No. _____

In The Supreme Court of the United States

ILMA SORIANO NUNEZ,

Petitioner,

v.

WILLIAM BARR, Attorney General,

Respondent.

EMERGENCY MOTION FOR STAY OF DEPORTATION ORDER PENDING WRIT OF CERTIORARI

COMES NOW the Petitioner, Ilma Soriano Nunez, by and through her counsel, Jose C. Campos, Esq., and pursuant to Supreme Court Rule 23 hereby makes this Emergency Motion for a Stay of the Order of the Immigration Judge of January 9, 2019, in this matter until resolution of the petition for Writ of Certiorari of the Mandate of the United States Court of Appeals for the Third Circuit to the United States Supreme Court. As grounds for the motion, Petitioner states as follows:

I. REQUEST FOR EMERGENCY RELIEF

1. A Petition for Writ of Certiorari[1] from an opinion and judgment of the

[1] The judgment of the Court of Appeals is dated March 17, 2020. On March 19, 2020, in response to the Covid-19 epidemic, this Honorable Court extended the deadline to submit Petitions for Writ of Certiorari to 150 days from the date of the underlying order. (Order List: 589 U.S.). Petitioner

United States Court of Appeals for the Third Circuit in an immigration matter is being prepared for submission to this high Court.

2. On information or belief, the Respondent Government is preparing to and intends to imminently deport the Petitioner Ilma Soriano Nunez to the Dominican Republic, even though a Petition for Writ is currently being prepared for submission to this Court.

3. A stay of the deportation order may be issued below by the Immigration Judge or the Board of Immigration Appeals only pursuant to a motion for reconsideration or to reopen made within 30 and 90 days, respectively of the deportation order. 8 U.S.C. § 1229a(c)(6) and (7); 8 C.F.R. § 1003.2. Since those deadlines have passed and due to the very short period of time remaining before the Petitioner's possible deportation by the Government, it was impractical to first apply for the stay with the Immigration Judge or the Board of Immigration Appeals.

4. Additionally, the Third Circuit Court of Appeals issued its Mandate in this case on May 8, 2020, closing the case, making a motion before the Court of Appeals regarding the Petition for Review impractical.

5. Petitioner now seeks from this Court a stay of her imminent deportation to allow her the opportunity to file her Petition for Writ of Certiorari with The United States Supreme Court.

II. MOTION

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has until August 14, 2020 to submit her Petition for Writ and is in the process of doing so.

6. This case highlights the problems inherent when the government criminally prosecutes an individual in Federal Court and simultaneously proceeds with removal in Immigration Court without first resolving the criminal case. This situation puts the defendant/respondent in a situation where she is forced to decide between self-incrimination or deportation.

7. On January 9, 2019, the Immigration Judge issued an order of removal of Petitioner, Ilma Soriano Nunez, to the Dominican Republic. A true and correct copy of the Order of Removal is attached as "Exhibit A". Mrs. Soriano Nunez timely appealed the deportation order to the Board of Immigration Appeals.

8. On June 7, 2019, the Board issued its final decision dismissing Mrs. Soriano Nunez's appeal. A true copy of the Order of the Board of Immigration Appeals is attached as "Exhibit B".

9. A timely petition was then filed by Mrs. Soriano Nunez in the United States Court of Appeals for the Third Circuit on June 12, 2019. On March 17, 2020, a panel of the Circuit Court denied the petition for review from final decision of the Board of Immigration Appeals and the Immigration Judge. A true and correct copy of the Judgment and Opinion of the Court of Appeals is attached as "Exhibit C". A Mandate from the Court of Appeals was issued on May 8, 2020.

A. Standards to Be Applied on Motion to Stay Removal Order

10. This Court has jurisdiction to issue a stay of a removal order. 8 U.S.C. § 1252(a)(1) incorporating 28 U.S.C. § 2349(b); Fed. R. App. P. 8; *Thapa v. Gonzales*, 460 F.3d 323, 329 (2nd Cir. 2006); *Obale v. Attorney General*, 453 F.3d 151, 155-7 (3rd Cir. 2006). The standard to be applied in regard to a motion to stay a removal order

by an Immigration Judge is the same as that used for a motion for preliminary injunction which requires the Court to consider (a) the likelihood of success, (b) the threat of irreparable harm if the stay is not granted, (c) the absence of harm to opposing parties if the stay is granted, and (d) any risk to the public interest. *Thapa*, 460 F.3d at 334; *Obale*, 453 F.3d at 160-1; *Tesfamichael v. Gonzales*, 411 F.3d 169, 171-7 (5th Cir. 2005).

B. Likelihood of Success on the Merits of the Writ

11. The Court of Appeals' decision in its Order and Judgment on the merits was based upon a ruling that the Immigration Judge, (Hereinafter "IJ"), did not violate Mrs. Soriano Nunez's Fifth Amendment right by drawing negative inferences from her refusal to testify during her immigration proceeding. Exhibit C (Order and Judgment, pages 6-7). Her refusal to testify was directly based on the fact that she had an ongoing criminal prosecution in the Federal District Court for the Eastern District of Pennsylvania. She asserted her Fifth Amendment right to remain silent during the immigration proceedings because everything she said in that forum was going to be used against her in the criminal court. As such she was unable to put forth any evidence towards discretion or eligibility for cancellation of removal. This directly resulted in her removal being ordered by the IJ.

12. Explicit in the Court of Appeals decision is that Mrs. Soriano Nunez had eventually pleaded guilty to the federal charges (False Claim to US Citizenship, Passport Fraud, Social Security Fraud, and Production of a Fraudulent

Document) making her ineligible for cancellation of removal.[2] However, that conviction is currently on appeal in the briefing stage in the Third Circuit. See USA v. Ilma Soriano Nunez, Case No. 20-1032, Third Circuit Court of Appeals. Part of her argument on appeal is that the District Court erred in denying her Motion to Dismiss the Indictment when she was ordered released on unsecured bail but taken into ICE custody pursuant to a detainer.[3] Deporting her now will moot her criminal appeal causing a direct harm in her criminal case from her assertion of her right to remain silent in the immigration case. This is not what the Constitution requires. As such, she should be given the opportunity to exhaust her appeals. Moreover, should she be successful in her criminal appeal, the indictment, which formed part of the basis for the Immigration Judge's removal order, will have been dismissed.

C. Irreparable Harm If the Stay Is Not Granted

13. Mrs. Soriano Nunez entered the United States in 1999. She is married with two U.S. Citizen children. She has an ongoing criminal appeal and has been held in federal custody (both ICE and DOJ custody) for approximately 2 and ½ years.

14. On information or belief, Petitioner is currently being held in ICE custody at the Irwin County Detention Center, in quarantine after a positive COVID-19 infection.

[2] She was sentenced in the criminal case to 1 year of imprisonment and 3 years of supervised release. She served approximately six months of imprisonment at FCI Danbury and was released to ICE custody for deportation on June 12, 2020.

[3] See also *United States v. Soriano Nunez*, 928 F.3d 240, 245 (3d Cir. 2019), where the Court of Appeals previously held that Mrs. Soriano Nunez' continued detention by ICE after being ordered released by the District Court was permissible but did not rule on the Motion to Dismiss the Indictment.

15. Her deportation to the Dominican Republic is imminent and will likely moot her Petition for Writ of Certiorari and her pending criminal appeal. The Department of Justice is keenly aware of this.

16. Moreover, the deportation of an individual who is a positive carrier of the COVID-19 virus raises its own set of ethical issues.

17. Under 8 U.S.C. § 1182(a)(9)(A)(i), any alien who has been ordered removed under 8 U.S.C. § 1229(a) (removal proceedings) may not be readmitted for a period of at least 5 years. The Government has a history of deporting aliens while appeals are pending - and even after deportation stays have been issued - and then arguing that the appeal and stay are moot. *See*, *e.g.*, *Patel v. Ashcroft*, 378 F.3d 610, 612-613 (7th Cir. 2004) (see citations and discussion therein). As the Seventh Circuit noted in *Patel*: "We doubt that Congress meant to empower the immigration authorities to thwart judicial review by removing the alien from the United States in conscious contempt of a judicial decree." The removal of Petitioner prior to the completion of her Petition for Writ of Certiorari before the United States Supreme Court and her current active criminal appeal in the Third Circuit will substantively interfere with her ability to conduct those appeals if not depriving the Courts of jurisdiction altogether. *Id*. If Petitioner is removed in this manner by the Government, she will effectively be deprived of substantive and procedural due process of law.

18. Deportation is a drastic remedy that should be rarely applied:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence

> in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948).

D. Harm to Opposing Party

19. The is no harm to the Government in the granting of a stay of deportation. If Petitioner is unsuccessful in her Petition for Writ of Certiorari to the Supreme Court, the process of deportation can proceed in the same manner then as it would now. The expense would be the same. Although Mrs. Soriano Nunez is intent on staying with her family in the United States, the Government cannot even argue a risk of flight as the Government does not even want her in the United States. Mrs. Soriano Nunez is no threat to anyone. There is not any even arguable harm to the Government in the granting of a stay by this Court of Mr. Soriano Nunez' deportation.

E. Risk to the Public Interest

20. As previously noted, Mrs. Soriano Nunez was sentenced to imprisonment and supervised release. If released she would be under the supervision of the United States Probation Office mitigating any risk to the public. If she remains in ICE custody, there will be no risk to the public.

21. The public has an interest in the fair and just treatment of its citizens, residents, and non-residents. The deportation of Mrs. Soriano Nunez as she is in the midst of her appeals of not only her removal but also her conviction in federal court is not fair, not just, and not in the public interest. The deportation of Mrs.

Soriano Nunez before she has had the opportunity to complete her appeals would be unfair, unjust, and a violation of her rights to procedural and substantive due process of law, and not in the public interest.

22. The public has an interest in supporting and protecting the well-being of families and children. The psychological and emotional toll her imprisonment and positive COVID-19 diagnosis has taken on her individually and as a family is indescribable.

WHEREFORE, for good cause shown, Petitioner Ilma Soriano Nunez respectfully requests that this Court stay the order of removal of the Immigration Judge in this matter pending resolution of the petition for Writ of Certiorari.

Respectfully submitted,

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Certificate of Service

I hereby certify that true and correct copies of the Motion for Stay with attachments in writing were served by email and by US Mail on this 25th day of June 2020 to:

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ATTORNEY FOR PETITIONER

ATTACHMENTS

Exhibit A – Decision of the Immigration Judge dated January 9, 2019

Exhibit B – Decision of the Board of Immigration Appeals dated June 12, 2019

Exhibit C – Opinion and Judgment of the Court of Appeals dated March 1, 2020

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File: A216-545-029 January 9, 2019

In the Matter of

ILMA ALEXANDRA SORIANO NUNEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: INA 212(a)(6)(A)(i) and 212(a)(6)(C)(ii) of the Immigration and Nationality Act.

APPLICATION: Cancellation of removal for non-lawful permanent resident - INA 240A(b).

ON BEHALF OF RESPONDENT: KEVIN SANTOS

ON BEHALF OF DHS: JEFFREY BUBIER

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 40-year-old native and citizen of the Dominican Republic. She entered the United States without admission or parole by an Immigration officer. The Department of Homeland Security (DHS) commenced removal proceedings through the issuance of a Notice to Appear on March 6, 2018. See Exhibit 1. DHS charged the respondent with being removable from or inadmissible to the United States

pursuant to 212(a)(6)(A)(i) and 212(a)(6)(C)(ii) of the Act. See Exhibit 1.

The respondent invoked her Fifth Amendment right to self-incrimination and has elected to remain silent during her proceedings. Based upon this, the Court deemed the factual allegations denied and the charge of removal as well. Thereafter, the Court sustained allegations 1 through 4 and the first charge of removability under INA § 212(a)(6)(A)(i) based upon the evidence presented. The Court did not initially make a finding as to allegation 5 or the charge under 212(a)(6)(C)(ii) of the Act. The Court directed the Dominican Republic as the country of removal in the event removal became necessary.

At a Master Calendar hearing conducted by Immigration Judge Dinesh Verma on August 21, 2018, the Court conducted a contested removal hearing. The Court ruled on objections to the evidence ~~submitted~~ and thereafter admitted Exhibits 1 through 5. On that date the Court heard arguments by both parties and declined to sustain the second charge of removal under INA § 212(a)(6)(C)(ii~~) of the Act~~. However, the Court kept the record open to give DHS an opportunity to submit additional evidence in support of the remaining charge of removal.

Thereafter, the respondent filed an application for cancellation of removal for non-lawful permanent residents pursuant to INA § 240A(b) of the Act. See Exhibit 6. The respondent, through counsel, also filed a *motion in limine* in response to evidence that the Government submitted. See Exhibit 7. The Court notes that the respondent has again invoked her Fifth Amendment right to self-incrimination throughout her ~~submitted~~ application and in submitting personal documents in support of her case. See Exhibit 6.

Today, the respondent appeared for the scheduled individual hearing on the merits of that application and ~~again the respondent~~she again invoked her Fifth

Amendment right to self-incrimination and remained silent.

I. ISSUES

The issues before the Court concerns the charges of removal and the respondent's ~~application for relief,~~ cancellation of removal application, under INA § 240A(b)~~for non-lawful permanent residents~~.

II. EVIDENTIARY RECORD

The evidence in the record consists of Exhibits 1 through 8. The respondent, through counsel, has made numerous objections to the evidence.

The respondent objects to DHS' submissions arguing that some of the evidence is hearsay, has not been properly authenticated and is subject to the confrontation clause as set forth by Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006).

Removal proceedings are civil in nature and the rules of evidence do not strictly apply. See Matter of Barcenas, 19 I&N Dec. 609, 611 (BIA 1988); Singh v. Ashcroft, 398 F.3d 396, 406-07 (6th Cir. 2005). The test for admissibility of evidence in removal proceedings is whether the evidence is probative and fundamentally fair so as not to deprive the alien of due process. See Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980); Matter of Ponce-Hernandez, 22 I&N Dec. 784, 785 (BIA 1999). An Immigration Judge may receive in evidence any oral or written statement that 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. See 8 C.F.R. 1240.7(a) and 1240.46(c).

First, the Court finds that the 213 is admissible in this case because the record does not support a finding that it contains information that is incorrect or was obtained by coercion or duress. The Court also recognizes the respondent has chosen to remain silent during the proceedings. Thus, the Court finds the 213 is inherently trustworthy as

admissible evidence to prove alienage and deportability or inadmissibility. See Matter of Barcenas.

Additionally, the Court finds that the respondent's contentions regarding the confrontation clause are not applicable in Immigration proceedings, which are civil in nature and because the confrontation clause only applies in criminal prosecutions. See United States Constitutional Amendment ~~Six~~VI.

The Court also recognizes the respondent's objection to the affidavit of Department of State Special Agent Myers. See Exhibit 7 and 8. Although the Court finds that a notarized statement from the agent and language regarding perjury would have been useful ~~and helpful in the case~~, the Court finds the lack of ~~those~~ this component~~s~~ does not render the document inadmissible. See 8 C.F.R. 1287.6.

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Given the standards delineated, the Court finds the documents submitted by the Department of Homeland Security to be probative and fundamentally fair and, thus, admitted into the record.

The Court has considered all evidence in the record even if not explicitly mentioned in the decision. Based upon the evidence, the Court makes the following findings of fact.

III. FINDINGS OF FACT

The respondent came to the attention of DHS after being indicted by a Grand Jury in the United States District Court, Eastern District of Pennsylvania, for passport fraud in violation of 18 U.S.C. 1542, falsely representing herself to be a United States citizen in violation of 18 U.S.C. 911, social security fraud in violation of 42 U.S.C. 408, identity theft in violation of 18 U.S.C. 1029(a)(1) and aiding and abetting. See Exhibit 2, tabs A and C.

The indictment charges the following:

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"...: tThat on January 11, 2017, the defendant, Ilma Alexandra Soriano, an alien, native and citizen of the Dominican Republic, knowingly and willfully made false statements in an application for a United States passport with the intent to induce and secure for her own use the issuance of a passport under the authority of the United States contrary to the laws regulating the issuance of passports and the rules proscribed pursuant to laws. That is defendant, Ilma Alexandra Soriano Nunez, stated her name was "MDCRR" and that she was born in Pennsylvania and was a United States citizen and her social security number was ending in 0843, which are statements she knew to be false. The indictment also charges that on January 12, 2017, the defendant, Ilma Alexandra Soriano, falsely and willfully represented herself to be a United States citizen. It also charges that on January 11, 2017, with the intent to deceive and for the purpose of acquiring a false identification, falsely represented a social security account number with the last four digits 0843 had been assigned to her by the commissioner of social security, which in fact such number was not the number assigned to her. And finally it charges that on March 11, 2015, the defendant knowingly and without lawful authority produced and aided and abetted the production of an identification document other than one issued lawfully to her for her use, that is a Pennsylvania driver's license in the name of MDCRR:..."

See Exhibit 2, tab C.

According to the I-213, the Department of State initiated a fraud investigation, after they determined that the respondent had obtained a United States citizen passport in a United States citizen's identity. The 213 and the Government's motion for a revocation of bond indicate the following. That in 1997 the respondent first applied for U.S. passport in the name of MDCRR using the victim's identity and was issued a

passport. In 2007 the defendant, again impersonating MDCRR, filed another passport application in the victim's identity and received a passport. And finally in 2017 she applied for a passport renewal in the same identity and on that last occasion the application was forwarded to the National Passport Center for fraud prevention. See Exhibit 2, tab A, Exhibit 3-E.

-Investigators interviewed the United States citizen, "Maria Rivera," whose identity the respondent had been suspecting of using. There is a copy of a letter from her in the record. See Exhibit 4, tab H. This individual indicates that she did not submit passport applications in 1997, 2007 or renewal application in 2017 and indicates that the pictures attached to those applications are not her. See Exhibit 4. The Department of State investigators also interviewed the respondent's parents, Maria Del Carmen De Jesus De Soriano, date of birth September 29, 1953, and Jamie Enrique Secspreto Soriano, date of birth September 7, 1953, who confirmed that the respondent was born in the Dominican Republic. The parents identified a photograph of the respondent as their daughter. They further indicated that the respondent was residing Allentown with her husband, Franklin Cleto, and her two sons, Franklin Cleto, Jr., Jasal Cleto born in New York. See Exhibit 2, tab A, Exhibit 3, tab F.

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Department of State investigators also obtained a copy of the respondent's Dominican Republic birth certificate. See Exhibit 2, tab B. A copy is in the record. Exhibits 2 and 4. The birth certificate indicates that Ilma Alexandra was born in the Dominican Republic on February 2, 1978. It indicates her parents are Maria Del Carmen, a native of the Dominican Republic, and Soriano Nova, a native of the Dominican Republic. The Department of Homeland Security has also submitted copies of the passport applications that are the subject of the criminal prosecution with attached photographs. See Exhibit 5, tabs 1 through 3. The passport application from

2007 lists her husband as Franklin Cleto with a year of marriage of 1997. See Exhibit 5, tab 2.

The respondent has filed an application for cancellation of removal under INA 240A(b) with the Court. See Exhibit 6. On that application, the respondent indicates she was born in Santo Domingo, Dominican Republic, on February 2, 1978, and that her parents are Jamie Soriano, date of birth September 8, 1951, and he resides in Santo Domingo, Dominican Republic, and Maria Del Carmen Nunez, year of birth 1957. She further indicates that she resides in Santo Domingo, Dominican Republic. She indicates she has two children, Jasal Cleto and Franklin Cleto, Jr. She has signed that application today confirming that all the information in the application is true and correct to the best of her knowledge. She has also submitted a Form G-325, biographic information, wherein she asserts that she is Ilma Alexandra Soriano Nunez born in Santo Domingo, Dominican Republic, on February 2, 1978, and she has signed that form under the penalty of law. See Exhibit 6, tab C.

IV. ANALYSIS

The DHS has the burden of establishing removability by clear and convincing evidence. 8 C.F.R. 1240.8. The clear and convincing standard imposes a lower burden than the clear unequivocal and convincing standard applied in deportation and denaturalization proceedings because it does not require that the evidence be unequivocal or of such a value as to dispel all doubt. See Matter of Patel, 19 I&N Dec. 744, 783 (BIA 1998).

A. INA 212(a)(6)(A)(i)

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The Court finds that DHS has established the charge of removability under 212(a)(6)(A)(i) by clear and convincing evidence. First, the Court finds that the Department has established alienage. See 8 C.F.R. 1240.8(c). The Court makes this

finding based upon various submissions by the Department, including the I-213, which the Court has found to be reliable and has admitted into the record. See Matter of Recinas and Gutierrez-Berdin v. Holder, 618 F.3d 647 (7th Cir. 2016) (the 213 is presumptively reliable, petitioner did not demonstrate that it was inaccurate and the document coupled with petitioner's silence can be used to establish alienage even if petitioner was subject to touch verbal tactics when signing). The 213 and the report regarding the overseas investigation summarized the nature of the respondent's criminal investigation, explains the process in which the Department of State obtained the respondent's birth certificate and the interviews that the Department of State investigator conducted with the respondent's parents in the Dominican Republic, whom identifies a picture of the respondent as their daughter and confirms she had been born in the Dominican Republic. See Exhibit 2, tab A and Exhibit 3, tab F. Additionally, the respondent's birth certificate states she was born on February 2, 1978, to Maria Del Carmen and Jamie Enrique Secspreto Soriano Nova, See Exhibits 2 and 4, both natives of the Dominican Republic. Moreover, the respondent has represented herself to be Ilma Alexandra Soriano Nunez born in the Dominican Republic. See Exhibit 4, 42B application and letters of support for Ilma from her children and father of her children. She affirmed the contents of the 42B application were true and correct.

Thus, based upon the evidence, the Court finds DHS has established alienage. It is then the respondent's burden to establish by clear and convincing evidence that she is lawfully present in the United States. See INA 291; Matter of Benitez, 19 I&N Dec. 173 (BIA 1984).

The Court finds that she has not established that she is lawfully present in the United States.

Accordingly, the Court sustains the charge of removal under 212(a)(6)(A)(i) of the

Act.

B. INA 212(a)(6)(C)(ii)

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A person who knowingly falsely represents or has falsely represented himself or herself to be a United States citizen for any purpose or benefit under the INA or any other federal or state laws inadmissible. See INA 212(a)(6)(C)(ii). The scope of 212(a)(6)(C)(ii) is limited to false claims to United States citizenship that meets two requirements: that the false claim was made with a subjective intent of achieving a purpose or obtaining benefits under the Act or any other federal or state law and that the presence of a purpose or benefit actually affects or matters to the purpose or benefit sought. See Matter of Richmond, 26 I&N Dec. 779, 786-787 (BIA 2016). A purpose or benefit cannot be assumed because of an individual's undocumented status. See Castro v. Attorney General, 671 F.3d 356, 367-71 (3rd Cir. 2012). A passport is clearly a benefit under the Immigration laws, both as proof of United States citizenship and as a means to enter and be employed in this country. Matter of Richmond, 26 I&N Dec. at 787, citing Matter of Barcenas-Barrera, 25 I&N Dec. 40, 44 (BIA 2009).

The DHS has submitted numerous documents into evidence to support the charge of removal. First, the Court recognizes the respondent has been indicted by a federal grand jury for passport fraud, falsely representing herself to be a United States citizen, social security fraud, identity theft and aiding and abetting. See Exhibit 2, tabs A and C. Under the first two charges in the indictment she is charged with falsely representing herself to be a citizen and false statements in a passport application for the conduct in relation to the 2017 passport renewal application. Thus, there is probable cause to believe that the respondent has committed the charged offenses. Second, as

discussed, the DHS has submitted various documents regarding alienage: the birth certificate of the respondent, See Exhibit 2 and 4; the 213, which summarizes the nature of the investigation and the conversations that the investigator had with the respondent's parents; the report of investigation. And again, the Court recognizes the respondent represents herself to be Ilma Alexandra Soriano Nunez born in the Dominican Republic. See Exhibit 6.

Next, the Court recognizes that the three applications that are the subject of the criminal prosecution dated 1997, 2007 and 2017. The applications contain a picture of what appears to be the same person who is identified in the application as Maria Del Carmen Rivera Rivera, with a date of birth of April 13, 1974, and contains consistent information. See Exhibit 5. The pictures bear a strong resemblance to the respondent's picture in the I-213. See Exhibit 5, Exhibit 2, tab A. The respondent's resemblance to the woman in the pictures attached to the applications can also be observed through an evidentiary submission. See Exhibit 6, tab H, page 17. Today, the Court observes the respondent and observes that there is some resemblance to the pictures within the applications. Moreover, the Court also recognizes that the victim, Maria Rivera, has written an affidavit affirming that the pictures that were attached to the applications were not her and that she did not submit these applications, nor was she ever issued a passport based upon these applications. See Exhibit 4, tab H.

In addition, the 2007 passport application names Franklin Cleto, date of birth May 15, 1972, born in the Dominican Republic as Ms. Rivera Rivera's husband and the I-213, Exhibit 2, tab A, indicates that the respondent's husband is Franklin Cleto. Although respondent has not included the status of her marriage on the 42B application, she has submitted a letter from Franklin Cleto as a supporting document on her application and he identifies himself as having two children with the respondent. See

Exhibits 2, 5 and 6.

The respondent has elected to invoke her right against self-incrimination and remain silent during these proceedings. The Court recognizes it is her right to do so. See Kastigar v. United States, 406 U.S. 441, 444 (1972). However, the Court may draw negative inferences from the respondent's refusal to testify. U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149, 154 (1923). DHS cannot establish its *prima facie* case solely through the inference drawn by the respondent's Fifth Amendment assertion of silence. See Matter of Guevara, 20 I&N Dec. 238 (BIA 1991).

The Court finds that based upon the overwhelming evidence submitted coupled with the respondent's silence, the Department of Homeland Security has established by clear and convincing evidence that the respondent is removable pursuant to INA 212(a)(6)(C)(ii) of the Act.

Accordingly, the Court sustains the charge of removability under Section 212(a)(6)(C)(ii) of the Act.

V. CANCELLATION OF REMOVAL

UNDER INA § 240A(b)(1)

The respondent has filed an application for cancellation of removal. The respondent bears the burden to establish eligibility for relief. Under INA 240A(b)(1) she must establish the following: that she has been continuously physically present in the United States for not less than ten years immediately preceding the date of such application; has been a person of good moral character during the ten year period; has not been convicted of an offense under INA 212(a)(2), 237(a)(2) or 237(a)(3), unless a domestic violence waiver is granted; and that removal would result in exceptional and extremely unusual hardship to the respondent's United States citizen or lawful permanent resident spouse, parent or child. The respondent bears the burden that she

meets all applicable eligibility requirements and that she merits a grant of relief in the exercise of discretion. See INA 240(c)(4): 8 C.F.R. 1240.8.

To qualify for cancellation of removal, the respondent must establish that she has been a person of good moral character. See Matter of Gomez-Beltran, 26 I&N Dec. 765 (BIA 2016). An alien who has made a false claim of citizenship may be considered a person who is not of good moral character. See INA 101(f). Matter of Guadarrama, 24 I&N Dec. 625 (BIA 2008). The Court recognizes that there are exceptions to this provision. However, the Court finds that the respondent has not established any of the exceptions. In particular, that each parent is or was a United States citizen, that she permanently resided in the United States prior to being 16 and she reasonably believed at the time that she was a citizen. See Id.

As the Court finds that it has sustained the charge of removal under INA § 212(a)(6)(C)(ii) and finds the respondent has made a false claim to United States citizenship and does not fall into one of the exceptions set forth, the Court finds that she is unable to establish the good moral character requirement for cancellation of removal and, thus, the Court finds the respondent statutorily ineligible for cancellation of removal under 240A(b) of the Act.

If a higher court disagrees with this finding, the Court will discuss the other statutory requirements, which include that she has been continuously physically present in the United States for not less than ten years preceding the date of the filing of the application; has not been convicted of an offense under 212(a)(2), 237(a)(2) or 237(a)(3); and that the removal would result in exceptional and extremely unusual hardship to a qualifying relative.

First, the Court finds the evidence does not support a finding she has been convicted of one of the described offenses. However, in looking to the physical

presence requirement and the hardship requirements, the Court finds she is unable to establish her burden.

As discussed, the respondent has elected to remain silent and invoked her Fifth Amendment right to self-incrimination regarding a number of questions in the application, has declined to testify in support of her application and has chosen not to submit identity documents regarding her claimed qualifying relatives and has not submitted other relevant information in support of her application. As it is the respondent's burden to establish eligibility for relief and the respondent has not submitted this evidence, the Court finds that she is unable to establish her burden. Thus, the Court denies the respondent's application for cancellation of removal under INA § 240A(b) of the Act.

VI. CREDIBILITY

As the respondent's application was filed on October 29, 2018, the REAL ID Act applies. The Court has considered everything before it. As the respondent has declined to testify the Court is unable to observe her demeanor, candor and responsiveness. Although the Court has made a negative inference due to her decision to remain silent, the Court is unable to make a well-reasoned credibility finding. Thus, the Court will not make an adverse credibility finding.

VII. ORDERS

IT IS HEREBY ORDERED that the charge of removal under 212(a)(6)(A)(i) of the Act is ~~sustained~~SUSTAINED.

IT IS HEREBY ORDERED that the charge of removal under INA 212(a)(6)(C)(ii) of the Act is ~~sustained~~SUSTSAINED.

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal under INA 240A(b) is ~~denied.~~DENIED.

AND IT IS HEREBY ORDERED that the respondent is ~~ordered removed~~ REMOVED from the United States to the Dominican Republic.

Please see the next page for electronic signature

ALICE SONG HARTYE
Immigration Judge

//s//

Immigration Judge ALICE S. HARTYE

i:05.t|doj federation services rp-sts|alice.s.hartye@usdoj.gov
on February 12, 2019 at 3:29 PM GMT

EXHIBIT B

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Santos, Kevin Samuel
Santos Law Group, pc
137 N 5th Street
Allentown, PA 18102

DHS LIT/York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: SORIANO NUNEZ, ILMA ALEXA... **A 216-545-029**

Date of this notice: 6/7/2019

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly

Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

SORIANO NUNEZ, ILMA ALEXANDRA
A216-545-029
3400 CONCORD ROAD
YORK, PA 17402

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: SORIANO NUNEZ, ILMA ALEXA... **A 216-545-029**

Date of this notice: 6/7/2019

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly

Userteam:

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A216-545-029 – York, PA

Date: JUN - 7 2019

In re: Ilma Alexandra SORIANO NUNEZ

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Kevin Samuel Santos, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

APPLICATION: Cancellation of removal under section 240A(b) of the Act; remand

The respondent, a native and citizen of the Dominican Republic, appeals from the Immigration Judge's decision, dated January 9, 2019, finding her removable as charged and denying her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The respondent also requests remand with an order of adjournment to await the disposition of her federal criminal charges. The appeal will be dismissed and the motion to remand will be denied.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent challenges the Immigration Judge's determination that the Department of Homeland Security (DHS) met its burden to establish her removability by clear and convincing evidence (IJ at 7). *See* sections 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A); 8 C.F.R. § 1240.8(a). She was charged with entering the United States without inspection under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), and with falsely claiming citizenship under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii). The latter charge is related to a federal criminal indictment of the respondent for passport fraud, falsely representing herself to be a United States citizen, Social Security fraud, and identity theft.[1]

The respondent argues that the Immigration Judge's denial of her motion to continue proceedings until the resolution of the criminal charges was arbitrary and capricious (Respondent's Br. at 14-16). She further contends that the Immigration Judge violated her Constitutional rights by drawing an adverse inference from her decision to invoke her Fifth Amendment privilege against self-incrimination during removal proceedings (Respondent's Br. at 16-18). Finally, the respondent argues that the Immigration Judge violated her due process rights by admitting and relying on DHS evidence that was based on an investigation by the United States Department of

[1] 18 U.S.C. §§ 911, 1029(a)(1),1542; 42 U.S.C. § 408.

State (State Department) when the DHS did not present witnesses for cross-examination (Respondent's Br. at 11-12). She requests that the Board remand the case with an order to adjourn until the disposition of the underlying criminal prosecution (Respondent's Br. at 23).

We affirm the Immigration Judge's determination that the respondent is removable as charged. First, the Immigration Judge did not violate the respondent's Fifth Amendment rights when she drew a negative inference from the respondent's refusal to testify (IJ at 2). A respondent in removal proceedings who remains silent when confronted with evidence of his alienage, the circumstances of his entry, or his deportability, may leave himself open to adverse inferences, which may properly lead in turn to a finding of deportability against him. *See Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990; BIA 1991).

Second, the respondent's due process rights were not violated by the admission of DHS's written evidence. The respondent argues that the Immigration Judge erred in relying on unauthenticated and unsworn hearsay documents, including the criminal indictment, the Record of Deportable/Inadmissible Alien (Form I-213), the written statements from State Department Special Agent Meyer and from a person named Maria Rivera, and the unauthenticated record of the passport applications purportedly filed by the respondent (Respondent's Br. at 20). She notes that, at the August 2018 master calendar hearing, the Immigration Judge expressed concern about the unsworn and unauthenticated nature of these documents, and left the record open for the DHS to submit additional evidence (Respondent's Br. at 3, 11, 21; IJ at 2; Tr. at 26-27). The DHS's only additional submission thereafter was an unsworn affidavit from Special Agent Meyer, attesting to the authenticity and legitimacy of the passport applications (Respondent's Br. at 21; IJ at 4; Exh. 7), and the respondent argues that this was an insufficient cure.

To the extent that the respondent argues for suppression of this evidence, we reject her argument. In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), the Supreme Court held that the exclusionary rule of the Fourth Amendment is generally not considered applicable in immigration proceedings. *Cf. Olivia-Ramos v. U.S. Att'y Gen.*, 694 F.3d 259, 272 (3d Cir. 2012) ("*Lopez-Mendoza* sanctions the application of the exclusionary rule in cases where constitutional violations by immigration officers are 'widespread' or evidence has been obtained as a result of 'egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.'").

As the Federal Rules of Evidence also do not apply in immigration proceedings, the admissibility of evidence thus depends on "whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law." *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (quotation marks omitted). "In the evidentiary context, fairness is closely related to the reliability and trustworthiness of the evidence." *Id.*

As the Immigration Judge noted, the Form I-213 has been long deemed to be inherently trustworthy as evidence to prove alienage or removability, absent any evidence that it contains information that is inaccurate or obtained by coercion or duress (IJ at 3). *See Matter of Gomez-Gomez*, 23 I&N Dec. 522, 524 (BIA 2002). An alien who raises the claim questioning the legality of evidence must come forward with proof establishing a prima facie case before the DHS will be called upon to assume the burden of justifying the manner in which it obtained evidence. *Matter*

of Barcenas, 19 I&N Dec. 609 (1988). While the respondent objected to the admission of the Form I–213 (Exh. 1) into evidence, she, like the respondent in *Matter of Barcenas*, "offered no evidence to even suggest that the contents of the form did not relate to [herself], that the information was erroneous, or that it was the result of coercion or duress." *Id.* at 611. The fact that, in this case, the Form I-213 included a summary of the State Department investigation as part of its narrative concerning the respondent's alienage, does not make it less probative or reliable. As the Immigration Judge found, the background evidence also submitted supports its conclusions.

Third, in finding that the DHS established the respondent's alienage and that the respondent was removable as charged, the Immigration Judge made reasonable inferences based on the record evidence as a whole (IJ at 7-8). *See Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (explaining that an Immigration Judge may make reasonable inferences from direct and circumstantial evidence in the record as a whole and is not required to accept an alien's account as persuasive when there are other permissible views of the evidence). The Immigration Judge considered the Form I-213 and the background evidence, as well as the respondent's signed application for cancellation of removal, wherein she recorded her identity in a manner that is in conflict with the information in the passport applications (IJ at 7, 8; Exh. 6). Thus, this is not a case in which a negative inference drawn from the respondent's silence was the sole basis for establishing removability. *See Matter of Guevara*, 20 I&N Dec. at 242 ("the respondent's silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case of alienage" for removal purposes).

The Immigration Judge also correctly concluded that the respondent had not met her burden of proof for cancellation of removal (IJ at 11-12). An alien seeking cancellation of removal "shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion." 8 C.F.R. § 1240.8(d); *see also Pareja v. U.S. Att'y Gen*, 615 F.3d 180, 186 (3d Cir. 2010) (noting that the Attorney General may cancel an alien's removal only if "the alien meets her burden of establishing eligibility"). The evidence casts doubt upon the respondent's good moral character (*see generally Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008)), and she did not rebut the information. Moreover, as the Immigration Judge found in the alternative, the respondent did not establish the identity of her qualifying relative(s) and other information necessary to demonstrate her eligibility for relief.

Finally, we reject the respondent's contention that proceedings should have been continued to await the disposition of her criminal case, and her current motion to remand for the same purpose. The respondent's motion to continue was filed with the Immigration Court in May 2018. The Immigration Judge did issue a form order denying the motion; however, the record reflects that the next master calendar hearing was not held until August 2018, where the status of the respondent's criminal case was discussed. The respondent notified the Immigration Judge that the criminal trial, originally scheduled for September 2018, had been held in abeyance pending the ruling of the United States Court of Appeals for the Third Circuit on particular issues in the case (Tr. at 19). The respondent's merits hearing was then set for January 9, 2019. There is no evidence in this procedural history that the denial of the motion in May 2018 was arbitrary and capricious or that the respondent suffered substantial prejudice. *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983).

The respondent does not now establish good cause for remand and continuance of these removal proceedings to await the disposition of her federal criminal case. 8 C.F.R. §§ 1003.29, 1240.6. The respondent was found removable even without her testimony, and she is not eligible for any relief in these proceedings. A charge of inadmissibility under section 212(a)(6)(C)(ii) of the Act does not require a criminal conviction. Thus, the potential for relief is less than speculative, given that the respondent's removability is not dependent on her conviction, and she has not met her heavy burden of demonstrating that the result is likely to change. *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Matter of L-A-B-R-*, 27 I&N Dec. 405, 415-417 (A.G. 2018) (stating that good cause for a continuance does not exist where the potential for the collateral relief sought will not materially affect the outcome of removal proceedings); *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) (recognizing that a continuance should not be granted where it is being sought "as a dilatory tactic to forestall the conclusion of removal proceedings").

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

FOR THE BOARD

EXHIBIT C

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2355

ILMA ALEXANDRA SORIANO NUNEZ,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent

On Petition for Review of a Final Order
of the Board of Immigration Appeals
(A216-545-029)
Immigration Judge: Alice Song Hartye

Submitted Under Third Circuit L.A.R. 34.1(a)
March 10, 2020

Before: McKEE, AMBRO, and PHIPPS, Circuit Judges

(Opinion filed: March 17, 2020)

OPINION*

AMBRO, Circuit Judge,

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Petitioner Ilma Alexandra Soriano Nunez seeks our review of the dismissal of her appeal by the Board of Immigration Appeals ("BIA"). The Immigration Judge ("IJ") denied Soriano Nunez's application for cancellation of removal and denied the motions to remand or continue her removal proceedings to await the disposition of her criminal proceedings. The BIA affirmed. For the reasons stated below, we deny the petition for review.

I. Facts and Procedural History

A. Background

Soriano Nunez is a native and citizen of the Dominican Republic who has lived in the United States since 1999. According to the Form I-213 ("Record of Deportable/Inadmissible Alien") submitted by the Department of Homeland Security ("DHS"), there is no record of her having been inspected and admitted.

In February 2018, Soriano Nunez was charged with passport fraud, falsely representing herself as a U.S. citizen, Social Security fraud, production of a fraudulent identification document, and aiding and abetting. She subsequently pleaded guilty to all charges.

B. Removal Proceedings Before the IJ

In March 2018, DHS issued a Notice to Appear charging Soriano Nunez as removable under the Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, and INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii), as an alien who falsely represented herself as a citizen of the United States.

Soriano Nunez first appeared for removal proceedings in May 2018. She invoked her Fifth Amendment right to remain silent because of her criminal proceedings. She did not testify but did, however, deny all allegations and the charge of removability. The IJ sustained Soriano Nunez's charge of removability and denied her motion to continue the immigration proceedings to allow for the conclusion of her federal prosecution. In August 2018, Soriano Nunez appeared before a new IJ, continued to claim her Fifth Amendment privilege, and objected to the evidence submitted by DHS. That IJ declined to sustain the charge under § 212(a)(6)(C)(ii) (falsely representing to be a citizen), but granted DHS leave to submit additional evidence.

In January 2019, Soriano Nunez appeared before yet another IJ. The IJ admitted into evidence, over Soriano Nunez's hearsay objections, her application for cancellation of removal under § 240A(b) of the INA, 8 U.S.C. § 1229b(b), her Form I-213, and DHS's affidavit from a Department of State special agent. The IJ ruled that the evidence submitted by DHS was probative and fair. The IJ concluded that DHS established removability under § 212(a)(6)(A)(i) (alien present without being admitted) by clear and convincing evidence, noting, among other things, that the Form I-213 was reliable, that other evidence submitted by DHS (including Soriano Nunez's birth certificate and a report containing statements from her parents) indicated her alienage, and that Soriano Nunez herself confirmed her name and place of birth in her application for cancellation of removal. The IJ thus ruled that Soriano Nunez did not meet her burden to establish by clear and convincing evidence that she was lawfully present in the United States.

The IJ also sustained the charge of removal against Soriano Nunez under § 212(a)(6)(C)(ii) (alien who falsely represented herself to be a citizen). Although the IJ recognized that DHS cannot establish removability solely through a negative inference drawn from a Fifth Amendment assertion of silence, she concluded that DHS submitted "overwhelming" evidence—including Soriano Nunez's indictment, a Department of State investigation report, and passport applications—that, coupled with her silence, established removability.

Finally, the IJ denied Soriano Nunez's application for cancellation of removal because she failed to meet her burden of establishing that she satisfies all of the eligibility requirements and that she merits relief as a matter of discretion. The IJ observed that a person who has made a false claim of citizenship may be considered as lacking good moral character. Further, Soriano Nunez was unable to meet her burden as to the physical presence and hardship requirements, as she did not submit documents regarding her qualifying relatives or other relevant information.

C. The BIA Affirms

The BIA dismissed Soriano Nunez's appeal, affirmed the IJ's rulings, and denied her motion to remand the case to the IJ pending the disposition of her criminal case. It held that the IJ did not violate Soriano Nunez's Fifth Amendment rights by drawing a negative inference from her refusal to testify, that her due process rights were not violated by the admission of the DHS's documentary evidence, and that the IJ correctly concluded that Soriano Nunez did not meet her burden of proof for cancellation of removal, as she did not rebut the evidence casting doubt on her moral character and failed

to establish the identity of her qualifying relatives. The BIA further rejected Soriano Nunez's argument that her immigration proceedings should have been continued, and her motion to remand granted, because there was no evidence that the denial of the motion to continue was arbitrary and capricious or that she suffered substantial prejudice.

II. Discussion

We review the BIA's denial of a motion to remand and for a continuance for abuse of discretion, and we review underlying findings of fact for substantial evidence. *See Tilija v. Att'y Gen*., 930 F.3d 165, 170 (3d Cir. 2019); *Khan v. Att'y Gen*., 448 F.3d 226, 233 (3d Cir. 2006). Under the abuse-of-discretion standard, we reverse the BIA's decision only if it is "arbitrary, irrational, or contrary to law." *Guo v. Ashcroft*, 386 F.3d 556, 562 (3d Cir. 2004). Where, as here, the BIA adopts the findings of the IJ and discusses some of the bases for the IJ's decision, we review both decisions. *Chen v. Att'y Gen.*, 376 F.3d 215, 222 (3d Cir. 2004). Constitutional and legal issues we consider *de novo*. *See Cadapan v. Att'y Gen.*, 749 F.3d 157, 159 (3d Cir. 2014)

First, the BIA neither abused its discretion in concluding that Soriano Nunez's motion to stay or continue her removal proceeding was properly denied, nor in denying the motion to remand her case to the IJ pending the conclusion of criminal proceedings. IJs may use continuances and administrative closures as a docket management tool and to "regulate the course" of immigration hearings. *See Zuniga Romero v. Barr*, 937 F.3d 282, 289, 297 (4th Cir. 2019) (holding that the INA permits immigration judges to control their own dockets); *see also* 8 C.F.R. §§ 1003.10(b), 1003.1(d)(l)(ii), 1240.l(a)(l), 1240.l(c). However, an IJ may grant a motion for a continuance only "for good cause

shown." 8 C.F.R. § 1003.29. A motion to remand is the functional equivalent of a motion to reopen. The BIA may deny such a motion if the movant (1) has not established *prima facie* eligibility for relief, (2) has not introduced previously unavailable, material evidence, or (3) if the ultimate grant of relief is discretionary and the BIA has determined the movant does not merit such relief. *See Korytnyuk v. Ashcroft*, 396 F.3d 272, 282 (3d Cir. 2005).

Here, Soriano Nunez argues that the IJ improperly denied her motion for a continuance based on facts drawn from unsupported allegations in unsworn affidavits and other inadmissible evidence from her criminal proceeding. That Soriano Nunez's criminal indictment was unresolved at the time of her removal proceeding made no difference because she gave her identity in her application for relief and other documentary evidence that supported the conclusion that she is a citizen of the Dominican Republic who entered the United States without authorization. In light of this evidence, Soriano Nunez did not refute the charge that she was removable. And given that she ultimately pleaded guilty, it is not clear that staying her proceeding would allow her to refute the evidence underlying her removal. *See Matter of L-A-B-R-*, 27 I. & N. Dec. 405, 415-17 (A.G. 2018) (stating that good cause for a continuance does not exist where the potential for the collateral relief sought will not materially affect the outcome of removal proceedings). The BIA concluded Soriano Nunez did not establish *prima facie* eligibility for relief and thus appropriately denied her motion to remand as well.

Next, the BIA was correct to hold that the IJ did not violate Soriano Nunez's Fifth Amendment rights by drawing negative inferences from her refusal to testify during her

immigration proceeding. In immigration cases, which are civil in nature, the decision to remain silent can negatively affect a case, particularly when the immigrant does not dispute the charges of removability. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043–45 (1984); *Peña-Beltre v. Holder*, 622 F.3d 57, 62 n.3 (1st Cir. 2010); *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978); *see also Matter of Guevara*, 20 I. & N. Dec. 238, 242 (BIA 1990). The IJ may draw adverse inferences from Soriano Nunez's refusal to answer questions during her removal hearing. Notably, the IJ did not base the removability determination on this inference alone, as the record independently established Soriano Nunez's removability. *Flores-Leon v. INS*, 272 F.3d 433, 440 (7th Cir. 2001) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043–44 (1984) (observing that the petitioner's silence was irrelevant where the IJ found the case against him to be overwhelming). The Form I-213, Soriano Nunez's birth certificate showing her place of birth as the Dominican Republic, an interview conducted through the Department of State with her parents, as well as evidence submitted by Soriano Nunez herself, all provided evidence of her alienage.

Further, the BIA and IJ did not violate Soriano Nunez's due process rights by relying on hearsay evidence. The test for admissibility of evidence in immigration proceedings is "whether its use is fundamentally fair so as not to deprive the alien of due process of law." *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (citation and internal quotation marks omitted). Here, the IJ admittedly relied on some unauthenticated and unsworn hearsay, but also on presumptively reliable documents. The Form I-213 has long been deemed to be inherently reliable. *See Antia-Perea v.*

Holder, 768 F.3d 647, 657 (7th Cir. 2014). Soriano Nunez presented no evidence to controvert the accuracy or reliability of the Form I-213. Moreover, her own evidence—including the admission of foreign birth in her cancellation application, as well as an unrefuted copy of her birth certificate—established a rebuttable presumption of alienage. *see Matter of Rodriguez-Tejedor*, 23 I. & N. Dec. 153, 164 (BIA 2001). Soriano Nunez presented no evidence to rebut this presumption. And, were there any error, she would still need to show prejudice to prevail on her due process claim. She could not do so because the IJ also relied on other compelling evidence to determine her removability. *Cf. Singh v. Gonzales*, 432 F.3d 533, 541 (3d Cir. 2006).

Finally, Soriano Nunez failed to establish she was eligible for cancellation of removal. To be eligible, she had to establish that she met four requirements: continuous physical presence of not less than 10 years, good moral character for that same period, an absence of disqualifying convictions, and, as a result of her removal, exceptional and extremely unusual hardship to a qualifying relative who is a United States citizen or lawful permanent resident. *See* 8 U.S.C. § 1229b(b)(1); *Pareja v. U.S. Att'y Gen*., 615 F.3d 180, 185–86 (3d Cir. 2010). The IJ found that Soriano Nunez's application was deficient in several respects. Specifically, she did not establish the identity of her qualifying relatives or provide any other information necessary to demonstrate her eligibility for relief. The IJ also appropriately considered Soriano Nunez's ongoing criminal proceeding in reaching a decision about discretionary relief from removal. *Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015) ("[I]n the context of determining whether an alien warrants discretionary relief from removal, the fact of an arrest and its

attendant circumstances . . . may have probative value in assessing [her] character . . . .”). And now that Soriano Nunez has pleaded guilty, she does not qualify for cancellation of removal, as she has admitted to committing a crime involving moral turpitude. *See Matter of Guadarrama de Contreras*, 24 I. & N. Dec. 625, 627 (BIA 2008) (holding that an alien “who has made a false claim of United States citizenship may be considered a person who is not of good moral character”).

* * * * *

Accordingly, we deny Soriano Nunez’s petition for review.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2355

ILMA ALEXANDRA SORIANO NUNEZ,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent

On Petition for Review of a Final Order
of the Board of Immigration Appeals
(No. A216-545-029)
Immigration Judge: Alice Song Hartye

Submitted Under Third Circuit L.A.R. 34.1(a)
March 10, 2020

Before: McKEE, AMBRO, and PHIPPS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the Board of Immigration Appeals and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on March 10, 2020.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the petition for review dated June 12, 2019 is denied. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ Patricia S. Dodszuweit
Clerk

Dated: March 17, 2020