Evidentiary Issues in Asylum Cases

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INTRODUCTION

An individual seeking asylum in the United States carries the burden[1] of showing that he or she is unwilling or unable to return home because of a "well-founded fear of persecution on account of race, nationality, membership in a particular social group, or political opinion."[2] In determining whether an applicant has this burden, the fact-finder may weigh credible testimony along with other evidence of record.[3] This practice advisory will provide guidance for the preparation and presentation of effective asylum evidence, including credible testimony of the applicant and witnesses, as well as corroborating documentation. It will also provide practical tips on the mechanics of presenting this evidence and how evidence presented by the Department of Homeland Security (DHS) may be challenged.

TESTIMONIAL EVIDENCE

[1] 8 CFR §§208.13(a), 1208.13(a); *Matter of C-A-L-*, 21 I&N Dec. 754, 6 (BIA 1997).
[2] INA §101(a)(42)(A).
[3] INA §208(b)(1)(B)(ii).

How is Credibility Assessed or Determined?

Credibility is fundamental to any asylum claim. An applicant's testimony may be sufficient to sustain his or her burden of proof, but only if the applicant's testimony is credible, persuasive, and specific.[4] General and vague testimony is not sufficient.[5] Moreover, testimony that contains inconsistencies, even when they are seemingly minor, can lead to a negative credibility determination. In fact, an applicant's credibility in an asylum case is so foundational to the case that a negative credibility determination can result in his or her return to a country in which he or she may face persecution or torture. Hence, when preparing an asylum case, practitioners should attempt to foresee problems that may arise during the course of their clients' testimony, whether before an asylum officer or an immigration judge.

Under the REAL ID Act of 2005, an immigration judge will make a credibility determination based upon the totality of the circumstances, including a witness' demeanor, candor, or responsiveness; the consistency between oral and written statements (including those not made under oath); the internal consistency of such statements; the consistency of such evidence with other evidence of record; and any false statements, regardless whether such false statements go to the heart of the claim.[6] An applicant's testimony will generally be found credible when it is plausible, detailed, internally consistent, consistent with the application, and unembellished.[7] Traditionally, an immigration judge has significant and broad authority in determining whether a witness's testimony is credible.[8] Courts have concluded that, ordinarily, an immigration judge is in the best position to evaluate the accuracy, reliability, and demeanor of witnesses, as well as to consider contradictory evidence or an inherent improbability of a witness's testimony. Thus, any credibility finding, particularly when it is supported by specific, cogent reasons,[9] is normally accorded substantial deference as a matter of practice and law.[10] As such, practitioners must take great care to ensure that a client's testimony presents the best and most persuasive case and that it is corroborated by supporting evidentiary materials.

Practice Pointer: Because an immigration judge's credibility determination is entitled to great deference insofar as a judge has a first-hand ability to observe a witness and assess their demeanor and mannerisms, it is critical for practitioners to properly prepare their client before the taking of any testimony. Proper preparation means knowing the facts and documentary

[4] INA §208(b)(1)(B)(ii).
[5] *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998) (finding that an applicant must demonstrate "specific, detailed facts supporting the reasonableness of his or her fear").
[6] INA §208(b)(1)(B)(iii). The provisions of the REAL ID Act apply only to applications filed on or after May 11, 2005. *See* REAL ID Act of 2005. *See also Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).
[7] *Matter of B-*, 21 I&N Dec. 66, 70-72 (BIA 1995).
[8] *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998).
[9] *He v. Ashcroft*, 328 F.3d 593, 595 (9th Cir. 2003) (utilizing substantial evidence standard); *De Leon-Barrios v. INS*, 115 F.3d 392, 393 (9th Cir. 1997) (adverse findings must be supported specific, cogent reasons). *See also Tewabe v. Gonzales*, 446 F.3d 533, 540 (4th Cir. 2006); *Mulanga v. Ashcroft*, 349 F.3d 123, 138 (3d Cir. 2003); *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1054 (9th Cir. 2002); *Daiga v. INS*, 183 F.3d 797, 798 (8th Cir. 1999); *Matter of O-D-*, 21 I&N Dec. 1079, 1082 (BIA 1998).
[10] *Garcia v. INS*, 31 F.3d 441, 444-45 (7th Cir. 1994); *Artiga-Turcios v. INS*, 829 F.2d 720 (9th Cir. 1987); *Espinoza-Ojeda v. INS*, 419 F.2d 183 (9th Cir. 1969). *Matter of Magana*, 17 I&N Dec. 1, 14 (BIA 1979); *Matter of Teng*, 15 I&N Dec. 516 (BIA 1975).

evidence inside and out, educating your client on what he or she can expect to happen, and predicting what questions an immigration judge or DHS counsel might pose. Such preparation is critical to ensuring that your client presents his or her best possible case. Practitioners may use the following checklist in preparing to present their clients' asylum cases:

- ☐ Carefully read every document and piece of evidence that has been submitted in support of your client's case. Note any corrections or amendments that need to be made, as well as any inconsistencies that need to be explained. Discuss these with your client.
- ☐ Explain to your client what to expect at the asylum interview or in immigration court. Knowing what to expect will increase his or her comfort level and ability to communicate clearly.
- ☐ Complete a thorough question-and-answer session with your client.
- ☐ Review potential questions from both an immigration judge and DHS counsel. "Grill" your client on all potential weak areas of the application, including discrepancies, inconsistencies, and any unreasonable or implausible accounts.
- ☐ Gather documentation that corroborates each aspect of your client's story or that may explain any inconsistencies or discrepancies.

Discrepancies

Throughout the asylum process, applicants are tasked to recount their tales of persecution, torture, or fears in returning to their home countries.[11] Often, these stories are difficult to articulate, the details may be unclear, or an applicant may be reluctant to provide the particulars of traumatic abuse or suffering.[12] However, inconsistent statements or discrepancies made almost anywhere in the asylum process can jeopardize an applicant's asylum claim. An applicant's omissions may be just as important as what he or she states in the application for asylum or in his or her testimony. In this regard, discrepancies, whether in the application itself or in the testimony provided during the hearing, may provide a basis for an immigration judge to make a negative credibility finding, which can be detrimental to the applicant's case.[13]

An applicant should always be given the opportunity to respond to and explain any apparent inconsistencies or omissions.[14] A reasonable explanation that is not contradicted and that is supported by evidentiary material should be credited by an immigration judge.[15] Practitioners should therefore discuss each omission, vague testimony or lack of detail, inconsistent statement, or discrepancy in detail with their clients. They should also discuss ways in which these negative factors may be addressed and explained on the record. When adequately explained on the record, courts have recognized that an applicant's reluctance to discuss traumatic or painful experiences, or to report it in an asylum interview or application, may not be fatal to a credibility determination.[16] In some situations, asylum applicants have given false or limited information

[11] 8 CFR §235(b)(1)(B)(iii)(III), 8 CFR §1208.30(g)(2) (outlining credible fear procedures).
[12] *See, e.g., Fiadjoe v. Attorney General*, 411 F.3d 125 (3d Cir. 2005) (recognizing that noncitizens who have been physically and sexually abused may be reluctant to explain details of their experience).
[13] *Matter of A-S-*, 21 I&N Dec. 1106, 1109-1110 (BIA 1998).
[14] *UNHCR Handbook*, at ¶ 199.
[15] *Dong v. Gonzales*, 421 F.3d 573 (7th Cir. 2005) (recognizing plausibility of claim over perceived inconsistencies).
[16] *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002) (finding that a failure to report a sexual assault in an asylum interview does not support an adverse credibility finding).

during their asylum interview or during their inspection upon arrival at an airport, yet have eventually been determined to be credible.[17] Courts have also recognized that giving false information for fear of removal to a persecuting country can be entirely consistent with a fear of persecution, not affecting the applicant's credibility.[18] However, it is imperative that these reasons are adequately explained in the record.

Practice Pointer: Often, the asylum process may drag on for months or even years, leaving applicants with a poor memory of the course of their asylum cases. Practitioners must thoroughly review and question their clients as to all statements made in the asylum process, including statements made upon arrival at an airport, sworn statements taken by immigration inspectors or asylum officers, and formal applications for asylum submitted directly to DHS. Doing so enables practitioners to engage in a more thorough preparation of the applicant before the taking of testimony and to more readily predict potential questions posed by immigration judges and DHS counsel. Practitioners may use the following checklist in preparing to present their clients' asylum cases:

- ☐ Submit a Freedom of Information Act (FOIA) request to obtain all available records in connection with the applicant's asylum claim.
- ☐ Request and review the notes made by the asylum officer, especially if you did not attend the asylum or credible fear interview. Sometimes, in response to requests for asylum officer notes, DHS argues that these notes are exempt and do not need to be produced.[19] If this is the case, consider an appeal.[20]
- ☐ Thoroughly review any available record of proceeding made in connection with the applicant's asylum claim. Note any inconsistencies or omissions that need to be explained and discuss these with your client.
- ☐ If your client has made prior inconsistent statements or omissions, or if discrepancies exist in the record, determine how these may be explained.
- ☐ Prepare testimony and documentary evidence to provide a reasonable explanation for these inconsistencies or discrepancies on the record.

Mental Health of the Applicant

Regrettably, many individuals who are seeking asylum in the United States have faced physical harm, extreme mental suffering or cruelty, acts of torture, and other forms of severe persecution, such as rape and forced abortion. Many others have been witnesses to such acts. As such, many applicants may suffer from Post-Traumatic Stress Disorder (PTSD) or other trauma-related disorders, and may exhibit signs and symptoms of the same. Practitioners who represent individuals in asylum cases who have suffered from mental health problems may face significant challenges in the asylum process.

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[17] *Rodriguez-Galicia v. Gonzales*, 422 F.3d 529 (7th Cir. 2005) (reversing the Board of Immigration Appeals and finding the applicant credible notwithstanding a failure to recount claim at initial interview due to a fear of return to persecution and ignorance of the U.S. asylum process); *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004); *Latifi v. Gonzales*, 430 F.3d 103 (2d Cir. 2005).

[18] *Yongo v. INS*, 355 F3d 27, 33 (1st Cir. 2004); *Balasubramanrim v. INS*, 143 F.3d 157, 164 (3d Cir. 1998).

[19] *See, e.g.*, CLINIC Report on Credible Fear and Expedited Removal (Oct. 29, 1997).

[20] 5 U.S.C. §§552(a)(6)(A)(i), 552(a)(6)(C).

PTSD and other mental health issues, such as depression and anxiety, may cause an individual to be reluctant, unwilling, or even unable to share their accounts of persecution. Additionally, the effects of mental illnesses may yield inconsistent, contradictory, or confusing statements by the applicant. Moreover, individuals who are suffering from mental health disorders, particularly those triggered by traumatic events, are generally focused on their own survival, rather than their legal status or the need to prepare and file an asylum application. Thus, asylum applicants who are suffering from mental health disorders may be found to lack credibility or their applications may be time-barred.[21]

Practitioners, therefore, must take special precautions to establish an adequate record of an applicant's mental health disorder. Documenting the mental health disorder not only demonstrates some of the real and lasting effects of persecution or torture, but also, it may help to explain any inconsistent statements or testimony, contradictions, omissions, or implausibilities, thus avoiding a negative credibility finding.[22] Moreover, if a mental health disorder was the cause for the applicant's delay in filing his or her asylum application, an adequate explanation on the record may enable him or her to fall within one of the exceptions to the one-year filing deadline.[23] Finally, creating an evidentiary record of any mental health disorder also maintains potential arguments and challenges to an immigration judge's decision on appeal, should an appeal become necessary.

Practice Pointer: It is imperative that practitioners establish a thorough record of testimony and evidence regarding their client's mental health issues. Practitioners may use the following checklist in preparing to present their clients' asylum cases:

- ☐ Have a thorough conversation with your client about their mental state at the time they gave prior testimony, as well as how they are feeling now. While you may not be qualified to diagnose an individual with a mental health issue, such conversations may make you aware of your client's need to see a mental health professional.
- ☐ Prepare affidavits of your client and any individuals who are aware of his or her mental health issues to verify the existence of a mental health issue and to explain what symptoms have been observed, when the symptoms began, and the effects that those symptoms have had on the applicant's ability to function normally.
- ☐ Obtain a detailed evaluation of your client by a mental health professional that is qualified to diagnose mental health issues, such as PTSD or other trauma-related disorders.
- ☐ If your client is seeing or being treated by a mental health professional, obtain an affidavit from that professional to explain the diagnosis, symptoms, treatment, and effects of the disorder on your client's ability to function normally.
- ☐ If the mental health professional is available to provide in-court testimony, prepare him or her for giving effective testimony before an immigration judge. If they are not able to

[21] *Nwaokole v. INS.*, 314 F.3d 303, 309 (7th Cir. 2002).
[22] For example, the Board of Immigration Appeals has held that noncitizens in removal proceedings are presumed to be competent, and if there are no indicia of incompetency in a case, no further inquiry regarding competency is required. *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).
[23] 8 CFR §1208.4(a)(5)(i) (2003).

provide testimony in court, ask them if they are able to provide telephonic testimony, and then file a Motion for Telephonic Testimony.

- ☐ Do your own research of the mental health disorder with which your client has been diagnosed. Submit objective information that you find about the disorder that can help explain any inconsistent testimony or delay in filing the application.

Expert Witnesses

Just as mental health professionals can be helpful in explaining the reasons for an applicant's inconsistent or vague testimony or the reasons for a delayed application, other experts also can be extremely effective in building a successful asylum case. Witnesses who are experts on the conditions in the asylum applicant's home country can be useful in educating an immigration judge on current socioeconomic or political conditions, the objective reasonableness of an applicant's claim, and the contours of a particular social group. Their testimony, in addition to assisting the court in understanding the applicant's fears, can provide important corroboration of events, government policies and practices, common human rights violations, and the inability or unwillingness of the government to control the actions of a particular social group. In particular, in cases involving countries where the systematic persecution of individuals with a certain characteristic is not well documented, expert testimony can be essential.

Expert witnesses can also assist the court in understanding cultural differences, including differences in an applicant's demeanor when speaking, or an applicant's inability to recall dates, times, or specific events.[24] For example, in many cultures, calendars, schedules, dates, and times are not as important as they are in Western cultures.[25] An expert can assist and clarify to the court that an applicant's inability to remember such details is not based upon evasiveness or deception, but rather, on the unique cultural aspects of the applicant's country.

Practice Pointer: As a practitioner preparing an asylum application, working with expert witnesses can present various challenges. First, finding an expert who can speak to your client's claims and specific country conditions can be difficult. Once you have found an expert, it can be difficult for them to find time in their schedules for you and your client. It can also be challenging to work with them on preparing the specifics of their affidavits and oral testimony. Practitioners may use the following checklist in preparing to present their clients' asylum cases:

- ☐ Make a list of the aspects of your client's claim that you would like to corroborate with expert testimony.
- ☐ Locate an expert who is qualified to address the relevant aspects of your client's claim. Practitioners may find experts through word of mouth of other immigration practitioners, university faculty websites, organizations and think tanks that work on those issues, or other sources.
- ☐ Contact the experts to request their assistance.
- ☐ Meet with the expert to discuss your client's claims and to verify that the expert is able to provide the information that you need to support your client's case.

[24] *Fiadjoe v. Attorney General*, 411 F.3d 135, 159-160 (3d Cir. 2005).
[25] *Id.* at 158.

- ☐ Ask the expert to prepare a detailed sworn affidavit relating to the particulars of the case, whether in regard to the country conditions, the objective reasonableness of a claim, or cultural differences.[26]
- ☐ Provide the expert with specific guidance of what to include in his or her sworn affidavit.
- ☐ Carefully review the sworn affidavit and flag any statements or information that may be problematic for your client's case.
- ☐ Discuss any problematic information with the expert and any concerns.
- ☐ Ask the expert to provide in-court testimony so that DHS may have an opportunity to cross-examine and "test" any statements made by the expert. An immigration judge is more likely to find the testimony of an expert witness as being persuasive if it is subjected to cross-examination, and it passes muster.
- ☐ If the expert cannot appear in court, ask if he or she can provide telephonic testimony. Expert witnesses may be permitted to appear telephonically, and practitioners should make efforts to move the court to allow such testimony well in advance of a hearing.[27]
- ☐ Prepare the expert witnesses for testimony, just as you would prepare the applicant for testimony: complete a thorough question-and-answer session, and attempt to anticipate questions by DHS counsel and an immigration judge.
- ☐ If an immigration judge refuses to permit or otherwise limits an expert's testimony, either in court or telephonically, object on the record to maintain the issue for appeal.[28]

DOCUMENTARY EVIDENCE

REAL ID Act and Corroborating Evidence

The credible, persuasive, and specific testimony of an asylum applicant, standing alone, can be sufficient evidence to grant asylum.[29] However, for cases filed on or after May 11, 2005, the REAL ID Act allows an adjudicator to require corroborating evidence "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[30] An applicant should provide

[26] *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1089 (9th Cir. 2000) (giving significant weight to professor who testified that some homosexual men are subject to greater abuse in Mexican culture than others and helped establish a particular social group); *Lukwago v. Ashcroft*, 329 F.3d 157, 179 (3rd Cir. 2003) (finding expert's testimony to be important and remanding to Board for consideration); *Castaneda-Hernandez v. INS*, 826 F.2d 1526, 1531 (6th Cir. 1987) (reversing Board and holding that expert testimony from three witnesses was more persuasive than State Department report); *Gailius v. INS*, 147 F.3d 34, 36 (1st Cir. 1998).

[27] *Immigration Court Practice Manual*, Chapter 4.15(n).

[28] *Podio v. INS*, 153 F.3d 506, 510 (7th Cir. 1998); Pangilinan v. Holder,568 F.3d 708 (9th Cir. 2009); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1199 (9th Cir. 2000) (reversing the Board and holding that live expert testimony was "the most salient" evidence of the noncitizen's persecution). Due process and the fundamental fairness of the proceedings require that an applicant be given an opportunity to present relevant, material information regarding his or her claim for asylum. *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999) (finding that applicants must be a afforded a "reasonable opportunity to be heard.")

[29] 8 CFR §1208.13(a). *See Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997); *Matter of B-*, 21 I&N Dec. 66 (BIA 1995).

[30] INA §208(b)(1)(B)(ii); 8 USC §1158(b)(1)(B)(ii). Although cases filed before May 11, 2005, were evaluated on a theoretically less demanding standard, the BIA had consistently held respondents to a duty of corroboration where corroborating evidence ought to be available. *Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997). Circuits had split over this requirement. *Compare Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000); *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001); *El-Sheikh v. Ashcroft*, 388 F.3d 643, 647 (8th Cir. 2004); *with Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000); *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000); *Zheng v. Gonzales*, 409 F.3d 804 (7th Cir. 2005).

"supporting evidence, both of general conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available" and where it is reasonable to expect such corroborating evidence.[31] Where such evidence is not available, the applicant must provide an explanation of why that evidence is unavailable.[32]

If an immigration judge determines that an applicant should have provided corroborating evidence, that ruling is a finding of fact. "No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."[33] These requirements make it imperative to seek out and present corroboration wherever possible and to document any difficulties in obtaining corroboration. If the need for corroborating evidence arises unexpectedly during a hearing, practitioners should move for adjournment to allow for sufficient time to obtain the needed evidence.[34]

Practice Pointer: The type of corroborating evidence needed depends on the matter to be proved, whether it is the applicant's qualifying characteristic, past persecution, an inability to supply corroborating documentation, the one year filing deadline, that your client merits a favorable exercise of discretion, or any other aspect of the case. Practitioners may use the following sample evidence checklist in preparing their clients' asylum cases:

- ☐ Identity documents and other official government documents.
- ☐ Privately-issued membership cards or other affiliation documents.
- ☐ Affidavits from the applicant's family, friends, neighbors, or community members confirming his or her protected characteristic.
- ☐ Photographs of the applicant participating in political or religious events.
- ☐ Letters from organizations of which the applicant is a member or affiliate.
- ☐ Objective, published descriptions of the characteristics or attributes, which designate members of your client's race, religion, nationality, political affiliation, or social group.
- ☐ Photographs of the applicant's injuries.
- ☐ Police reports recording the harm suffered or threatened.
- ☐ Arrest records, if your client was ever arrested due to his or her protected characteristic.
- ☐ Affidavits from witnesses who were present during the act(s) of harm or mistreatment.
- ☐ Affidavits from anyone whom the applicant confided in about the incident(s), confirming any observed physical or psychological harm, such as markings on the applicant's body, torn clothes, injuries, crying, anxiety, or unusual behaviors.
- ☐ Medical records, including evaluations of physical injuries and the likely cause of those injuries, letters from treating doctors, treatment reports, hospital admission records, or prescribed medications.

[31] *Matter of S-M-J-*, 21 I&N Dec. 722, 724-25 (BIA 1997).
[32] *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998); *Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997).
[33] INA §242(b)(4); 8 USC §1252(b)(4).
[34] *See Mulanga v. Ashcroft*, 349 F.3d 123, 135-36 (3rd Cir. 2003); *Poradisova v. Gonzales*, 420 F.3d 70, 79 (2nd Cir. 2005).

- ☐ Mental health records, including evaluations of mental health disorders and the likely trigger for those disorders, letters from treating mental health professionals, appointment records, or prescribed medications.
- ☐ Death certificates for the applicant's relatives, friends, neighbors, or community members who were targeted because of a qualifying characteristic.
- ☐ Newspaper or other media coverage, or coverage by human rights groups, of the incident in which the applicant was involved.
- ☐ Evidence that your client attempted to supply certain corroborating documentation, but was unable to.
- ☐ I-94 card, visa, and stamped passport (even if false).
- ☐ Evidence of means of travel to the United States (airline itineraries, bus tickets, hotel receipts, etc.).
- ☐ Evidence of presence outside of the United States in the past year, including financial, medical, school, or work records.
- ☐ Affidavits from individuals who have personal knowledge of the applicant's arrival in the United States.
- ☐ Expert report regarding the conditions in the applicant's home country, as they relate to the applicant's claims.
- ☐ Country conditions reports and articles showing the conditions in the applicant's home country during the time of persecution and presently.
- ☐ Certified English translations of any non-English documents. These translations must contain the regulatory language for certificates of translation.[35]
- ☐ Evidence of good moral character and rehabilitation if your client has any negative equities, such as an arrest.

Original Documents and Forensics Testing

Many official and unofficial documents may be relevant in an asylum case, including: police reports or arrest warrants, records of fines paid, political membership cards, marriage certificates, birth certificates, divorce certificates, national registers, identity cards, passports, and foreign criminal conviction records. Generally, an asylum applicant will need to provide, whenever possible, the relevant original documents, and to properly authenticate those documents and show proof of their chain of custody. For example, retaining and offering original mailing envelopes for affidavits sent from abroad can show chain of custody and bolster the document's provenance. However, inability to secure perfect authentication is not fatal to a document's admissibility.[36]

Authentication of foreign official records is governed by 8 CFR §1287.6. Documents from countries that signed the Convention Abolishing the Requirement of Legislation for Foreign Public Documents (Convention) are authenticated by proper certification from the official having legal custody of the record. These documents must be properly certified under the Convention by an official designated by the signatory country. No certification by an American consular official is required of these documents. On the other hand, when the document is issued by a country that

[35] *See* 8 CFR §§1003.33, 1003.23(b)(1)(I); *Immigration Court Practice Manual*, App. H.
[36] *Yan v. Gonzales*, 438 F.2d 1249, 1256 n. 7 (10th Cir. 2006); *Gui Cun Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004); *Matter of H-L-Z and Z-Y-Z*, 25 I&N Dec. 209, 214 n. 5 (BIA 2010).

is not a signatory to the Convention, it must bear a "chain of certifications" back to the original document and ending with a certification by a U.S. consular officer authenticating the last foreign official's signature and authority.

Nonpublic documents may also be subject to some verification in the relevant country or in the United States. For example, many periodicals are received and recorded in the Library of Congress. Photoduplicates of particular issues and pages might be obtained through the Library's reading room at www.loc.gov/rr/news/.

Original foreign documents may be subjected to scrutiny by the government. Consular field investigations may call such documents into question, but such investigations are subject to question and may well be found wanting. At a minimum, the applicant has the right to know the identity and background of the investigator, what sources were consulted in the investigation and the content of their information.[37] Moreover, the applicant must be given the opportunity to rebut any adverse report.[38]

ICE may also subject a document to its own forensic examination. In such a case, an applicant should be given the opportunity to cross-examine the forensic examiner or supervisor of the lab. An immigration judge has the power to subpoena such a witness,[39] and a judge's failure to subpoena a forensic examiner may be reversible error.[40] A foreign document may not be discounted based on speculation or conjecture.[41] Similarly, a forensic examiner's opinion must be based on actual knowledge and must be reasonable, or it should carry no weight.[42] Moreover, where a forensic examiner's conclusion is ambiguous, it should not be the basis for an adverse credibility finding.[43]

Former Board of Immigration Appeals Judge Lory Rosenberg, dissenting in *Matter of A-S-*, gave the following cautionary advice to asylum applicants concerning their documents:

> Before submitting this evidence, have the letters or certificates checked both by a forensics expert and an expert familiar with the circumstances in your country. Get a sworn and notarized statement concerning the paper on which the information is written, the credentials of the person making the statement or certificate, and a description of how, where, and when official documents are issued, who prepares them, how, where, and when you got them, and, if possible, provide an explanation for any variance from the normal condition of the document, in terms of the ink used on the document, the seals stamped on the

[37] *Zhen Nan Lin v. U.S. Dep't of Justice*, 459 F.3d 255 (2d Cir. 2006).
[38] *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003); *Alexandrov v. Gonzales*, 442 F.3d 395, 404 (6th Cir. 2006).
[39] 8 CFR §§1003.35(b); 1287.4(a)(2)(ii).
[40] *Xue Tong Zou v. United States Att'y Gen.*, 367 F. App'x 36, 40 (11th Cir. 2010); *Olabanji v. INS*, 973 F.2d 1232 (5th Cir.1992).
[41] *Kourouma v. Holder*, 588 F.3d 234, 241 (4th Cir. 2009); *Nasir v. INS*, 122 F.3d 484, 488 (7th Cir.1997); *Daiga v. INS*, 183 F.3d 797, 798 (8th Cir.1999) (per curiam).
[42] *Pasha v. Gonzales*, 433 F.3d 530 (7th Cir. 2005).
[43] *Zahedi v. INS*, 222 F.3d 1157, 1165 (9th Cir. 2000).

> document, the condition of the paper, and how the documents were either taken out of the country or delivered to you. [44]

Judge Rosenberg's thorough advice illustrates the importance and difficulty of the applicant's burden in asylum cases. If a client's resources allow it, it is wise to hire a member of the American Board of Forensic Document Examiners to make an independent examination.[45]

CHALLENGES AND OBJECTIONS TO DHS EVIDENCE

In addition to preparing and presenting effective testimony and documentary evidence on behalf of the asylum applicant, practitioners should pay close attention to any evidence that is submitted by DHS. If the evidence presented by DHS is improper in any way, practitioners should not be afraid to make objections or move for the evidence to be excluded from the record. Challenging DHS evidence can have multiple benefits: (1) It may lead to exclusion of the evidence; (2) DHS counsel may decide to negotiate or withdraw the contested evidence, rather than presenting embarrassing facts or a document or witness that it cannot actually produce;[46] (3) Practitioners can increase their credibility with the court and send a signal to DHS that they will be a zealous advocate on behalf of their clients; and (4) Objecting on the record maintains the issue and builds your record for any future appeals.

Although the immigration courts do not follow the Federal Rules of Evidence and the admissibility of evidence is generally favored, there is authority for making evidentiary objections in immigration court. First, the immigration judge and DHS counsel are not free to ignore the statute, regulations, and Immigration Court Practice Manual. If DHS attempts to submit a document or testimony that is contrary to one of these rules, practitioners should object. Moreover, the substantive due process clause of the 5th Amendment of the U.S. Constitution requires that the applicant be given a full and fair hearing on his or her claims.[47] If the admission and reliance upon any evidence would impact the fundamental fairness of the proceedings, practitioners should not be afraid to object and argue that it deprives the applicant of due process.[48] Challenging DHS evidence, whether testimonial or documentary, that interferes with the fundamental fairness of the applicant's case is fundamental to being a zealous advocate.

Practice Pointer: Practitioners may have several grounds to object to documents submitted by DHS or questions and answers sought by DHS counsel on cross-examination. Practitioners may use the following checklist in representing their clients:

- ☐ Untimely. If DHS tries to enter new evidence into the record on the day of the hearing, object![49]

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[44] *Matter of A-S-*, 21 I&N Dec. 1106, 1133 (BIA 1998) (Rosenberg, dissenting).
[45] A website listing members of the American Board of Forensic Document Examiners is available at www.abfde.org.
[46] *See, e.g., Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005).
[47] *See Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 504 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168 (BIA 1972).
[48] *Id.*
[49] *See* INA §240(b)(4)(B); 8 CFR §1240.10(a)(4) (codifying the applicant's right to examine and respond to evidence presented against him or her). *See also* INA §242(b)(3); 8 CFR §1240.10(a)(14) (codifying the applicant's

- ☐ Lack of foundation. If DHS has not properly established a foundation for the testimony or exhibit, object!
- ☐ Not authenticated. If DHS does not properly authenticate a document and show its chain of custody, object! If the exhibit is not an original document, there should be a copy attested by the officer having legal custody of the original record or by the officer's deputy, as well as a certificate that such officer has custody of the document.
- ☐ Relevance. If the question will not render any facts in dispute more or less probable, object!
- ☐ Confusing, ambiguous, misleading. If a question is not posed in a clear and precise manner so that the witness knows with certainty what information is being sought, object!
- ☐ Compound. If DHS counsel asks two or more separate questions within the framework of a single question, object!
- ☐ Misquotes or mischaracterizes exhibits or testimony. If DHS counsel changes a few words and asks a witness to affirm the misstatement, object! If DHS counsel later misquotes what a witness had said or the information contained in a document on the record, object!
- ☐ Argumentative. If DHS counsel states a conclusion and then asks the witness to argue with it, usually in an attempt to get the witness to change his or her mind, object!
- ☐ Repetitious, asked and answered. If DHS asks the same question again and again hoping to receive a different answer, object!
- ☐ Speculation. If DHS counsel's question would require the witness to guess, object!
- ☐ Improper opinion. If DHS counsel asks a witness to give an opinion on hypothetical facts where the witness is not qualified as an expert on that subject, object!
- ☐ Competency of witness. If DHS counsel calls a witness who is not qualified as an expert or not qualified to opine on that particular subject, a witness who was unable to observe or remember the events in question, or a witness who lacks personal knowledge of the events in question, object!
- ☐ Privileged. If DHS counsel asks a question that calls for privileged information (attorney/client, marital communications, self-incrimination, etc.), object!

CONCLUSION

Effective, zealous representation of an asylum applicant requires the preparation of credible testimony, as well as strong corroborating documentation. In addition to the substance of the testimony and documentary evidence, how that evidence is presented to the asylum office or immigration court is also important; improper presentation of evidence can lead to its exclusion from the record, seriously impacting the strength of the applicant's claim. Proper preparation and presentation of evidence, as well as challenges to improper DHS evidence, is fundamental to meeting an applicant's burden of proof, and thus, is fundamental to the success of an asylum application.

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right to cross-examine witnesses). *See also Immigration Court Practice Manual*, Chapters 4.16(a)(i), 3.1(b)(ii)(A) (requiring the timely-filing of exhibits) and Chapter 3.1(d)(iii) (referencing the right to sufficient time to review and respond to evidence).