

## FIFTH AMENDMENT

Removal proceedings are civil in nature and therefore need not strictly follow conventional rules of evidence. See *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). Evidence is admissible if it is probative and its use is fundamentally fair. See *id.*; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980). An Immigration Judge may receive into evidence “any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.” 8 C.F.R. § 1240.7. However, in removal proceedings, a respondent has the right to a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government. See 8 C.F.R. § 1240.10(a)(4).

When a respondent questions the legality of evidence, he must come forward with proof establishing a prima facie case that the Government’s evidence was unlawfully obtained. See *Barcenas*, 19 I&N Dec. at 611 (citations omitted). In meeting this burden, an affidavit alone is not sufficient, rather the testimony of the movant is required. See *id.* at 611-12. Once a respondent makes a prima facie showing, the burden shifts to the Government to prove that it obtained its evidence lawfully. See *Ramirez-Sanchez*, 17 I&N Dec. at 505 (citations omitted).

The Fifth Amendment requires that removal proceedings “conform to the traditional standards of fairness encompassed in due process; and accordingly, statements made by an alien used to support [removal] must be voluntarily made.” *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1277 (citation omitted). The BIA 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); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

### A. Involuntary or Coerced Statements

Miranda warnings are not controlling in removal proceedings because of the civil nature of the proceedings. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984). In addition, the exclusionary rule is not per se applicable, but 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); *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. See *id.* 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.

588 F.2d 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. *See Garcia*, 17 I&N Dec. at 320-21. In *Choy v. Barber*, 279 F.2d 642, 647 (9th Cir. 1960), the Ninth Circuit concluded that a petitioner's statement was involuntary after he was interrogated for seven hours, "continuing into the wee hours of the morning," and was told that he would be prosecuted for perjury and deported if did not make a statement agreeing with the accusation against him.

Example: While the respondent may have been frightened about what could possibly happen to him, he has not alleged that the immigration officers threatened him into signing or writing anything, nor has he alleged that they were coercive or behaved improperly. Therefore, this Court finds that the respondent's motion to suppress his sworn statement cannot be granted under the Fifth Amendment

## Conclusion

As the respondent has / has not made a prima facie showing that his statement was obtained by coercion or duress, this Court finds that suppression is / is not a suitable remedy for the violation of the Fifth Amendment guarantee of due process. DHS has presented / has not presented evidence justifying the manner in which the evidence was obtained. Therefore, the Court will / will not suppress the evidence.

In conclusion, the following statements will be suppressed: \_\_\_\_ [Identify statements] \_\_\_\_.

## B. Right to Counsel

An alien's right to counsel in removal proceedings is grounded in the Fifth Amendment's guarantee of due process (1). *See Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004). Immigration officers, however, are not required to advise aliens of their right to counsel prior to interrogation. *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975) (finding that Miranda warnings would be "inappropriate" in the deportation context). Moreover, because Miranda warnings are not required, an alien is not deprived of his right to counsel, even if he requested counsel's presence, so long as he answered the questions freely. *See Matter of Baltazar*, 16 I&N Dec. 108, 111 (BIA 1977). In *Baltazar*, the respondent asked if he could communicate with his attorney at the time of his arrest. *See id.* at 109. After the immigration officer unsuccessfully attempted to contact his attorney, the respondent admitted to having entered the United States as a nonimmigrant with the intent to remain permanently and to having divorced his wife in order to obtain an immigrant visa. *See id.* The Board declined to exclude these admissions because the respondent did not make them under duress or as a result of coercion. *See id.* at 110.

**Example:** The respondent similarly asked for counsel prior to being interrogated by the officer. Whereas the officer in *Baltazar* attempted to contact the attorney, albeit unsuccessfully, the officer here told the respondent that attorneys were not allowed on the premises. The officer's active interference with the respondent's right to counsel indicates that the respondent did not make his statement freely, but rather as a result of coercion or under duress. This Court therefore concludes that the officer violated the respondent's right to counsel under the Due Process Clause of the Fifth Amendment.

## Conclusion

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1. Cf. *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969) (recognizing that “the rules laid down in *Massiah* and *Escobeda* requiring the presence of counsel during interrogation, and other Sixth Amendment safeguards, are not applicable to [deportation] proceedings”).