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PRACTICE ADVISORY[1]

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DENT V. HOLDER AND STRATEGIES FOR OBTAINING DOCUMENTS FROM THE GOVERNMENT DURING REMOVAL PROCEEDINGS

In *Dent v. Holder*,[2] the Ninth Circuit found that the Immigration and Nationality Act (INA) requires the government to turn over copies of documents in a respondent's Alien File (A-file) in cases where removability is contested.[3] Significantly, the court held that the respondent's access to his or her records is not conditioned on filing a request under the Freedom of Information Act (FOIA). This groundbreaking decision is rooted in a statutory interpretation of INA §240(c)(2)(B) – "the mandatory access law." This provision states that where a respondent in removal proceedings must establish lawful presence in the United States, he or she "shall have access" to the "visa or entry document" and any other records and documents "pertaining to the alien's admission or presence in the United States." The court's reasoning in *Dent* suggests that the government must routinely produce A-files in removal proceedings.

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[1] This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

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[2] 627 F.3d 365 (9th Cir. 2010).

[3] An A-file is a compilation of documents that the Department of Homeland Security (DHS) maintains for noncitizens. *See* Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge, 72 Fed. Reg. 9017, 9018 (February 28, 2007). An A-file documents a noncitizen's interactions with the immigration agencies, namely U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and the former Immigration and Naturalization Service. *See id.* The A-file typically contains all of a noncitizen's official records regarding immigration status, including applications for immigration status, citizenship, or relief, and includes both documents submitted by the noncitizen as well as any investigations, statements, correspondence, and memoranda created by the agencies. It also may include other identifying documents, such as birth certificates.

This Practice Advisory discusses the Ninth Circuit's *Dent v. Holder* decision and the benefits of obtaining documents pursuant to the mandatory access law rather than through FOIA. The advisory then offers suggestions and strategies for making document requests pursuant to the mandatory access law and due process, both in the Ninth Circuit, where *Dent* is binding authority, as well as outside the Ninth Circuit.

I. Facts, Holding, and Implementation of *Dent v. Holder*

A. Case Background

The petitioner, Sazar Dent, first came to the United States with his adoptive mother in 1981 when he was 14 years old. Decades later, ICE initiated removal proceedings against him based on his criminal convictions. Dent claimed that he was a U.S. citizen, but was unable to produce the documentation the immigration judge (IJ) requested, and the IJ ordered him removed. On appeal to the Board of Immigration Appeals (BIA), Dent asked for assistance in obtaining documents related to his citizenship claim. The government did not turn over any documents, and the BIA affirmed the removal order.

In 2008, Dent was arrested for illegal reentry and in defense claimed that he did not know the BIA had ordered him removed. The government conceded inadequate notice and dismissed the indictment for illegal reentry. Then, through his criminal counsel, Dent petitioned the BIA to reissue its removal decision so that he could timely file a petition for review. The BIA reissued its decision, and Dent sought judicial review in the Ninth Circuit.

Before the Ninth Circuit, Dent again maintained that he was a naturalized citizen and thus could not be removed from the U.S. The government disputed Dent's citizenship claim and the citizenship of his adoptive mother. It was later discovered that Dent's A-file contained a naturalization application that his mother had submitted on his behalf in 1982 and a copy that Dent himself submitted in 1986. Neither the IJ nor the BIA was aware of these documents when they issued decisions ordering Dent's removal.

Dent further argued that pursuant to INA § 240(c)(2)(B) and constitutional due process, he was entitled to all documents in DHS's possession that were relevant to his citizenship claim.[4] The government maintained that it had no obligation to produce a respondent's A-file, even during ongoing proceedings, and that respondents must make FOIA requests to obtain their A-files.[5]

[4] Brief of the Petitioner at 32-43, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (No. 09-71987).
[5] Brief of the Respondent at 39-40, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (No. 09-71987) ("In essence, Petitioner's due process arguments amount to an attempt to use this petition for review as a proxy for a Freedom of Information Act ('FOIA') request, a remedy that was also available, and which he apparently ignored.").

B. The Ninth Circuit's Holding

The Ninth Circuit held that INA § 240(c)(2)(B) is a "mandatory access law," which entitled Dent to a copy of his A-file.[6] The court rejected the government's arguments that Dent must obtain his A-file through a FOIA request pursuant to 8 C.F.R. § 103.21 (2002),[7] and that its dissemination of records through the FOIA process comports with the requirements of § 240(c)(2)(B). The court explained that the FOIA provision was general and "[i]f it applied to removal proceedings, a serious due process problem would arise, because FOIA requests often take a very long time, continuances in removal hearings are discretionary, and aliens in removal hearings might not get responses to their FOIA requests before they were removed."[8] Further, if the FOIA regulations entitled a noncitizen in removal proceedings to his or her A-file, but denied actual access because of delay, that "would indeed be unconstitutional."[9]

Because the government failed to give Dent the documents in his A-file, the court found that he was denied the opportunity to fairly litigate his citizenship claim as a defense to removal, and that "[p]rejudice here is plain, because the A-file, when it is fully examined and this case

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[6] INA 240(c)(2)(B) provides:

> (2) Burden on alien. In the proceeding the alien has the burden of establishing – (A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.
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> **In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.**

(Emphasis added.)

[7] This provision sets forth the procedure for seeking access to government records about oneself by submitting a request to the Freedom of Information/Privacy Act Officer. 8 C.F.R. § 103.21 (2011). On November 28, 2011, DHS removed this provision from the regulations. *See* 76 Fed. Reg. 53764, 53771, 53782 (Aug. 29, 2011). The current DHS policies for filing Freedom of Information/Privacy Act requests are set forth in 6 C.F.R. § 5.21.

[8] *Dent*, 627 F.3d at 374. The court also rejected the government's argument that the court should defer to *Matter of Duran*, in which the Board of Immigration Appeals (BIA) upheld the denial of a subpoena for government documents because the noncitizen did not show that he had submitted a FOIA request. *Matter of Duran*, 20 I&N Dec. 1 (BIA 1989). The court determined it did not have to address *Duran* given that *Duran* involved discretionary relief under INA § 212(c) and because the BIA's decision predated the "shall have access" statute at issue. *Dent*, 627 F.3d at 375.

[9] *Id.* at 374.

adjudicated on all the facts, may show that Dent is a naturalized citizen of the United States."[10] The Ninth Circuit vacated Dent's removal order and remanded to the district court for determination of his citizenship claim.[11] Following the decision, the government filed a petition for panel rehearing, which the court denied.[12]

C. ICE's Implementation of Dent

At a meeting between the American Immigration Lawyers Association (AILA) and ICE in April 2011, AILA representatives asked what steps ICE Chief Counsel had taken to comply with the agency's statutory obligations following *Dent*.[13] ICE responded that it will follow *Dent* only in the Ninth Circuit,[14] as it believes that FOIA is the appropriate mechanism for obtaining documents in a noncitizen's A-file, and if counsel requests the file through FOIA during removal proceedings, the processing will be expedited. ICE emphasized its interest in protecting certain information and the built-in protections under FOIA, but nevertheless stated that "[e]veryone is very cognizant of the Dent case and … we are asking everyone around the country to utilize the 'rule of reason.'"[15] Additionally, an Associate Legal Advisor with ICE's Office of Principal Legal Advisor stated that the government's approach to responding to Dent requests is to tell attorneys outside of the Ninth Circuit to "use FOIA, use PD [prosecutorial discretion], we don't give up everything in the A file, i.e., confidential information or if the alien already admits or concedes removability."[16]

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[10] *Id.*

[11] *Id.* at 376. Ordinarily, upon deciding that a noncitizen was denied a fair hearing in removal proceedings, the court would remand the case to the BIA. In *Dent*, however, the court found a genuine issue of material fact existed regarding Dent's citizenship; thus, pursuant to INA § 242(b)(5)(B), it transferred the case to district court for a hearing on his citizenship claim.

[12] Order Den. Respondent's Pet. for Reh'g, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2011) (No. 09-71987) (March 2, 2011).

[13] *AILA/ICE Liaison Minutes (4/14/11)*, AILA Info Doc. No. 11051260 *available at* http://aila.org/content/default.aspx?docid=35365.

[14] Even within the Ninth Circuit, ICE is not always responding to document requests submitted under *Dent* and has construed *Dent* narrowly. According to information collected by the Immigration Justice Clinic at Benjamin N. Cardozo School of Law, a DHS trial attorney was overheard complaining (successfully) to the IJ that he did not have sufficient time to comply with a *Dent* request. On another occasion, a DHS attorney said *Dent* compliance would be achieved through a FOIA request, indicating that DHS policy has not changed since *Dent*. Further, an attorney in California asked an IJ to request that DHS provide a copy of the A-file pursuant to *Dent*. DHS informed counsel that the government lacked resources to copy the entire A-file, but offered to provide specific documents and referred counsel to the FOIA process. *See* October 5, 2011 document obtained from the Office of Principal Legal Advisor describing a current development in a case in which opposing counsel filed a writ of mandamus in federal court based on *Dent* (on file with Benjamin N. Cardozo School of Law's Immigration Justice Clinic).

[15] *Id.*

[16] Email from Associate Legal Advisor at the Office of Principal Legal Advisor with the subject line "RE: Draft Guidance – Dent Based Requests outside the 9th" (May 24, 2011, 12:57 p.m.)

II. Benefits of Obtaining Documents from DHS under the Mandatory Access Rule as Opposed to a FOIA Request

A. Timeliness – FOIA Requests Often Take Too Long to be Effective

The FOIA process is often too slow to be useful to respondents in removal proceedings. The length of time it takes to process an A-file request is particularly troubling in detained cases since asking for continuances requires that the respondent spend more time in detention.

In 2007, cognizant of the problem of delayed FOIA responses, USCIS implemented a "fast track," also known as "Track Three" or the "Notice to Appear Track," to expedite FOIA requests submitted by individuals in removal proceedings.[17] However, "fast track" FOIA processing has not resolved the problem. First, not all individuals in removal proceedings qualify for Track Three processing. Specifically, Track Three is not available to respondents with final orders of removal, respondents with a pending BIA appeal, and respondents who failed to appear for a scheduled hearing.[18] Second, even "fast track" processing often is untimely – the average processing time (as of June 4, 2012) is 41 business days[19] – and some IJs may deny a continuance to await FOIA processing.

As the *Dent* court explained, even after the implementation of Track Three, FOIA requests often take a "very long time, continuances in removal hearings are discretionary, and aliens in removal hearings might not get responses to their FOIA requests before they were removed."[20] Therefore, the court concluded that it would be unconstitutional if a noncitizen in removal proceedings was entitled to his A-file, but the mechanism denied him access until it was too late.

(on file with Benjamin N. Cardozo School of Law's Immigration Justice Clinic). The Cardozo Immigration Justice Clinic obtained this document through a FOIA request to ICE asking for information regarding the interpretation of *Dent*.

[17] *See* Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge, 72 Fed. Reg. 9017 (Feb. 28, 2007).

[18] *Id.* at 9018. Track Three only "allow[s] for accelerated access to the Alien-File (A-file) for those individuals who have been served with a charging document and have been scheduled for a hearing before an immigration judge as a result." *Id.* at 9017-18.

[19] *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DHS, FOIA Request Status Check & Average Processing Times (last visited June 8, 2012), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.8d416137d08f80a2b1935610748191a0/?vgnextoid=f3a2ba87c7a29110VgnVCM1000004718190aRCRD&vgnextchannel=f3a2ba87c7a29110VgnVCM1000004718190aRCRD. The processing times fluctuate significantly and have often been much longer than 41 days.

As of June4, 2012, FOIA requests for A-files that do not qualify for "fast track" processing take an average of 130 business days for Track One, simple requests, and 145 business days for Track Two, complex requests. *See id.*

[20] *Dent*, 627 F.3d at 374.

B. Breadth of Production – FOIA's Extensive Statutory Exemptions

The category of records the government can withhold pursuant to the mandatory access law, INA §240(c)(2)(B), is narrower than the records that the government may withhold under the FOIA exemptions. Section 240(c)(2)(B) provides that the government may withhold only documents that are "considered by the Attorney General to be confidential."

By contrast, FOIA permits the agency to withhold information requested based on any of nine different categories of exemptions.[21] Although FOIA exemptions are not mandatory[22]—even if a document arguably falls under one of these exemptions the agency may still choose to disclose it to the requesting individual—the government often reads the exemptions broadly and regularly withholds numerous records and/or turns over heavily redacted records.

There is no indication that the FOIA exemptions should be read into the mandatory access law.[23] The *Dent* court found that the FOIA regulations are general and govern all records requests, whereas INA § 240(c)(2)(B) specifically relates to document access for respondents in removal proceedings. While some of the FOIA exemptions may overlap with the confidentiality clause in INA § 240(c)(2)(B), particularly in light of the agency's broad interpretation of the exemptions, respondents may receive more documents with fewer redactions under INA § 240(c)(2)(B) than under FOIA.

C. Burden on Individuals Requesting Documents

The mandatory access rule says that information about the respondent's visa and other documents *shall be provided*, thus placing an affirmative obligation on the agency to produce information. By contrast, the FOIA process requires individuals to make a request for the documents they want. The government then determines what documents it deems responsive to an individual's request. Further, the FOIA process may be more burdensome for the requesting individual – especially if he or she is unrepresented – and a less efficient means than the direct production of a respondent's A-file by DHS counsel.

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[21] FOIA exemptions allow the government to withhold information related to national defense and foreign policy secrets, internal personnel rules, records that are otherwise exempt under statute, trade secrets, commercial information, financial information, intra-and inter-agency memoranda, personnel and medical files when disclosure would constitute an invasion of privacy, records compiled for law enforcement purposes, records related to regulation or supervision of financial institutions, and certain geological data. *See* 5 U.S.C.§ 552(b)(1)-(9).

[22] *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) ("Congress did not design the FOIA exemptions to be mandatory bars to disclosure.").

[23] In at least one case, DHS maintained that the mandatory access law encompasses the FOIA exemptions. The IJ in this case (which arose in the Ninth Circuit) rejected the government's argument and ordered DHS to produce the documents that would have otherwise been withheld. The government indicated it would file an interlocutory appeal to the BIA regarding the IJ's order. Cardozo's Immigration Justice Clinic obtained this information through a FOIA request asking for information and documents addressing the government's interpretation of *Dent* and the mandatory access law.

D. Disclosing Alienage

The FOIA request form (Form G-639) asks for the applicant's place of birth and thus poses the additional problem of disclosing alienage in cases where the respondent is contesting removability.[24] The mandatory access rule does not condition disclosure of documents on whether the respondent has identified a country of birth.

E. Judicial Efficiency

Finally, the goals of administrative and judicial efficiency also favor document production under the mandatory access law. In *Dent*, the IJ did not have access to all the documents in the respondent's A-file and thus missed a potentially dispositive citizenship claim. The Ninth Circuit lamented "that a proceeding … without the benefit of the documents in the government's file on Dent invited error."[25]

Similarly, in a recent Third Circuit case, the respondent asked to supplement the record with documentary evidence, obtained through a FOIA request, that showed he was admitted into the U.S. earlier than DHS alleged.[26] The case did not address the mandatory access law or *Dent*. However, the court commented that it was "strange" the government had information in its possession, but "did not provide this information to [the respondent] or the IJ at the time the former asserted his correct admission date, and instead forced him to seek out the documents through a FOIA request."[27] The court added that "[t]his resulted in unnecessary delay, an additional written decision by the BIA, and an additional appeal to us" and concluded that the court "expect[s] that the Government will respond (and quickly) in the future with such information in similar circumstances."[28]

III. Arguments that *Dent v. Holder*, INA § 240(c)(2)(B), and Due Process Require the Government to Produce A-files and Other Documents

Dent is binding legal authority within the Ninth Circuit. However, with no contrary law in other circuits, practitioners may request A-files and other documents in cases outside the Ninth Circuit. And, even in the Ninth Circuit, the government may be required to turn over

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[24] *See* Form G-639, Freedom of Information/Privacy Act Request *available at* http://www.uscis.gov/files/form/g-639.pdf; *see also* 8 C.F.R. § 103.21(a) (directing requester to identify his or her "date and place of birth"). Noncitizens may either decline to write their country of birth on Form G-639 or write "the government alleges he was born in [X country]." The government typically provides the A-file even where the requester does not identify the country of birth.

[25] *Dent*, 627 F.3d at 372.

[26] *Totimeh v. A.G.*, 666 F.3d 109, 112-13 (3d Cir. 2012).

[27] *Id.* at 112 n.3.

[28] *Id.*

documents in situations beyond those described in INA § 240(c)(2)(B) and beyond the facts of *Dent*.[29] These may include:

- documents that are related to issues other than a person's "admission or presence" and/or are relevant to an application for relief from removal;
- documents related to eligibility for relief even where the person was not admitted;
- documents that are relevant to the removal proceedings, but are not contained in the A-file.

The following arguments may be used to obtain documents outside the FOIA process. Additionally, practitioners should continue to make FOIA requests and, whenever applicable, should request "fast track" processing.[30] The reason for this is twofold. First, FOIA requests may result in document production where *Dent* requests fail. Second, documentation of FOIA processing delays or incomplete responses may help persuade an IJ to grant a *Dent* motion. To that end, Dent motions (described in section IV of this advisory) should include copies of FOIA requests and government responses. Where the government has not turned over documents requested pursuant to *Dent* and/or through FOIA, counsel may ask the IJ to grant a continuance until the government grants access to relevant documents.[31]

A. Where a Noncitizen is Contesting Removability, INA § 240(c)(2)(B) Mandates that the Government Turn Over Documents Related to the Noncitizen's Entry and Presence in the United States.

The plain language of INA § 240(c)(2)(B) mandates that the government turn over visa, entry documents, or other records and documents "pertaining to the alien's admission or presence in the United States" in all instances where a respondent (1) has been admitted to the United States and (2) is contesting removability. Therefore, in this situation, practitioners may argue for document production based on the plain language of the INA and may cite *Dent* as binding or persuasive authority.

[29] In a 2011 district court case, the government refused to hand over documents crucial to the noncitizen's naturalization application, prompting the judge to cite *Dent* in his opinion. *Hajro v. U.S.*, No. 08-1350-PSG, 2011 U.S. Dist. LEXIS 117964, *47-48 n.107 (N.D. Cal. 2011). The decision noted that, as in *Dent*, injustice may occur where the government fails to share determinative documents. *Id.*

[30] *See* USCIS FOIA Request Guide, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=34139c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=34139c7755cb9010VgnVCM10000045f3d6a1RCRD, for specific guidelines.

[31] *See* 8 C.F.R. § 1003.29 ("The Immigration Judge may grant a motion for continuance for good cause shown.").

B. Where Removability is Not Being Contested, Due Process Requires the Government to Turn Over Relevant Documents in Its Possession.

Although the *Dent* Court based its decision on INA § 240(c)(2)(B), it nonetheless discussed due process concerns, and the right to a full and fair hearing informed the decision. Therefore, as discussed below, there may be viable due process arguments for obtaining documents from the government. We caution that it generally is difficult to succeed on a due process claim, and practitioners should consider whether there are statutory or regulatory arguments that can be made first.

Where a respondent's case arguably falls within the mandatory access law, he or she also may argue that document production is required based on due process considerations. This is especially important because the mandatory access law only requires production of documents related to admission and presence, but there may be other relevant documents in the government's possession.[32]

Furthermore, due process may require the government to produce documents even where the mandatory access law is not applicable. For example, respondents seeking admission and/or applying for immigration relief may be deprived of a full and fair hearing without access to relevant documents in the government's possession. Practitioners should make clear, however, that they are challenging a procedural flaw in the initial proceeding, not the failure to grant or consider relief, as some courts have rejected due process challenges where noncitizens applied for discretionary forms of relief, finding that noncitizens do not have a constitutionally protected liberty interest in such relief. *See, e.g.*, *U.S. v. Torres*, 383 F.3d 92, 104-06 (3d Cir. 2004) (holding no fundamental unfairness in failing to consider an alien for 212(c) relief) (citing cases in other circuits). Violations of procedural due process, "which are predicated on the right to full and fair hearing, are not affected by the nature of the relief sought." *Fernandez v. Gonzales*, 439 F.3d 592, 602 n.8 (9th Cir. 2006). *But see Assaad v. Ashcroft*, 378 F.3d 471, 475-76 (5th Cir. 2004).

Noncitizens in removal proceedings are protected by the Fifth Amendment guarantee of due process.[33] Even those seeking admission must have an "'opportunity to be heard upon the questions involving his right to be and remain in the United States' before being deported."[34] A

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[32] Notably, however, the *Dent* Court presumes that the government must produce the entire A-file under INA § 240(c)(2)(B). *See Dent*, 627 F.3d at 374-75 (making several references to furnishing the "A-file"). However, in an unpublished decision, the BIA said that an IJ's order to produce the entire A-file exceeded the scope of INA § 240(c)(2)(B). *See In re: Cuevas*, A095-282-946, 2012 WL 1951058 (BIA May 7, 2012).

[33] *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing The Japanese Immigrant Case, 189 U.S. 86, 100-101 (1903)); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985).

[34] *Rusu v. INS*, 296 F.3d 316, 322 & n.8 (4th Cir. 2002) (quoting *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)); *see also Cinapian v. Holder*, 567 F.3d 1067, 1073-74 (9th Cir. 2009).

"meaningful opportunity to be heard" includes a "reasonable opportunity" to present evidence.[35] The immigration statute and regulations further ensure that noncitizens facing removal are afforded due process.[36]

In order to establish that a noncitizen was deprived of due process, he or she must establish prejudice. This means demonstrating that his or her "rights were violated in a manner so as potentially to affect the outcome of the proceedings."[37] Thus, to the extent possible, practitioners should indicate what documents are needed and why their absence will be prejudicial.

Admittedly, without having the contents of a respondent's A-file, an attorney may have difficulty explaining the impact of not having certain documents. In fact, in *Dent*, the government argued that Dent's due process claim should be rejected because the documents he requested would not conclusively establish citizenship.[38] However, the court rejected this high threshold, and instead found that "[p]rejudice here is plain, because the A-file, when it is fully examined and this case adjudicated on all the facts, may show that Dent is a naturalized citizen of the United States."[39]

Pre-*Dent* case law also supports a reasonable approach to assessing the effect of not having documents. In a 2006 case, the Ninth Circuit held that an immigration judge had violated a noncitizen's due process rights by failing to order the government to produce a voluntary departure form that *may* have been useful to his defense against removal.[40] Post-*Dent*, the Ninth Circuit granted a petition for review in another case and vacated the agency's adverse credibility

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[35] *Hussain v. Gonzales*, 424 F.3d 622, 626 (7th Cir. 2005) (citation omitted). Practitioners should check their circuit's case law on due process violations relating to a noncitizen's right to fully and fairly present a defense to removal.

[36] INA § 240(b)(4)(B) (providing that noncitizens have a reasonable opportunity to examine adverse evidence, present favorable evidence, and cross-examine government witnesses); *see also* 8 C.F.R. § 1240.10(a)(4).

[37] *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926 (9th Cir. 2007) (internal quotations omitted). *See also United States v. Charleswell*, 456 F.3d 347, 362 (3d Cir. 2006); *Rusu v. INS*, 296 F.3d 316, 320-1 (4th Cir. 2002) (finding "prejudice requires a reasonable likelihood that the result would have been different if the error in the deportation proceeding had not occurred"); *Alimi v. Gonzanles*, 489 F.3d 829, 834 (7th Cir. 2007) (holding that a person must show "the error likely affected the result of the proceedings"); *Lapaix v. AG*, 605 F.3d 1138, 1143 (11th Cir. 2010) (holding that a noncitizen "must demonstrate that, in the absence of the alleged violations, the outcome of the proceeding would have been different") (citation omitted).

[38] Brief of the Respondent at 34-39, *Dent v. Holder*, 267 F.3d 365 (9th Cir. 2010) (No. 09-7187).

[39] *Dent*, 627 F.3d at 374.

[40] *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 621 (9th Cir. 2006). *But see Sedrakyan v. Gonzales*, 237 Fed. Appx. 76, *81-82 (6th Cir. 2007) (unpublished) (denying due process claim that IJ failed to locate lost documents and ignored other documents because the noncitizen "provided no proffer to the BIA of what those documents might be, the information that might be contained in the documents, or otherwise explain how the documents that the IJ purportedly ignored would have impacted her case").

and frivolous application findings largely because the government had failed to provide the petitioner with letters that he had sought for purposes of his defense.[41] Comparing the case to *Dent*, the court explained that because the IJ had confirmed that the original letters would have been probative of the petitioner's truthfulness, the IJ's denial of a continuance in order to obtain such documents constituted an abuse of discretion.[42]

C. All Claims Should Be Raised at Each Step in the Proceeding to Comply with the Exhaustion Requirement of INA § 242(d)(1).

Under INA § 242(d)(1), a respondent generally must exhaust a claim before raising it with the court of appeals. The courts sometimes reach different conclusions about how fully a person must raise an issue before an agency to satisfy the exhaustion requirement. At a minimum, a respondent should argue to the IJ and BIA that the proceedings did not comport with the statutory requirements of INA § 240(c)(2)(B) and/or due process because he or she was deprived of access to documents.

D. Under Both the INA and Due Process, ICE Should Produce the A-file in Removal Proceedings Without a Request.

In *Dent*, the Ninth Circuit explicitly states that it is *not* holding that the due process right to a full and fair hearing is conditioned upon the respondent's request for the A-file. In fact, the court notes that it is "unable to imagine a good reason for not producing the A-file routinely without a request, but another case may address that issue when facts call for it."[43] This acknowledgement is critical because of the large number of noncitizens in removal proceedings appearing *pro se*.[44] In immigration court, "when the alien appears pro se, it is the IJ's duty to 'fully develop the record.'"[45] The government can facilitate this task by routinely providing the entire A-file and all other relevant documents in its possession when an NTA is filed.

IV. Steps to Obtain Documents Following *Dent*

This section describes steps to make document requests and motions for production of documents. Given exhaustion requirements, it is important to document all such efforts in order to preserve administrative and judicial review, if necessary.

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[41] *Singh v. Holder*, 405 Fed. Appx. 193 (9th Cir. Dec. 7, 2010) (unpublished).
[42] *Id.* at *194.
[43] *Dent*, 627 F.3d at 375.
[44] According to the Executive Office for Immigration Review, 49% of noncitizens in removal proceedings appeared *pro se* in 2011. Dep't. of Justice, *FY 2011 Statistical Year Book*, fig. 9 at 25 (2011) *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.
[45] *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (quoting *Jacinto v. INS*, 208 F.3d 725, 733-34 (9th Cir. 2000)).

A. Informal Request

Some respondents have successfully obtained documents by making an informal request to DHS counsel for particular documents or for the entire A-file. The request may be for specific documents or any documents subject to mandatory disclosure under INA § 240(c)(2)(B). Noncitizens should consider documenting their requests by sending them in writing and saving copies of email correspondence, fax transmission reports, or return-receipt cards for letters sent through the mail. Such documentation may be submitted in support of a formal motion filed later if the informal request is ignored or denied.

B. Motion

If requests to DHS counsel are only partially satisfied or ignored, respondents may file a *Dent* motion with the IJ. The motion may request that the IJ order production of the A-file and/or any requested documents and that the IJ's decision on the motion be in writing. The motion should cite the mandatory access law, *Dent*, and due process as the bases for the document request. Documentation of prior requests and responses (if any) should be submitted in support of the motion.

C. Subpoena

In addition to filing a *Dent* motion, respondents also should consider requesting a subpoena. IJs "have the exclusive jurisdiction to issue subpoenas …for the production of…documentary evidence…. An Immigration judge may issue a subpoena upon his or her own volition or upon application of the Service or the alien."[46] However, many IJs are reluctant to issue subpoenas, and as a result, subpoenas are granted infrequently.[47] Nonetheless, particularly outside of the Ninth Circuit – where *Dent* is not binding and ICE has indicated that it will not abide by the Ninth Circuit's interpretation of INA § 240(c)(2)(B) – subpoenas may be an effective method of obtaining documents.

The subpoena regulation requires the requesting party to make a "diligent effort" to furnish evidence,[48] so it is important to attach documentation to the request regarding the steps already taken to obtain the documents. The party requesting the subpoena also must explain what he or she "expects to prove by such . . . documentary evidence."[49] If an IJ refuses to grant a subpoena, the respondent may raise this issue on appeal to the BIA and then in a petition for review.

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[46] 8 C.F.R. § 1003.35(b)(1).

[47] Thus, there may be strategic reasons for not requesting a subpoena at the same time a *Dent* motion is filed. Practitioners should take into account local immigration court practices when considering whether to request a subpoena.

[48] 8 C.F.R. § 1003.35(b)(2).

[49] *Id.*

D. Appeal

Where non-disclosure of documents affected or may have affected a respondent's removal case, he or she may raise this issue on appeal to the BIA and then in a petition for review in the court of appeals.