

Hearsay

A. The rules of evidence applicable to criminal proceedings do not apply to removal hearings. The Supreme Court in *United States ex rel. Bilokumsky v. Tod*, 236 U.S. 149 (1923), noted that a failure to abide by judicial rules of evidence does not render a removal hearing unfair.

1. Evidence is admissible when it is probative and its admission would not be so fundamentally unfair as to deprive the alien of due process. *Trias- Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975).

B. Evidence during a removal proceeding is controlled by the Code of Federal Regulations; any type of evidence is admissible so long as it is material and relevant to the issues before the hearing. 8 C.F.R. § 1240.7(a).

1. Since the rules of evidence are not applicable and admissibility is favored, the pertinent question regarding most evidence in immigration proceedings is not whether or not it is admissible, but what weight the fact finder should accord it in adjudicating the issues on which the evidence has been submitted.

C. Hearsay

1. The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

- a. Hearsay evidence is admissible in deportation proceedings unless its use is fundamentally unfair. *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988). Hearsay evidence may be relied on, even if contradicted by direct evidence. *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980).

- b. The corollary is also true: where an asylum applicant's testimony consists of hearsay evidence, the statements by the out-of-court declarant may be accorded less weight by the trier of fact when weighed against non-hearsay evidence. *Xiaoguang Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006).

D. Types of hearsay evidence regularly admitted against aliens include: country conditions reports; documents such as birth records, marriage certificates, or conviction records; ex parte affidavits and other statements of witnesses; and out- of-court admissions of the alien, including those recorded on a Form I-213.

1. Documents

- a. Courts have generally upheld the admission of documents such as birth records, marriage certificates, or conviction records into evidence in removal proceedings provided that the evidence is properly authenticated. See 8 C.F.R. §§ 1003.41, 1287.6(a).

- b. Care should be taken not to afford the hearsay statements contained within a properly authenticated document undue weight. In *Singh v. Gonzales*, 403 F.3d 1081, 1087-1088 (9th Cir. 2005), the appellate court rejected an IJ's reliance on hearsay statements contained within an asylum officer's Assessment To Refer to support its adverse credibility determination where the Assessment did not contain any record of the questions and answers at the asylum interview, or other detailed, contemporary, chronological notes of the interview, but included only a short conclusory summary, there was no transcript of the interview, or any indication of the language of the interview or of the administration of an oath before it took place, the asylum officer did not testify at the removal hearing, and the applicant was not asked at the removal hearing about the accuracy of the

asylum officer's report or given any opportunity to explain the discrepancies the asylum officer perceived. See *id.* at 1089–90.