shown that gang databases may sweep up people who are not gang-involved and there is no way for someone to challenge his or her inclusion in the database.[36] In other cases, there may be evidence that statements made by the client or a witness were coerced or not given voluntarily. Practitioners should review each arrest report carefully for indications that it may be unreliable, including:

- There are factual errors in the report.[37]

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[33] *See, e.g., Avila-Ramirez v. Holder*, 764 F.3d 717, 724–25 (7th Cir. 2014) (finding error in giving "significant weight to uncorroborated arrest reports" where the respondent "admitted no wrongdoing," and "was not prosecuted or convicted after these arrests, and there was no corroboration introduced at the immigration hearing."); *Garces v. U.S. Att'y Gen*., 611 F.3d 1337, 1350 (11th Cir. 2010) ("Absent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence…"); *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708 (6th Cir. 2004) (IJ should not have relied on police report to deny adjustment of status, where the respondent denied committing a crime, the arrest did not result in a conviction, and the report was not corroborated). *But see Abbas v. Lynch*, 647 F. App'x 671, 672 (9th Cir. 2016) (unpublished) (upholding reliance on reports where they were corroborated by testimony); *Lanzas-Ramirez v. U.S. Atty. Gen.*, 508 F. App'x 885, 889 (11th Cir. 2013) (unpublished) (noting that the police report was corroborated by a police officer deposition summarizing interviews of alleged victims); *Henry v. I.N.S.*, 74 F.3d 1, 6–7 (1st Cir. 1996) (upholding consideration of an arrest report where the Board did not give it "excessive weight").

[34] *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1349 (11th Cir. 2010) (plea of guilty does not corroborate the allegations in the arrest report where Florida allows defendants to take "pleas of convenience without any admission of guilt").

[35] *See, e.g., Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012) (noting that police reports "often contain little more than unsworn witness statements and initial impressions" and "because these submissions are generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections"); *Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006) (RAP sheets are products of "agencies whose jobs are to seek to detect and prosecute crimes" and thus "do not necessarily emanate from a neutral, reliable source"); *Dickson v. Ashcroft*, 346 F.3d 44, 54 (2d Cir. 2003) (reasoning that because factual narratives in probation reports "are prepared by a probation officer on the basis of interviews with prosecuting attorneys, police officers, law enforcement agents, etc., they may well be inaccurate" and are "not a highly reliable basis for a decision of such importance as deportation"); *United States v. Bell*, 785 F.2d 640, 642 (8th Cir. 1986) (noting that police reports are "inherently . . . subjective" given the "personal and adversarial" relationship between police officers and those whom they arrest, and are therefore not "reliable evidence of whether the allegations of criminal conduct they contain are true", and noting that "Congress exhibited similar doubts about the reliability of [police] reports when it specifically excluded them from the public reports exception to the hearsay rule in criminal cases"); *Noe Cesar Hernandez-Avila*, A079 531 484, 2013 WL 416253 (BIA Jan. 18, 2013) (unpublished) ("'[A]rrest reports are one-sided recitations of events aimed at establishing probable cause or reasonable suspicion in criminal proceedings.'" (citing IJ decision)).

[36] For a discussion of gang databases, see National Immigrant Justice Center, *Untangling the Immigration Enforcement Web*, at 10-12 (Sept. 2017), https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf; New York Civil Liberties Union and New York Immigration Coalition, *Stuck With Suspicion: How Vague Gang Allegations Impact Relief & Bond for Immigrant New Yorkers* (2019), https://d1jiktx90t87hr.cloudfront.net/323/wp-content/uploads/sites/2/2019/02/020819-NYCLU-NYIC-Report.pdf.

[37] *See, e.g., Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (noting that a government memorandum was unreliable because it contained significant errors). *But see, e.g., Jian Hui He v. Holder*, 589 F. App'x 587, 589 (2nd

- The statements contained in the report were not written down verbatim or contemporaneously, but rather written or summarized later.[38]
- There was a language barrier between the author of the report and any of the witnesses.[39]
- Statements in the report are opinions or speculation, without supporting facts.
- There is evidence that the individual who created the report or made the statements is not reliable or credible. Perhaps the individual making the statements did not have firsthand knowledge of the events or later recanted the statements.[40] In some instances, practitioners may be able to obtain a letter from a victim or witness recanting the statements. In other cases, practitioners may be able to show that the individual making the statements had an ulterior motive or incentive to be untruthful.[41]
- The report lacks detail, fails to provide facts supporting its conclusions, or fails to describe how the investigation was conducted.[42]
- The report contains multiple levels of hearsay.[43] An example of "double hearsay" would be a police report that describes a witness's statements. The police report itself is hearsay, and the witness statements contained in the report are hearsay within hearsay.
- The source for the document's statements is not identified, including where the document relies on confidential informants or other undisclosed sources.[44] Practitioners could argue

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Cir. 2014) (unpublished) (upholding reliance on government document despite the fact that it "inaccurately identified [the petitioner] as female, given the accuracy of the other, *more* detailed identifying information, i.e., [petitioner's] name, date of birth, and passport number").

[38] *See Matter of J-C-H-F-*, 27 I&N Dec. 211, 214–15 (BIA 2018), citing *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2nd Cir. 2004) (holding that, in determining whether a report of a border interview is accurate, IJs should consider, among other things, "whether the report of the interview is verbatim or merely summarizes or paraphrases the alien's statements").

[39] *See Hernandez-Garza v. INS*, 882 F.2d 945 (5th Cir. 1989) (reversing smuggling finding based on hearsay testimony from immigration agent who wrote down respondent's Spanish responses in English, concluding that respondent was entitled to cross examine the agent on Spanish fluency before the statement could be relied upon).

[40] *See Ezeagwuna v. Ashcroft*, 325 F.3d 396, 408 (3rd Cir. 2003) (concluding that it was a due process violation to rely on government documents that reported the statements of "declarants who are far removed from the evidence sought to be introduced").

[41] *See, e.g.*, *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 269 (2nd Cir. 2006) (concluding that consular report submitted by DHS was unreliable where it lacked detail and was based on the opinions of Chinese government officials who had "powerful incentives" not to be candid).

[42] *See, e.g.*, *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1349–1350 (11th Cir. 2010) (arrest report could not sustain charge of "reason to believe" drug trafficker where it contained conclusions, rather than observations of facts); *Banat v. Holder*, 557 F.3d 886, 891 (8th Cir. 2009) ("Reliance on reports of investigations that do not provide sufficient information about how the investigation was conducted are fundamentally unfair"); *Anim v. Mukasey*, 535 F.3d 243, 258 (4th Cir. 2008) ("General deference to the Department of State cannot substitute for an adequate evaluation of the reliability of a document, especially when the document . . . provides practically no information upon which a reliability determination can be made.").

[43] *See, e.g.*, *Banat v. Holder*, 557 F.3d at 892–93 (concluding that government investigative report was unreliable in part because it contained "multiple levels of hearsay"); *Lin v. U.S. Dep't of Justice*, 459 F.3d at 272 (concluding that a document was unreliable in part because it "contain[ed] multiple levels of hearsay that exacerbate its myriad reliability problems"); *Ezeagwuna v. Ashcroft*, 325 F.3d at 406 (concluding that the BIA erred in relying on government document that contained "multiple hearsay of the most troubling kind" because it contained statements from declarants who were far removed from the evidence).

[44] *See, e.g.*, *Banat v. Holder*, 557 F.3d at 892–93 (concluding that government evidence was unreliable in part because it relied on unidentified sources without any attempt to verify the claims made by the source or any showing of the qualifications or experience of the unidentified sources); *Alexandrov v. Gonzales*, 442 F.3d at 407 (concluding that IJ should not have relied on Department of State reports because they were unreliable, in part because they did not identify who the investigator was or what type of investigation was conducted).

that considering such evidence would be fundamentally unfair, given that it is impossible for the applicant to evaluate the reliability of the source.

C. The client has not been given an opportunity to cross-examine the author of the report or the witnesses.

In the context of removal proceedings, a respondent can argue that he or she has a right to cross-examine any individuals who made hearsay statements.[45] If not afforded an opportunity to cross-examine the declarant, practitioners should argue that the evidence should be excluded or given little weight. Practitioners could also consider asking the court to issue a subpoena or seek a deposition, in order to cross-examine the declarant.[46] Although applicants are not typically afforded an opportunity to cross-examine witnesses in USCIS adjudications, practitioners can still assert that, without an opportunity for cross-examination, evidence should be given little to no weight.

X. Evidence Practitioners May Submit to Counter or Mitigate an Arrest Report

If there is evidence to counter or contradict an arrest report, that evidence should be submitted in conjunction with an argument that the report should be excluded or given little weight. For example, if an arrest report alleges that a client is a gang member, an expert on gang involvement could review the police report, meet with the client, and write a statement that the client is not a gang member, based on his or her expertise. Similarly, if a witness recanted statements made in an arrest report, or additional witnesses can provide statements or testimony countering the report, that additional evidence should be submitted.

When submitting an arrest report in bond proceedings, or in relation to an issue of discretion or good moral character, practitioners are encouraged to include evidence of the client's good character and rehabilitation, or other compelling reasons why the case should be granted, to mitigate the allegations in the report.[47] Evidence of good character can include letters from

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[45] *See, e.g.*, *Karroumeh v. Lynch*, 820 F.3d 890 (7th Cir. 2016) (respondent was deprived of due process where government did not make reasonable efforts to produce ex-spouse for cross examination but relied on that person's inconsistent statements); *Pouhova v. Holder*, 726 F.3d 1007, 1015 (7th Cir. 2013) (even where government makes reasonable but unsuccessful efforts to produce a witness, "[w]e do not see why making an unsuccessful effort to locate a witness renders the unreliable hearsay evidence any more reliable or its use any fairer than without such effort"); *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004) ("[T]he INS may not use an affidavit from an absent witness unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing") (internal quotations omitted); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997) (hearing was fundamentally unfair where the INS relied on a hearsay affidavit but made no effort to produce the witness, depriving the respondent of the opportunity for cross-examination); *Olabanji v. I.N.S.*, 973 F.2d 1232, 1234–35 (5th Cir. 1992) ("This court squarely holds that 'the use of affidavits from persons who are not available for cross-examination does not satisfy the constitutional test of fundamental fairness unless the INS first establishes that despite reasonable efforts it was unable to secure the presence of the witness at the hearing'" citing *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989); *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988) (finding that the BIA's reliance on hearsay documents was fundamentally unfair because the government failed to make reasonable efforts to produce the declarant for cross-examination).

[46] 8 CFR § 1003.35.

[47] Discretion may be favorably exercised in the face of adverse factors where there are countervailing equities such as long residence in the United States, close family ties in the United States, or humanitarian needs. *Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972).

family, friends, employers, teachers, or religious leaders that speak positively about the client. Such evidence could also include certificates from rehabilitation programs, positive school and employment records, military records, or evidence of involvement in the community.

In some cases, the behavior that led to the arrest may be anomalous or may be mitigated by circumstances in the client's life at the time, such as a death in the family, or a medical or mental health issue. Even when there are no mitigating factors related to the arrest itself, practitioners can include evidence of other compelling factors in the case, to counter the negative statements in the arrest report. For example, if the client is seeking adjustment of status through a spouse and the spouse has a disability, the practitioner can include evidence that the spouse is dependent on the client and argue that this special circumstance outweighs the allegations in the arrest report when balancing the equities in the case.

XI. Potential Consequences of Failing to Submit an Arrest Report

Practitioners and their clients should be aware of the potential consequences of not submitting a requested arrest report. In immigration court, IJs are permitted to draw an adverse inference against the respondent when information that is available is not provided to the court.[48] This means that, if an arrest report is available but the respondent declines to provide it, IJs are permitted to assume the arrest report contains information that is unfavorable to the respondent. Thus, for example, where a client has been charged or convicted under a statute that punishes a broad range of conduct, and the IJ requests the police report as part of a bond hearing, or to determine if the client merits a favorable exercise of discretion, the IJ could infer that the client committed the worst conduct punished by the statute if the arrest report is not submitted.

Similarly, failure to submit an arrest report to USCIS that was requested in an RFE or NOID could result in the denial of the application.[49] As previously mentioned, in some cases a denial of an application could result in the issuance of an NTA. These risks, which will vary from case to case, must be weighed against the consequences that could flow from submitting the arrest report.

Practitioners should note that a USCIS officer could obtain an arrest report by other means. However, regardless of the source of the arrest report, applicants have a regulatory right to inspect any evidence in the report.[50] If a practitioner becomes aware that USCIS is considering some evidence that the applicant did not submit, such as an arrest report, practitioners could demand an opportunity to review the derogatory information and be given a chance to rebut it, citing the regulation.[51]

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[48] *See Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003); *United States v. Alderete-Deras*, 743 F.2d 645, 647 (9th Cir. 1984).

[49] 8 CFR § 103.2(b)(13)(i) (if an applicant fails to respond to an RFE or NOID by the required date, the application "may be summarily denied as abandoned, denied based on the record, or denied for both reasons").

[50] 8 CFR § 103.2(b)(16). Although in some contexts, this has been interpreted as a right to review a summary of the evidence and not an exact copy of the evidence.

[51] 8 CFR § 103.2(b)(16)(i) ("If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information on his/her own behalf before the decision is rendered. . . .").

XII. The Importance of Obtaining Arrest Reports

It is beneficial to obtain all of a client's criminal records at the outset of their case, even though some of the records may ultimately not be submitted to the adjudicator. Waiting until after an RFE or request from the immigration judge is received could result in the practitioner having insufficient time to obtain these records before the RFE deadline or next court date. Practitioners often encounter difficulties with obtaining court and arrest records, particularly if the incident occurred a long time ago.

Additionally, if the contents of the arrest report could affect the client's eligibility or likelihood of success in their case, practitioners will want to know this as early as possible, and before filing any application. This is particularly true where a denial of the application could result in the issuance of an NTA. Obtaining the records early on also allows practitioners to proactively address any negative content, and to resolve any inconsistencies with the other evidence in the case.

XIII. What To Do When an Arrest Report is Unavailable

Sometimes the agency that made the arrest will not or cannot provide the arrest report. This may be because the agency no longer has the report, the report has been sealed, or the agency simply will not disclose the information. This is especially common where the individual was a juvenile at the time of the arrest.[52] In these instances, practitioners should try to obtain a certified letter from the agency explaining that the report has been destroyed or cannot be released.[53] If the agency will not provide any written documentation, practitioners can write a sworn affidavit, documenting the efforts made to obtain the report.[54] Practitioners may also be able to cite to a state law or local rule that requires certain types of reports to be sealed or destroyed.

XIV. Ethical Considerations for Practitioners

Practitioners should remember that the decision to provide an arrest report ultimately lies with the client.[55] Practitioners should counsel clients about the different options for responding to a request for arrest reports, including the risks and benefits of each option, and then decide with the client which option to pursue. For the benefit of both the client and the practitioner, it is recommended to obtain the client's informed consent to the decision in writing.

However, both practitioners and clients have an obligation to ensure that any information provided to USCIS, the immigration court, or any other immigration officer is truthful.[56] If a client intends to provide false or misleading information - including by omission - either in writing or at a hearing or interview, the practitioner may need to withdraw from representation.

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[52] For example, Section 831 of the California Welfare & Institutions Code limits the access and use of reports from juvenile delinquency or dependency proceedings.
[53] 8 CFR § 103.2(b)(2)(ii). However, where the FAM indicates that this type of document generally does not exist, a certified letter from the agency is not necessary.
[54] *Id.*
[55] *See* Rule 1.2 of the Model Rules of Professional Conduct (2018).
[56] *See* Rule 3.3 of the Model Rules of Professional Conduct (2018).

Additionally, a practitioner cannot assist a client in trying to obtain a benefit for which the client is not eligible. For example, if an arrest report alleges that the client used a fake birth certificate to obtain a driver's license, and the client admits to the practitioner that he or she claimed to be a U.S. citizen in a driver's license application, then the client may not be eligible for the immigration benefit being sought. If the client is in fact ineligible and no waiver is available, the practitioner should inform the client of this, and that the practitioner cannot continue to assist him or her in pursuing that benefit. Practitioners should consult the applicable rules of professional conduct in their jurisdiction for guidance in these situations.

XV. Conclusion

Responding to a request for an arrest report often involves making a difficult judgment call. Practitioners must balance the potential negative impact of a report with the reality that USCIS and IJs are increasingly denying applications where a non-citizen declines to provide an arrest report. Practitioners should be prepared to advocate for their clients and argue against the over-reliance on these one-sided and often inaccurate reports.