

## Confrontation of Witnesses - Summary of Cases

### A. Cases Where Due Process Violation Found:

#### 1. DHS Makes Little or No Attempt to Locate Witness

*Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997) - "The INS made no effort to call an admittedly available witness and relied instead on that witness's damaging hearsay affidavit. This rendered the hearing fundamentally unfair. That the IJ issued a subpoena for the alien to serve on the government's witness did not cure that unfairness."

*Baliza v. INS*, 709 F.2d 1231, 1234 (9 Cir. 1983) - Government required to produce witnesses for cross examination even though Government no longer in contact with witnesses because Court found that Government knew for at least a year that witnesses' testimony would play key role in case and Government provided only nominal evidence of their attempt to relocate them.

*Maltez v. Nagle*, 27 F.2d 835 (9th Cir. 1928) - Refusal to produce for cross-examination persons whose ex parte statements were relied on deprived alien of fair trial, though no demand was made at hearing. Petitioner, at the time said statements were introduced, demanded the production of the persons alleged to have made the said statements for the purpose of cross-examination, but such demand was refused. When the original hearing was conducted, the four persons were either in the actual custody of the immigration officers, and could easily have been produced.

#### 2. DHS Fails to Inform Respondent About Witness (Surprise)

*Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988) - Alien's right to confront witness violated where alien not aware of witnesses affidavit, and Government's intent to submit it, until day of the hearing.

### B. Cases Where NO Due Process Violation Found:

#### 1. DHS Unable to Locate Witness

*Fisher v. INS*, 79 F.3d 955, 965 (9th Cir. 1996) - INS made reasonable efforts to find the witness before the hearing. Alien did not object to the IJ's reliance on the witnesses affidavit, in lieu of live testimony. The IJ offered alien the opportunity to offer testimony about the affidavit. Under these circumstances, the IJ's reliance on Witness's affidavit was not fundamentally unfair.

*De Hernandez v. INS*, 498 F.2d 919, 921 (9th Cir. 1974) - Affidavits of four aliens were admitted without production of the individuals. It was shown that their whereabouts were unknown after a search had been made to locate them. Their absence is of even less consequence as the affidavit of alien, corroborates the information contained in the affidavits in question.

*Navarette-Navarette v. Landon*, 223 F.2d 234, 237 (9th Cir. 1955) - Government not required to produce witnesses for cross examination because the record clearly showed the witnesses had been granted voluntary departure to Mexico and could no longer be found.

#### 2. Witness Resides in Distant Location

*Kishan Singh v. District Director of Immigration*, 83 F.2d 95 (9th Cir. 1936) - The fact that alien was not financially able to go to Calexico or to send his attorney there to cross examine witnesses was not a denial of the right of cross-examination.

*Bachelier v. INS*, 625 F.2d 902, 904 (9th Cir. 1980) - Alien's right to confront witness not violated where alien was given ample notice that affidavits would be used rather than live witness testimony and IJ offered alien's attorney the option to depose witnesses, send interrogatories, or transfer hearings to witnesses location.

### 3. Alien Waives Right

*Imazo Itow v. Nagle*, 24 F.2d 526 (9 Cir. 1928) - Alien alleged error when IJ admitted an ex parte affidavit and written statements by two immigration officers. No objection was made to incorporating the affidavit and alien did not ask to do so. IJ offered alien opportunity to examine officers, but alien declined to do so.

### 4. Telephonic Cross Examination Adequate

*Beltran-Tirado v. INS*, 213 F.3d 1179, 1186 (9th Cir. 2000) - Telephonic cross examination adequate. Witness lived in Missouri and the hearing was in San Diego. Although the telephone presentation cost alien the opportunity to have the witness's demeanor more fully observed by the finder of fact, admission of the testimony was fair.

### 5. No Right to Cross Examine Confidential Informant

*Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823-24 (9 Cir. 2003) - INS was not required to produce testimony from the confidential informant who participated in the drug negotiation and allegedly provided information to the detectives. Testimony by the confidential informant was not necessary to ensure a fundamentally fair hearing given that the Detectives personally monitored the conversations between the informant and alien through body wires and, in one instance, videotape.

### 6. No Right to Cross Examine Uncontested Facts

*Espinoza v. INS*, 45 F.3d 308, 1234 (9th Cir. 1994) - An alien in deportation proceedings may not assert a cross-examination right to prevent the Government from establishing uncontested facts. Alien had no right to cross examine preparer of government document which merely noted his alienage.