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Expert Witnesses in Immigration Proceedings

by Garry Malphrus

Introduction

Immigration Judges have increasingly complex and demanding jobs, and a good example of this trend can be seen in the expanding use of expert witnesses in Immigration Court. Expert evidence, which includes both documentary and testimonial evidence, can be very significant and potentially determinative in whether a party meets his or her burden of proof. However, issues may arise regarding this evidence, posing challenges that the Immigration Judge must resolve. This article examines case law from the Board of Immigration Appeals and the Federal circuit courts of appeals addressing the use of expert evidence in immigration proceedings, including questions of admissibility and weight. In general, it can be difficult to discern broadly applicable rules from cases, particularly across circuits, because the issues regarding expert witnesses can be very fact specific. This article also discusses the Federal Rules of Evidence regarding expert evidence as a possible guide to assist in navigating this terrain.

Expert evidence that is relevant and reliable can be very helpful to Immigration Judges in reaching the proper outcome of a case. "Immigration Judges, like other trial judges generally, are often required to determine factual disputes regarding matters on which they possess little or no knowledge or substantive expertise, and, in making such determinations, they typically rely on evidence, including expert testimony, presented by the parties." *Matter of Marcal Neto*, 25 I&N Dec. 169, 176 (BIA 2010). Expert witnesses are persons "with scientific, technical, or other specialized knowledge" who can "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Because of their specialized knowledge, "[e]xpert witnesses are often uniquely qualified in guiding the trier of fact through a complicated morass of obscure terms and concepts," and they can provide conclusions and inferences drawn from facts that lay persons are not qualified to make. *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994). For these reasons, "their testimony can be extremely valuable and probative." *Id.*

The Opportunity To Present Probative Evidence

Expert evidence is a form of evidence, and thus the proper starting point is to discuss basic rules regarding evidence in Immigration Court. In immigration proceedings, the "'sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.'" *Nyama v. Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004) (quoting *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995); *see also, e.g.*, *Kholyavskiy v. Mukasey*, 540 F.3d 555, 565 (7th Cir. 2008); *Matter of Grijalva*, 19 I&N Dec. 713, 721-22 (BIA 1988). It is well settled that the Federal Rules of Evidence are not binding in immigration proceedings and that evidentiary considerations are more relaxed in Immigration Court than in Federal court. *See, e.g.*, *Matter of De Vera*, 16 I&N Dec. 266, 268-69 (BIA 1977); *Navarrette-Navarrette v. Landon*, 223 F.2d 234, 237 (9th Cir. 1955) (stating that "administrative tribunals may receive evidence which a court would regard as legally insufficient").

Moreover, an alien has the statutory and due process right under the Fifth Amendment to a full and fair hearing and a reasonable opportunity to present evidence on his or her own behalf. Section 240(b)(4)(B) of the Immigration and Nationality Act; 8 U.S.C. § 1229(b)(4)(B); *Hassan v. Gonzales*, 403 F.3d 429, 435 (6th Cir. 2005); *Kaur v. Ashcroft*, 388 F.3d 734, 736-37 (9th Cir. 2004); *Capric v. Ashcroft*, 355 F.3d 1075, 1087 (7th Cir. 2004). Expert evidence can be highly persuasive to help satisfy a party's burdens of proof and persuasion. *See generally Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008).

Immigration Judges have broad discretion in conducting hearings, and a "due process violation occurs only when the 'proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" *Lin v. Holder*, 565 F.3d 971, 979 (6th Cir. 2009) (quoting *Hassan*, 403 F.3d at 436); *Ladha v. INS*, 215 F.3d 889, 904 (9th Cir. 2000). To prevail in a due process challenge to the exclusion of evidence, an alien must show both that he was denied a reasonable opportunity to be heard on his evidence and that there was resulting prejudice (that is, the outcome of the proceedings may well have been different had the expert testimony been considered). *See, e.g.*, *Diop v. Holder*, 586 F.3d 587 (8th Cir. 2009); *Rusu v. U.S. INS*, 296 F.3d 316 (4th Cir. 2002); *Espinoza*, 45 F.3d at 311. As explained by the Seventh Circuit in *Kholyavskiy v. Mukasey*, 540 F.3d 555, the key consideration is whether an Immigration Judge's evidentiary ruling prevents an alien from presenting probative evidence on his own behalf. For example, in *Kyolyavaskiy*, the court, in finding no error where the Immigration Judge failed to consider the witness as an expert because of the witness's lack of an academic or research background on the topic, discussed the limited probative value and reliability of the testimony. *Id.* at 565-66. By contrast, in *Tun v. Gonzales*, 485 F.3d 1014, 1025-26 (8th Cir. 2007), the Eighth Circuit found a due process violation when the Immigration Judge excluded an affidavit from a highly relevant and even critical expert witness when the affidavit was *facially unobjectionable*.

Guidance from Federal Rules

While the Federal Rules of Evidence clearly are not binding in immigration proceedings, the Board and the circuit courts have found that the Federal Rules may provide useful guidance in determining the admissibility of evidence. *See, e.g.*, *Niam v. Ashcroft*, 354 F.3d 652, 658-60 (7th Cir. 2004) (holding that, while administrative agencies are not bound by the conventional rules of evidence, the Federal Rules can provide helpful guidance on whether the admission or exclusion of expert testimony is fundamentally fair). The Federal Rules of Evidence codified common law rules regarding "the reliability and probative worth" of certain types of evidence. *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996). The fact that specific evidence would be admissible under the Federal Rules "lends strong support to the conclusion that admission of the evidence [in immigration proceedings] comports with due process." *Id.*; *see also Matter of DeVera*, 16 I&N Dec. at 270-71. For example, in *Nyama*, 357 F.3d at 816, the Eighth Circuit noted that the "traditional rules of evidence do not apply to immigration proceedings" but also cited to Federal Rule of Civil Procedure 26(a)(1)(B) as being persuasive in upholding the Immigration Judge's decision to permit the Government to question an applicant with documents that were not admitted in advance of the hearing because they were being used to impeach the applicant's credibility. In a case regarding expert evidence, the Ninth Circuit in *Malkandi v. Holder*, 576 F.3d 906, 916 (9th Cir. 2009), noted that the strict rules of evidence are not binding in Immigration Court. However, the court found that the introduction of the 9/11 Commission Report into evidence without also admitting underlying supportive documentation was fundamentally fair by stating that the report was "akin to an expert report" and that under Federal Rule of Evidence

702 the facts underlying the opinion do not need to be admissible for the expert opinion to be admissible. *Id.* at 916. Thus, similarly, this article discusses Federal Rules that relate to experts, not as binding authority, but as useful guidance. The Federal Rules can provide a helpful framework from which to approach issues that may arise when determining whether to admit specific expert evidence, and if admitted, what probative value or weight to give that evidence.

Federal Rule of Evidence 702 provides the standards for admission of expert evidence as follows:

> *Testimony By Experts*. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under Rule 702, an expert may testify to an "opinion or otherwise." "An expert is permitted to base his opinion on hearsay evidence and need not have personal knowledge of the facts underlying his opinion." *Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 n.7 (9th Cir. 2010). An opinion may include reasonable inferences that the expert draws from the available facts and data. *See* Fed. R. Evid. 703. The facts or data need not be admissible in evidence, and an expert may assume the truth of the facts or data in order to render an opinion. *See* Fed. R. Evid. 703, 705.[1]

Experts presented by either party may testify about a wide variety of factual questions, such as whether an applicant's scars are consistent with the persecution he claims to have suffered, or whether a document in question has been fabricated. However, witnesses generally may not opine on questions of law. *See Matter of Cruzado*, 14 I&N Dec. 513, 515 (BIA 1973) (holding that the opinions of a professor and others as to the proper construction of a State statute is not admissible). Courts have repeatedly stated that while expert testimony can be helpful in resolving factual disputes, such testimony cannot be used to "usurp" a judge's role of interpreting the law, applying the law to the facts, weighing the evidence, and making credibility determinations. *See, e.g.*, *United States v. Farrell*, 563 F.3d 364, 377 (8th Cir. 2009); *United States v. Stewart*, 433 F.3d 273, 311 (2d Cir. 2006).

An exception to the rule that experts may not opine on questions of law exists for opinions involving foreign law and procedures. *See Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006). For example, the Board has relied on expert evidence in determining matters such as the validity of marriages, divorces, and adoptions concluded under foreign law. *See Matter of Kodwo*, 24 I&N Dec. 479 (BIA 2008); *Matter of Khatoon*, 19 I&N Dec. 153 (BIA 1984); *Matter of Yue*, 12 I&N Dec. 747 (BIA 1968).

Relevance, Qualifications, and Reliability

There are three basic requirements for admission or exclusion of expert evidence under Federal Rule of Evidence 702: relevance of the expert testimony, qualification of the expert witness, and reliability of the expert opinion. If the evidence is admitted, concerns regarding these issues may relate to the weight that the testimony receives, which is further discussed later.

Relevance of Expert Testimony. According to Rule 702, expert testimony is relevant and proper if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." This standard of relevance is considered a "liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). It is similar to the general relevance standard of Rule 401, which simply provides that "relevant evidence" means evidence having "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable."[2] The regulations provide that Immigration Judges may consider "any oral or written statement that is material and relevant to any issue in the case." 8 C.F.R. § 1240.7(a).

Qualification of the Expert Witness. An expert witness is broadly defined as anyone who is "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The expert must have greater knowledge than a lay person on the particular subject matter and must possess the necessary expertise in his or her field. *See United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). However, Rule 702 "contemplates

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CIRCUIT COURT DECISIONS FOR APRIL 2010

by John Guendelsberger

The United States courts of appeals issued 309 decisions in April 2010 in cases appealed from the Board. The courts affirmed the Board in 261 cases and reversed or remanded in 48, for an overall reversal rate of 15.5% compared to last month's 10.8%. The Ninth Circuit issued over half of the month's decisions and nearly two-thirds of total reversals. There were no reversals from the First, Fourth, Sixth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for April 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% reversed
First	4	4	0	0.0
Second	56	49	7	12.5
Third	43	38	5	11.6
Fourth	6	6	0	0.0
Fifth	16	13	3	18.8
Sixth	1	1	0	0.0
Seventh	4	3	1	25.0
Eighth	4	3	1	25.0
Ninth	155	124	31	20.0
Tenth	3	3	0	0.0
Eleventh	17	17	0	0.0
All circuits:	**309**	**261**	**48**	**15.5**

The 309 decisions included 152 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 77 direct appeals from denials of other forms of relief from removal or from findings of removal; and 80 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	152	128	24	15.8
Other Relief	77	67	10	13.0
Motions	80	66	14	17.5

The 24 reversals in asylum cases involved the following issues: 9 addressed the adverse credibility determination; 2 involved nexus; and 2 concerned the level of harm for past persecution. Other issues included the 1-year filing bar for asylum eligibility, firm resettlement, and application of the REAL ID Act corroboration requirement. Four reversals addressed Convention Against Torture denials, two of which held that the Board had applied the wrong standard of review in overturning the Immigration Judge's fact-finding underlying the grant of relief. Of the other two cases, one concerned governmental acquiescence and the other involved a remand for additional analysis.

The 10 cases in the "other relief" category included 6 addressing various criminal grounds of removal. Two of these concerned Federal First Offender Act coverage for "under the influence" offenses in the Ninth Circuit. Two others addressed aspects of applying the categorical and modified categorical approach to aggravated felony grounds. Other issues included a continuance request, 10 years of physical presence for cancellation of removal, a section 237(a)(1)(H) waiver, and naturalization.

The 14 reversals involving motions included 7 cases from the Ninth Circuit addressing ineffective assistance of counsel. In these cases, the court found error with respect to equitable tolling, due diligence, and the standard applied for determining prejudice. There were four reversals of motions to reopen based on changed country conditions, two each from the Second and Third Circuits. Other motions involved jurisdiction to consider an in absentia motion, a section 212(c) waiver, and a motion to reconsider a denial of reopening for adjustment of status based on labor certification.

The chart on the next page shows the combined numbers for the first 4 months of 2010, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Ninth	648	558	90	13.9
Seventh	15	13	2	13.3
Eighth	24	21	3	12.5
Second	361	332	29	8.0
Tenth	13	12	1	7.7
Third	147	137	10	6.8
Fifth	44	41	3	6.8
Sixth	30	28	2	6.7
Eleventh	94	88	6	6.4
Fourth	51	49	2	3.9
First	8	8	0	0.0
All circuits:	**1435**	**1287**	**148**	**10.3**

The numbers by type of case on appeal for the first 4 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	763	683	80	10.5
Other Relief	287	257	30	10.5
Motions	385	347	38	9.9

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Sixth Circuit:

Hassan v. Holder, __F.3d__, 2010 WL 1850371 (6th Cir. May 11, 2010): The Sixth Circuit granted the petition for review of a married couple from an Immigration Judge's order of removal. The main issue concerned the timing of the couple's marriage. The husband was admitted to the U.S. as the unmarried son of a U.S. citizen, but at the time of his naturalization petition, questions arose as to whether he was, in fact, married prior to such admission, resulting in a DHS investigation. An Immigration Judge subsequently ordered the couple removed on the grounds that they were inadmissible at time of entry because they were already married. The Immigration Judge further found the husband removable for falsely representing himself to be a U.S. citizen on a Small Business Administration ("SBA") loan application. The Board affirmed and further rejected the aliens' due process challenge of improper conduct by the Immigration Judge.

On appeal, the court found no violation of due process based on the following: (1) although the Immigration Judge had previously served as DHS Chief Counsel, there was no indication that she was involved in the aliens' case while serving in such capacity; (2) the allegation that the Immigration Judge had a close working relationship with the Government witness while working for DHS was unsupported; and (3) the Immigration Judge's active questioning of witnesses was well within an Immigration Judge's broad discretion. However, the court reversed the finding regarding the aliens' earlier marriage, holding that the DHS failed to satisfy its burden of proof where its key evidence, Embassy letters, lacked any real degree of detail. The court also reversed the finding of false representation of citizenship by the husband because the Government failed to offer any evidence of the statutorily required "purpose or benefit" of the misrepresentation, noting that the husband had previously received multiple similar SBA loans as a lawful permanent resident without claiming citizenship on the applications. The case was thus remanded to the Board to terminate proceedings.

Seventh Circuit:

Kucana v. Holder, __F.3d__, 2010 WL 1755014 (7th Cir. May 4, 2010): On remand from the Supreme Court, the Seventh Circuit considered whether the Board abused its discretion when, in denying the alien's 2006 motion to reopen based on a claim of changed country conditions in Albania, the Board ignored the alien's affidavit from a country expert. The court had previously ruled that it lacked jurisdiction to consider abuse of discretion arguments; the Supreme Court reversed, distinguishing the present case because discretion was delegated to the Board by regulation rather than by statute. On remand, the circuit court found no abuse of discretion, noting that the expert affidavit, which provided a history of Albania's political problems, did not support the only issue relevant to the present motion, namely, whether country conditions had materially worsened between 2002 (when the alien's first motion to reopen was denied by the Board), and 2006 (when the motion at issue was filed).

Eighth Circuit:

Litvinov v. Holder, __F.3d__, 2010 WL 1994683 (8th Cir. May 20, 2010): The Eighth Circuit denied the petition for review of a husband and wife from an Immigration Judge's denial of their application for asylum from Belarus. Applying the pre-REAL ID Act standard, the Immigration Judge found most of their testimony credible but concluded that the couple had failed to meet their burden of establishing either past persecution or a well-founded fear of future persecution. The court dismissed

the aliens' claim that the Immigration Judge applied too high a legal standard by requiring them to show that certain events would occur upon their return to Belarus. Noting that this argument was based on one statement in the Immigration Judge's decision, the court found that when the decision was read in its entirety, it was clear that the proper legal standard was applied. The court further determined that the aliens failed to provide sufficient evidence to support their claim of changed conditions in Belarus or to corroborate their claims of harm purportedly suffered by family members. The court thus concluded that the aliens' evidence only compelled a finding of mistreatment falling short of persecution. The court further upheld the Immigration Judge's partial adverse credibility determination, finding that the discrepancies and omissions cited by the Immigration Judge for that determination were actually present and that the aliens' explanation for them were unpersuasive.

Ninth Circuit:

Cesares-Castellon v. Holder, __F.3d__, 2010 WL 1759452 (9th Cir. May 4, 2010): The Ninth Circuit granted the petition for review of an applicant for a waiver under former section 212(c) of the Act whose application was deemed abandoned by the Immigration Judge. Although the alien had timely filed his actual waiver application, he subsequently failed to file supporting documentation within the time allotted by the Immigration Judge. Citing regulation 8 C.F.R. § 1003.31(c), the Immigration Judge deemed the section 212(c) application abandoned and thus reached no determination on the merits of the application. The Board upheld the decision. The court found the Immigration Judge's interpretation of the regulation to be erroneous. It held that the regulation only entitled the Immigration Judge to deem the right to file the supporting documentation waived but not to deem his entire timely filed application abandoned. The matter was therefore remanded for consideration of the application on the merits.

Partap v. Holder, __F.3d__, 2010 WL 1838905 (9th Cir. May 10, 2010): The court upheld the decision of an Immigration Judge (affirmed by the Board) denying the alien's application for cancellation of removal for certain nonpermanent residents under section 240A(b) of the Act and the Board's denial of the alien's motion to remand. The court rejected the alien's argument that the Immigration Judge should have considered his U.S. citizen daughter, who was not yet born at the time of his hearing before the Immigration Judge, as a qualifying relative who would have rendered him statutorily eligible for relief. The court held that for purposes of this relief, a "child" must meet the statutory definition found in section 101(b) of the Act, noting that the child is required to be a U.S. citizen, a status that requires either *birth* in the U.S. or naturalization. The court further upheld the Board's denial of the motion to remand where the motion was not accompanied by any evidence showing "exceptional and extremely unusual hardship."

Federiso v. Holder, __F.3d__, 2010 WL 1980763 (9th Cir. May 19, 2010): The court granted the petition for review of a long-term lawful permanent resident who was deemed ineligible to apply for a waiver under section 237(a)(1)(H) of the Act by the Board. The alien obtained his lawful permanent resident status as the unmarried son of his U.S. citizen mother but was placed into removal proceedings years later when he was determined to have been married prior to his admission to the U.S. In proceedings before the Immigration Judge, the alien sought a fraud waiver as the son of a U.S. citizen; the DHS challenged his eligibility subsequent to the death of the alien's mother during the pendency of the proceedings. While the Immigration Judge held that the alien continued to qualify as the son of a U.S. citizen and granted the waiver, the Board reversed, holding that section 237(a)(1)(H) required a relationship to a living relative. The court disagreed, finding the statutory language to be "plain and unambiguous." Noting that it is undisputed that the alien is the son of a U.S. citizen, the court concluded that neither the Board nor itself "may further our preferred interpretation of Congress's intent by misreading or adding to the statutory eligibility requirements that Congress has laid out quite clearly."

Uppal v. Holder, __F.3d__, 2010 WL 2011538 (9th Cir. May 21, 2010): The court withdrew its prior decision in *Uppal v. Holder*, 576 F.3d 1014 (9th Cir. 2009), in which it held that a conviction for aggravated assault under section 268(2) of the Canada Criminal Code was categorically a crime involving moral turpitude ("CIMT"), and it issued a superseding opinion reaching the opposite conclusion. The court observed that Canadian case law "leaves no doubt" that the statute requires no actual harm. The court determined that the Board "most likely" erred in its interpretation of the Canadian statute's elements. Because the court found that the Board's unpublished decision lacked thorough reasoning and was inconsistent with prior circuit and Board precedent, it declined to give deference to the Board. It analyzed the mens rea

requirement of section 268(2) and concluded that it did not require that "the perpetrator specifically intend to inflict serious physical injury, or any injury at all," or even to "recklessly disregard the risk of bodily harm or endangerment." The court stated that in comparing such mens rea requirement with that discussed in the case law defining assaults that constitute CIMTs, "it becomes clear that a § 268 conviction cannot categorically be a CIMT." The case was therefore remanded for application of the modified categorical approach.

BIA PRECEDENT DECISIONS

In *Matter of Alania*, 25 I&N Dec. 231 (BIA 2010), the Board found that unauthorized employment is not a bar to adjustment of status for aliens who are otherwise eligible to adjust under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The respondent overstayed the period of authorized presence permitted in his nonimmigrant visa and subsequently worked without authorization. His I-140 petition was approved with an April 30, 2001, priority date. The respondent filed an adjustment of status application, but the Immigration Judge found that he was ineligible because of his unauthorized employment. The Department of Homeland Security argued that the respondent was barred from adjusting by section 245(c) of the Act, which prohibits adjustment under section 245(a) if the alien has engaged in unauthorized employment, in conjunction with section 245(k), which provides for a limited exception in the employment visa context. The Board observed that section 245(i) operates as a total waiver of any section 245(c) bar for the limited pool of aliens who have a qualifying priority date, whereas section 245(k) merely creates a limited exception to the application of section 245(c). The regulations provide support for this interpretation. 8 C.F.R. § 1245.1(b)(4). The Board sustained the respondent's appeal and remanded the record to the Immigration Judge.

In *Matter of B-Y-*, 25 I&N Dec. 236 (BIA 2010), pursuant to a remand from the United States Court of Appeals for the Second Circuit, the Board further explained the standards to be applied in making a frivolousness determination on an asylum claim. The Immigration Judge had denied the respondent's asylum and withholding applications based on an adverse credibility determination and found that the respondent had submitted a frivolous asylum claim, a decision the Board affirmed. The Second Circuit upheld the adverse credibility determination and the denial of the persecution claim, but it remanded the case for further analysis of the frivolousness determination, requesting that the Board address a number of issues. The first issue was whether an Immigration Judge may incorporate by reference factual findings made in support of an adverse credibility finding. The Board found that an Immigration Judge may incorporate fact-finding regarding credibility with a frivolousness finding where the two overlap, but cautioned that the analyses do not always overlap and that a frivolousness determination requires extra, explicit findings as to "materiality" and "deliberate fabrication." *See Matter of Y-L-*, 24 I&N Dec. 151, 156 (BIA 2007).

As to the court's request to clarify whether an Immigration Judge must separately consider any explanations for inconsistencies and discrepancies, the Board found that while some incorporation by reference from the adverse credibility finding and analysis is permissible, the Immigration Judge should separately address the respondent's explanations. This is because the burden of proof in a frivolousness determination rests with the Government and not the alien, and the alien's explanations may have a bearing on the materiality and deliberate fabrication requirements. Lastly, the Board found that an Immigration Judge does not need to provide additional warnings that a frivolousness determination is being considered. In an adverse credibility determination, where inconsistencies are obvious to the respondent during the course of the hearing, the Immigration Judge need not provide a separate opportunity to explain the inconsistencies; the same holds true for frivolousness warnings. In this case, the Board found that the Immigration Judge gave the appropriate warnings but did not sufficiently identify the factors relied upon and did not make specific findings regarding materiality and deliberate fabrication.

In *Matter of Monges*, 25 I&N Dec. 246 (BIA 2010), the Board discussed the interplay of the 90-day time limitation for filing a motion to reopen in 8 C.F.R. § 1003.23(b)(1) and the 5-year limitation on discretionary relief when an alien fails to appear at deportation proceedings under former section 242B(e)(1) of the Act, 8 U.S.C. § 1252b(e)(1) (1994). In this case, the Board had dismissed the respondent's appeal from the denial of a 2003 motion to reopen her October 1994 in absentia deportation order to permit her to apply for adjustment of status. The Ninth Circuit

remanded the case to the Board to discuss whether there was a conflict between the motion rule and former section 242B(e)(1). The Board found that the motion regulations were promulgated pursuant to a directive by Congress in conjunction with its enactment of the enforcement provisions of section 242B, intending that the time and number limitations on motions would further the statute's purpose of bringing finality to immigration proceedings, ending unwarranted delays, and ensuring that aliens no longer benefit from remaining in the country following a final order of deportation. The Board found that the two provisions have separate restrictions for different purposes and are not at odds with one another. Further, to permit the 5-year bar to operate as an exception to the motions regulation would be inconsistent with the congressional intent to prevent aliens from obtaining benefits as a result of the mere accrual of time after the entry of a final administrative order. The Board again dismissed the respondent's appeal.

REGULATORY UPDATE

75 Fed. Reg. 24734
DEPARTMENT OF HOMELAND SECURITY

Extension of the Designation of Honduras for Temporary Protected Status

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Honduras for temporary protected status (TPS) for 18 months from its current expiration date of July 5, 2010, through January 5, 2012. This Notice also sets forth procedures necessary for nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) with TPS to reregister and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of Honduras and whose applications have been granted or remain pending. Certain nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.
DATES: The extension of the TPS designation of Honduras is effective July 6, 2010, and will remain in effect through January 5, 2012. The 60-day reregistration period begins May 5, 2010, and will remain in effect until July 6, 2010.

75 Fed. Reg. 24737
DEPARTMENT OF HOMELAND SECURITY

Extension of the Designation of Nicaragua for Temporary Protected Status

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Nicaragua for temporary protected status (TPS) for 18 months from its current expiration date of July 5, 2010, through January 5, 2012. This Notice also sets forth procedures necessary for nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) with TPS to reregister and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of Nicaragua and whose applications have been granted or remain pending. Certain nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.
DATES: The extension of the TPS designation of Honduras is effective July 6, 2010, and will remain in effect through January 5, 2012. The 60-day reregistration period begins May 5, 2010, and will remain in effect until July 6, 2010.

Expert Witnesses *continued*

a broad conception of expert qualifications" and thus, even in Federal court, what constitutes adequate qualifications to testify as an expert should be broadly defined. *Thomas v. Newton Int'l Enterprises*, 42 F.3d 1266, 1269 (9th Cir. 1994).

Under Chapter 3.3(g) (Witness Lists) of the Immigration Court Practice Manual, an expert witness' curriculum vitae or resume should be made part of the record of proceedings. An expert's credentials can be ascertained from this document and through voir dire of the expert during the hearing. In most cases, reviewing courts have deferred to the agency's determination whether a proposed expert possesses the necessary expertise to testify. *See, e.g., Castro-Pu v. Mukasey*, 540 F.3d 864, 867, 869 (8th Cir. 2008) (affirming the decision to exclude an expert witness on country conditions, where the expert did not have academic credentials and had last visited

the country 6 years earlier); *Pasha v. Gonzales*, 433 F.3d 530, 532, 535 (7th Cir. 2005) (finding the Government's witness unqualified to testify regarding the authenticity of an Albanian document when he did not have access to comparable documents or knowledge of the type of equipment the Albanian Government would have used at the time); *Dailide v. U.S. Att'y Gen.*, 387 F.3d 1335, 1343 (11th Cir. 2004) (finding the witness properly deemed unqualified to testify when he had no relevant published works or course work during the pertinent period of European history and was the brother of the alien's attorney). However, as noted previously, some decisions have reversed the exclusion of an expert's testimony on due process grounds, particularly where the testimony was found probative and critical to the alien's case. *See Tun*, 485 F.3d at 1027 (finding that the exclusion of a physician's testimony was erroneous, where the physician "was clearly qualified and offered critical corroborating testimony based on a recent medical examination of the Petitioner"); *Koval v. Gonzales*, 418 F.3d 798 (7th Cir. 2005) (finding it erroneous to exclude a former KGB agent's testimony in an asylum case).

Although the qualifications of a witness to testify as an expert are rarely challenged in Immigration Court, there are situations as noted above where the expert may properly be excluded as not being qualified to testify.[3] In general, the standard for qualifying a witness as an expert is a generous one. If an Immigration Judge permits an expert witness to testify but has concerns about the witness' reliability, the judge may accord less weight to the testimony. Factors such as publication experience, education and work experience in the relevant field, and potential bias may inform the judge's view of the weight to give the expert's testimony. *See Tun*, 485 F.3d at 1027 (stating that participation in an advocacy organization is not an adequate basis to exclude testimony but may affect the weight of the evidence); *Akinfolarian v. Gonzales*, 423 F.3d 39, 43 (1st Cir. 2005) (holding that indications that an expert's affidavit was unreliable, which were permissibly used to exclude the evidence, could also have been used to lessen the weight the evidence was given); *United States v. Brown*, 415 F.3d 1257, 1270 (11th Cir. 2005) (noting that the trial court properly considered an expert witness' testimony but gave it substantially less weight based on lack of expertise); *Matter of M-*, 5 I&N Dec. 484 (BIA 1953) (holding that the fact that an expert has appeared in many cases and has been paid a fee is a valid consideration in evaluating the evidence but does not conclusively show bias).[4]

Reliability of the Expert Testimony. Generally, the most significant issues that arise regarding an expert relate to the reliability of the testimony. As noted above, an expert's testimony is deemed reliable under Federal Rule of Evidence 702 if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993), the seminal case regarding expert witness testimony in Federal court, the Supreme Court held that it is for the trial judge to determine whether a potential expert's testimony is reliable and relevant and therefore admissible. *Id.* at 597. The Court further explained that in determining whether an expert's opinion is reliable, the trial judge must examine the reasoning or methodology underlying the expert's opinion, not the ultimate conclusion the expert reached. The trial judge must determine whether the reasoning or methodology is valid and whether it was applied reliably to the facts of the case. *Id.* at 592-93. The Court announced a flexible four-part test for determining the validity of expert evidence.

The *Daubert* test, which was developed with scientific evidence in mind (specifically whether the drug Bendectin was the cause of the plaintiffs' birth defects), consists of four questions that trial judges may ask in performing their gate-keeping function to ensure that the evidence is valid and reliable. The questions are: (1) Has the methodology been tested or is it testable? (2) Has the methodology been subjected to peer-review publication? (3) Is there a known or knowable error rate for the methodology? (4) Is the methodology generally accepted in the relevant field? *Daubert*, 509 U.S. at 592-94. In a subsequent case, the Supreme Court clarified that all expert knowledge, both scientific and nonscientific, is subject to the *Daubert* reliability analysis. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151-54 (1999) (holding that the *Daubert* principles applied in a products liability case where an engineer's opinion of why a tire blew out was based on a visual and tactile inspection involving skill- and experienced-based observation, rather than the application of scientific principles). In *Kumho Tire*, the Court emphasized that outside of the scientific context, the test is generally more flexible in nature. Not all four *Daubert* factors will apply to every expert in every case; only those factors that are relevant to the particular discipline may be applied. *Id.* at 151-53. The Court concluded that

"the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152.

The specific *Daubert* methodology analysis regarding the admissibility of scientific and technical expert evidence at a jury trial has limited practical applicability in immigration proceedings, in part because the underlying methodology that the expert uses to reach his or her conclusions is rarely a disputed issue in an immigration case. *Cf. Thomas v. Newton Int'l Enterprises*, 42 F.3d at 1270 n.3 (holding that, under *Daubert*, although scientific conclusions "must be linked in some fashion to the scientific method, . . . non-scientific testimony need only be linked to some body of specialized knowledge or skills").[5]

There is limited case law specifically addressing whether *Daubert* applies with respect to immigration proceedings. The Board has not discussed *Daubert* in the context of experts in immigration proceedings. The only circuit court to have done so, the Seventh Circuit, has stated that "the spirit of *Daubert* . . . does apply to administrative proceedings" and that "'[j]unk science' has no more place in administrative proceedings than in judicial ones." *Niam*, 354 F.3d at 660. That court has invoked *Daubert* both in ruling that expert testimony should have been permitted and in finding an expert witness unreliable. *See id.* (reversing the determination to exclude certain expert evidence); *see also Pasha*, 433 F.3d at 535 (citing to *Niam* in finding the testimony of the Government's document expert to be unreliable.)

The fact that aliens have a statutory and due process right to an opportunity to present probative evidence may counsel, in many cases, against a strict approach to the admissibility of evidence. There are situations where evidence is not reliable and is of no benefit to the trier of fact, and it is properly excluded. However, there may be some concerns regarding the extent of the reliability of evidence, and in those cases, it may be advisable to admit the evidence and permit the issues that may otherwise affect its admissibility to, instead, affect the weight that it receives in Immigration Court. *See Akinfolarian*, 423 F.3d at 43 (holding that indications that an expert's affidavit was unreliable, which were permissibly used to exclude the evidence, could also have been used to lessen the weight the evidence was given); *see also, e.g.*, *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 516 (6th Cir. 1998) (holding that an expert's testimony was properly admitted and questions about the extent of his qualifications and expertise were properly considered by the trier of fact as going to the weight and credibility of the testimony, particularly given that the opponent was able to cross-examine the expert and expose the weaknesses in his qualifications and expertise).

With respect to applying the *Daubert* principles in Immigration Court, it is relevant that *Daubert* is premised on the "gatekeeping" function to prevent the jury from being unduly influenced by unreliable expert evidence. *See Kumho Tire*, 526 U.S. at 149-50. However, immigration proceedings are, of course, bench trials where the judge is also the trier of fact, so keeping less reliable or trustworthy evidence completely out may be less important. In other words, "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *Brown*, 415 F.3d at 1269. The judge is in the position to admit testimony but give it less weight based on issues related to its reliability. *Id.* at 1270.

Thus, in immigration proceedings, the "spirit of *Daubert*" may best be viewed as a focus on the reliability of the evidence. Knowing the underlying basis for the expert's opinion and the sources relied upon to reach it can be important to understanding its value. An opinion is only as reliable as the assumptions it is based upon. For example, a professor testifying on country conditions can be expected to rely on sources typically relied upon by other academics in the field. *See* Fed. R. Evid. 703 (sources relied upon should be "of a type reasonably relied upon by experts in the particular field"); *cf.* 8 C.F.R. § 1208.12(a) (stating that asylum officers may consider the U.S. Department of State materials and other "credible sources" in forming their opinions, and that such sources can include "international organizations, private voluntary agencies, news organizations, or academic institutions"). On the other hand, opinion testimony based on internet sources that have not been shown to be authentic and reliable may itself not be reliable. *Cf. Badasa v. Mukasey*, 540 F.3d 909, 910 (8th Cir. 2008) (holding that an article from the online encyclopedia Wikipedia is not a reliable source for evidence in immigration proceedings).

Even if the sources relied upon are trustworthy and reliable, there also needs to be "a link between the facts or data the expert has worked with and the conclusion the expert's testimony is intended to support." *United States v. Mamah*, 332 F.3d 475, 478 (7th Cir.

2003). "When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony . . . ." *Int'l Adhesive Coating Co., Inc. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988). While testimony based on pure speculation is inadmissible, arguments about the speculative nature of testimony or whether certain assumptions are unfounded properly go the weight of the testimony, *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996), and these issues may be addressed in cross-examination. *Larson v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005). Thus, for example, in *Barreto-Claro v. U.S. Att'y Gen.*, 275 F.3d 1334, 1340 (11th Cir. 2001), an expert witnesses' testimony that the asylum applicant would face "serious trouble when he returns" was reasonably found inadequate to establish eligibility for relief, where the applicant had not suffered past persecution in his home country but had only lost his employment, and there was no other evidence in the record to support the expert's theory. Also, in *Hysi v. Gonzales*, 411 F.3d 847, 853 (7th Cir. 2005), the Seventh Circuit stated that the Immigration Judge properly gave minimal weight to expert's testimony, in part because it relied on the applicant's false representation that he authored news articles and that he was known as the author of news articles in Albania to bolster his asylum claim.

A related issue regarding the reliability of testimony, including expert testimony, may be the hearsay nature of it. Hearsay is clearly admissible in immigration proceedings if it is reliable. *See, e.g.*, *Kim v. Holder*, 560 F.3d 833, 836 (8th Cir. 2009); *Matter of Grijalva*, 19 I&N Dec. 713. However, hearsay evidence may be accorded less weight. *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006) (finding an out-of-court hearsay statement of applicant's friend less persuasive than a first-hand account); *Kiareldeen v. Ashcroft*, 273 F.3d 542, 549 (3d Cir. 2001) (stating that the hearsay nature of evidence affects the weight it is accorded); *Matter of Kwan*, 14 I&N Dec. 175 (same); *see also Silva v. Gonzales*, 463 F.3d 68, 72-73 (1st Cir. 2006) (holding that testimony based on "triple hearsay" may be found not to be probative or reliable). Thus, in *Kholyavskiy*, 540 F.3d at 566, the Seventh Circuit explained that a proposed expert's affidavit that was based on second- and third-hand information on the treatment of the mentally ill in Russia, instead of academic studies or research, was of minimal reliability and probative value.

Form of Expert Evidence

Expert evidence in immigration proceedings may be in the form of live testimony, telephonic testimony, or affidavits, unlike under the Federal rules, which generally require that the testimony be presented at trial or deposition. *See Djedovic v. Gonzales*, 441 F.3d 547, 551 (7th Cir. 2006) (citing approvingly to *Richardson v. Perales*, 402 U.S. 389 (1971), where the Court held that, in administrative adjudications, agencies can accept expert evidence in writing as well as through oral testimony); *see also Hamid v. Gonzales*, 417 F.3d 642, 645-46 (7th Cir. 2005) (holding that telephonic testimony is an acceptable alternative to live testimony because observable factors like demeanor are less important for expert testimony than other testimony).[6]

Live and Telephonic Expert Testimony

There are procedural requirements that a party must follow in Immigration Court to submit live or telephonic testimony. These requirements include complying with the time limits to file a witness list and providing the expert witness' curriculum vitae or resume. *See* Chapters 3.3(g) (Witness lists), 4.16(b) (Filings) of the Immigration Court Practice Manual. Also, for telephonic testimony, the requesting party must explain in a written motion (or an oral motion at a master calendar hearing) why the witness cannot appear in person, and the party must provide the witness' telephone number and the location from which he will testify. *See* Chapter 4.15(o)(iii) of the Immigration Court Practice Manual.

Whether to permit telephonic testimony is within the discretion of the Immigration Judge. *See id.*; *see also Akinwande v. Ashcroft*, 380 F.3d 517, 522 (1st Cir. 2004) (upholding the telephonic testimony of a Government witness, as the alien's right to cross-examine the witness was not infringed upon). Federal courts view a decision to exclude testimony for failure to comply with procedural requirements under an abuse of discretion standard. *See Diop*, 586 F.3d at 592 (finding no error in the Immigration Judge's discretionary determination to exclude the testimony of a therapist witness who was not on the pretrial witness list, when the opposing party had no opportunity to review anything in writing from the witness in advance of the hearing); *Djedovic*, 441

F.3d at 550-51 (finding no error to exclude telephonic testimony from an expert witness when the request was not included on the pretrial witness list but instead was made 2 days prior to the hearing); *Singh v. Ashcroft*, 398 F.3d 396, 407 (6th Cir. 2005) (finding no error to exclude expert testimony when applicant's attorney failed to seek permission in advance of the hearing). The question is whether the respondent had a "reasonable opportunity" to have the evidence considered. *See Sankoh v. Mukasey*, 539 F.3d 456, 465-66 (7th Cir. 2008) (finding no error for the Immigration Judge to deny a motion to reopen to submit additional evidence after the hearing was complete, as the alien was afforded the opportunity to submit the evidence during proceedings).

The question whether to continue a hearing to permit a late-identified witness to testify is also a discretionary determination. *See Gebresadik v. Gonzales*, 491 F.3d 846, 851 n.5 (8th Cir. 2007); *Djedovic*, 441 F.3d at 550-51; *see also Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983) (holding that, to obtain a continuance, the "alien at least must make a reasonable showing that the lack of preparation occurred despite a good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, noncumulative, and significantly favorable"); 8 C.F.R. § 1240.6 (stating that an Immigration Judge may grant a continuance "for good cause shown").

Expert Affidavits

As noted previously, it may be a due process violation to entirely exclude probative expert evidence if the alien complies with procedural requirements and can show prejudice. *See Tun*, 485 F.3d at 1028-29 (finding error in the exclusion of a facially unobjectionable affidavit from a critical witness, where the affidavit was excluded solely because the expert was not available for cross-examination); *Niam*, 354 F.3d at 658-60 (finding that the exclusion of both an expert's live testimony and her affidavit was prejudicial because it would have provided facts contrary to the State Department reports); *see also Biggs v. INS*, 55 F.3d 1398, 1402 (9th Cir. 1995) (finding it erroneous to ignore a letter from an alien's doctor regarding her medical condition and also exclude the doctor from testifying by telephone). In that regard, as a general rule, it is much more difficult to show prejudice from the exclusion of expert testimony if the expert's written affidavit is admitted and considered. *See Diop*, 586 F.3d at 592 (holding that, even assuming the Immigration Judge erred in excluding the expert from testifying, the applicant failed to show that the expert could have provided relevant information beyond her affidavit, which the judge admitted into evidence); *Jarbough v. Att'y Gen. of U.S.*, 483 F.3d 184, 192 (3d Cir. 2007) (finding no error in the denial of a continuance for an expert to testify live, because the respondent did not show that the testimony would be materially different from the expert's written submission); *Hamid*, 417 F.3d at 645-46 (finding no error in the exclusion of live testimony because the expert's written statement was considered); *Akinwande*, 380 F.3d at 522 (finding no error in permitting the expert witness to testify by telephone and not requiring in-court testimony). However, there may be circumstances where it would be error for an Immigration Judge not to hear and consider testimony from an expert even if written materials are admitted. *See Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1057-59 (9th Cir. 2005) (finding it erroneous to exclude live testimony even when written materials were submitted, in part because the proferred testimony was not covered in the written materials).

The admissible nature of hearsay testimony (both expert and otherwise) does not negate the rule that both parties are entitled to a "reasonable opportunity" to cross-examine witnesses in Immigration Court, consistent with the adversarial nature of the proceedings. *See* 8 C.F.R. §§ 1240.2(a), 1240.10(a)(4). However, there are "practical limitations on this right." *Matter of DeVera*, 16 I&N Dec. at 269. In particular, while the primary purpose of cross-examination is to ensure the reliability and credibility of witness testimony, these interests can also be met with respect to an out-of-court statement if the statement falls within an express exception to the rule against hearsay. *Id.* at 270-71 ("[A]n affidavit made by an unavailable declarant which is of sufficient reliability that it would be admissible in a Federal judicial proceeding as a declaration against penal interest is entitled to full weight in an administrative deportation proceeding."); *see also Duad v. United States*, 556 F.3d 592, 596 (7th Cir. 2009) (finding that hearsay documents are admissible if they are reliable and noting that any contrary rule would be very harmful to asylum seekers); *Ruckbi v. INS*, 285 F.3d 120, 124 n.7 (1st Cir. 2002) (holding that the author of a forensics report is not required to be available to testify for the report to be admissible); *Espinoza*, 45 F.3d at 310-11 (holding that a Form I-213 (Record of Deportable Alien) was admissible even though its authors were not available for cross-examination).

Thus, while the affidavit of an expert is generally admissible without the expert being made available to testify, the statement may be given less weight because the author is not produced for cross-examination. S*ee Chen v. Gonzales*, 434 F.3d 212, 218 (3d Cir. 2005) (finding an affidavit less probative, in part because it was based on hearsay and the affiant was not subject to cross-examination); *De Brown v. Dep't of Justice*, 18 F.3d 774, 778 (9th Cir. 1994) (discounting a witness' affidavit, in part because the witness was not available for cross-examination and no showing was made that the witness was unavailable). The opposing party or the Immigration Judge may have questions about "logical or empirical shortcomings in the expert's analysis" that are not answered by the written document. *See Djedovic*, 441 F.3d at 551. If the judge has such concerns and they affect the weight of the affidavit, the judge should explain them in his or her decision.

Similarly, another relevant issue is whether an affidavit is conclusory in nature. Expert evidence that offers nothing more than a legal conclusion is excludable in Federal court. *See Woods v. Lecureux*, 110 F.3d 1215, 1220 (6th Cir. 1997). In the Federal court context, an affidavit that is highly conclusory in the opinion it offers and does not contain facts and rationale for the opinion is not persuasive. *See, e.g.*, *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago*, 877 F.2d 1333, 1339-40 (7th 1989).

An additional consideration may be whether the affidavit is general in nature and not prepared specifically for the applicant's situation. The relevance and weight of an expert affidavit may be limited if it is "not prepared specifically for the petitioner and is not particularized as to his circumstances." *See Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006). Generally, if the expert is not available to explain issues that are not fully covered in the written submission, such as the factual basis for the opinion or sources used to develop the opinion, or how the opinion relates to the applicant's particular circumstances, these concerns can limit the persuasive value of the affidavit. *Cf. Matter of E-M-*, 20 I&N Dec. 77, 81 (BIA 1989) ("[I]n determining the weight of an affidavit, it should be examined first to determine upon what basis the affiant is making the statement and whether the statement is internally consistent, plausible, or even credible. Most important is whether the statement of the affiant is consistent with other evidence of record.").

Evaluation of Expert Evidence

After evidence is admitted, it is critical for the Immigration Judge to consider it and address its probative value as part of the record. *See generally Aguilar-Ramos*, 594 F.3d at 706 n.7 (noting that the Immigration Judge stated reasons in the record why the expert testimony was insufficient to establish eligibility for relief); *Dukuly v. Filip*, 553 F.3d 1147, 1149 (8th Cir. 2009) (finding that the Immigration Judge properly considered expert testimony and did not ignore it but, instead, found it unpersuasive when weighed against other evidence). This is consistent with the general requirement that evidence should be considered and evaluated based on the totality of the record. *See, e.g.*, *Zheng v. Mukasey*, 552 F.3d 277, 286 (2d Cir. 2009) (stating that the Immigration Judge is required to give consideration to "an undeniably probative piece of evidence"); *Tan v. U.S. Att'y Gen.*, 446 F.3d 1369, 1376 (11th Cir. 2006) ("[T]he Immigration Judge is required to consider all evidence submitted by the applicant."). *See generally Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997) (holding that testimony should be examined and weighed in the context of the totality of the evidence of record); section 240(c)(4)(C) of the Act (stating that the Immigration Judge should "[c]onsider[] the totality of the circumstances, and all relevant factors" in making a credibility determination). Immigration Judges should specifically and fully explain the reasons why they do or do not find expert testimony reliable and persuasive.

Courts will often remand cases when no reason was given for why specific testimony from a undisputed expert was excluded or was admitted but not considered. *See, e.g.*, *Morgan v. Mukasey*, 529 F.3d 1202, 1211 (9th Cir. 2008) (remanding, in part because the Board did not adequately consider psychological reports, their contents, or their bearing on a central issue of the applicant's claim); *Leia v. Ashcroft*, 393 F.3d 427, 434-35 (3d Cir. 2005) (remanding, in part because the Board approved without explanation the Immigration Judge's rejection of the testimony of a witness who the parties agreed was an expert regarding country conditions); *Gailius v. INS*, 147 F.3d 34, 46 (1st Cir. 1998) (holding that the testimony of an acknowledged expert witness must be considered against State Department reports); *Castaneda-Hernandez v. INS*, 826 F.2d 1526, 1530-31 (6th Cir. 1987) (remanding because the Board failed to directly

address and consider affidavits of experts in reaching the conclusion that the respondent did not have a well-founded fear of persecution).

Conclusion

Expert evidence that is relevant and reliable can be very useful in assisting the trier of fact in understanding the evidence or determining a fact in issue. The admissibility of evidence, including expert testimony, depends on whether the evidence is probative and its admission would be fundamentally fair. Although not binding in immigration proceedings, the Federal Rules can provide useful guidance regarding the admissibility of evidence and, if admitted, the weight and probative value the evidence receives. There may be times when expert evidence is properly excluded because of a lack of expertise or because the expert's opinion is entirely unreliable. However, in other instances, concerns regarding evidence that would impact admissibility in Federal court may, instead, impact the weight and persuasive value of the evidence in Immigration Court. This is consistent with the more relaxed approach to the admissibility of evidence in immigration proceedings and aliens' statutory and due process right to have the opportunity to present probative evidence on their own behalf. After expert evidence is admitted, it is very important for the Immigration Judge to consider it and explain whether and to what extent the evidence is found to be reliable and persuasive.

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1. When discussing the Federal rules, this article principally focuses on Rule 702's admissibility standards for expert evidence. The other Federal Rules of Evidence speak to opinion testimony by lay witnesses (Rule701), the bases of opinion testimony by experts (Rule 703), expert opinion on the ultimate issue in a case (Rule 704), and disclosure of facts or data underlying expert opinion (Rule 705).

2. The evidence must be "of consequence" to be relevant. For example, expert testimony about hardship to an applicant for nonpermanent resident cancellation of removal (as opposed to hardship to a qualifying relative) is not relevant to the application. *See, e.g.*, *Matter of Monreal*, 23 I&N Dec. 56, 58 (BIA 2001).

3. If a witness is not qualified to testify as an expert, he may be permitted to testify as a lay witness if his knowledge is based on his own experience and perceptions. *See Kholyavskiy*, 540 F.3d at 566. However, a lay witness cannot, for example, render opinions based on specialized knowledge. Fed. R. Evid. 701.

4. The fact that a witness has testified in other courts does not alone conclusively establish that the witness is a qualified, reliable expert in the case at hand. *See Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 800 (4th Cir. 1989).

5. The *Daubert* analysis has been applied in other kinds of administrative agency proceedings. *See, e.g.*, *Terran v. Sec'y of Dept. of Health & Human Servs.*, 41 Fed. Cl. 330, 336 (1998), *aff'd*, 195 F.3d 1302, 1316 (Fed. Cir. 1999) (stating that, although the Federal Rules of Evidence do not apply in cases under the National Childhood Vaccine Injury Act, "*Daubert* is useful in providing a framework for evaluating the reliability of scientific evidence"); *see also Elliott v. Commodity Futures Trading Comm'n*, 202 F.3d 926, 933 (7th Cir. 2000) (applying a *Daubert* analysis in Commodity Futures Trading Commission proceedings).

6. In Federal court, expert reports are considered inadmissible hearsay, and the testifying expert must present his opinions by oral testimony under oath at a deposition or at trial unless the court provides otherwise. *See* Fed. R. Civ. P. 26(a)(2)(B). Also, the expert generally must submit a signed written report that contains a complete statement of the facts and data the expert relied upon and the expert's statement of opinions and reasons for them, as well as the expert's qualifications, publications within the past 10 years, other testimony in the past 4 years, and amount of compensation. *Id.*; *see also* Fed. R. Evid. 703, 704. These procedural differences between Federal court and immigration proceedings is consistent with the more relaxed standard regarding the admissibility of evidence in Immigration Court compared to the Federal rules.