



**Evidentiary Challenges:
Admissibility, Weight,
Reliability, and
Impeachment v. Rebuttal Evidence**

2018 Executive Office for Immigration Review
Legal Training Program



Evidence

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The Honorable F. James Loprest, Jr.
*Assistant Chief Immigration Judge
New York Area Immigration Courts*

The Honorable Mimi Tsankov
Immigration Judge, New York (Detained)

Slide Title



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Introduction:

- **Part I - understand the basic legal framework for assessing admissibility, weight, and reliability of evidence**
- **Part II - understand impeachment v. rebuttal evidence**
- **Part III - understand challenges to the reliability of Government interviews and reports**

Learning Objectives



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Part I –
Admissibility of Evidence

Part 1 - Admissibility



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- Federal Rules of Evidence not binding in removal proceedings, but helpful as guidance
- If evidence admissible under FRE, admission probably comports w/ due process
- *Matter of Y-S-L-C-*, 26 I& N. Dec. 688 (BIA 2015); *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999)

Part 1 - Admissibility



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Evidence is generally considered admissible in removal proceedings if:

- it is **probative** and its **use is fundamentally fair**
- fairness not only means **notice and opportunity**
- related to “**reliability and trustworthiness**”

Part 1 – Admissibility and Reliability



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Assessing the weight given to evidence

- Even if evidence admissible, consider weight:
 - Hearsay - *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972)

 - Lack of personal knowledge of document - *Matter of C-*, 5 I&N Dec. 370 (BIA 1953)

Part 1 – Assessing Weight



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Two step process:

- 1) Determine whether evidence admitted
 - probative
 - admission fundamentally fair
- 2) Assess weight that evidence should be accorded, recognizing that reasonable fact-finders could differ on this

Part 1 – Assessing Weight



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Examples of how this works in practice.

Part 1 – Assessing Weight



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Proving a Lawful Admission

IJ upheld in affording little to no weight:

Acosta v. Lynch, 819 F.3d 519 (1st Cir. 2016) –
respondent offered affidavits and polygraph

DHS offered: two experts, enforcement officer, and
forensics officer

IJ found respondent not credible; “**polygraph**
evidence has “long been considered of dubious
value”

Part 1 – Assessing Weight



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Asylum Cases –
Harm Rising to the Level of Persecution
Hernandez-Lima v. Lynch, 836 F.3d 109 (1st Cir. 2016): “**Total dearth of evidence**” - while not dispositive, the absence of physical harm weighs against a finding

Part 1 – Assessing Weight



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AW/H/CAT Cases – Motions to Reopen –
Change in Country Conditions –
Expert Reports

Marsadu v. Holder, 748 F.3d 55 (1st Cir. 2014) – upheld the Board’s finding that there was no “intensification or deterioration of country conditions”

Simarmata v. Holder, 752 F.3d 79 (1st Cir. 2014) – afforded **diminished weight** to an expert opinion for **failure to provide an assessment of particular or individualized risk** of harm to alien

Part 1 – Assessing Weight



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Asylum Cases

Respondent threatened based on family relationship, or political opinion, and no cognizable social group, but IJ and Board failed to appreciate or address critical evidence -- remanded for **“wholesale failure to discuss the evidence”**

Zavaleta-Policiano v. Sessions, 873 F.3d 241 (4th Cir. 2017)

Part 1 – Assessing Weight



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Temporary Protected Status

Shul-Navarro v. Holder, 762 F.3d 146 (1st Cir. 2014) IJ and Board found insufficient evidence of presence -- **overturned for failure to discuss letter contradicting finding**

Part 1 – Assessing Weight



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Asylum

Musa v. Lynch, 813 F.3d 1019 (7th Cir. 2016):
IJ erred by placing too much weight on the absence of general documentary evidence regarding FGM in Botswana; credible testimony was sufficient

Part 1 – Assessing Weight



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Motion to Reopen – Change in Country Conditions - Unauthenticated “Village Committee Notice”

Le Bin Zhu v. Holder 622 F.3d 87 (1st Cir.
2010): **Lack of authentication undermines
document’s evidentiary weight**

Part 1 – Assessing Weight

Authentication and Foundation

- *Matter of H-L-H- & Z-Y-Z-*, 25 I. & N. Dec. 209, 215 (BIA 2010), *remanded on other grounds by Hui Lin Huang*, 677 F.3d at 130 (unsigned unauthenticated documents prepared for purpose of hearing, and documents authored by interested witnesses unavailable for cross-examination may be afforded minimal weight)



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Takeaways:

- discuss each document and all relevant testimony
- ask parties to offer “weight” arguments in closing
- if documents or testimony contradict, review both and give appropriate weight based on reliability factors

Part 1 – Assessing Weight



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Part II - Impeachment v. Rebuttal Evidence

**Part II - Impeachment v.
Rebuttal Evidence**



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(A) Non-detained aliens. — For individual calendar hearings involving non-detained aliens, filings must be submitted at least 15 days before hearing (*provision does not apply to exhibits or witnesses offered solely to rebut and/or impeach*)

**Part II - Impeachment v.
Rebuttal Evidence**



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Impeachment Evidence

Evidence that bears circumstantially upon the evaluation of the probative value given to other evidence in the case: "Proof that a witness who has testified in a cause is unworthy of credit." (Blacks' Law Dictionary)

**Part II - Impeachment v.
Rebuttal Evidence**



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Impeachment Evidence

[Urooj v. Holder](#), 734 F.3d 1075 (9th Cir. 2013)

Respondent submitted application and refused to testify; DHS submitted sworn statement contradicting her application. The Board held that DHS "can satisfy its burden through impeachment evidence only," i.e., through an adverse inference

**Part II - Impeachment v.
Rebuttal Evidence**



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Rebuttal Evidence

Testimony and evidence that shows that the evidence that was presented by the opposing party is not true.

Black's Law Dictionary

**Part II - Impeachment v.
Rebuttal Evidence**



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Rebuttal Evidence

U.S. v. Harris, 557 F.3d 938 (8th Cir. 2009)

Provides an excellent discussion of rebuttal versus impeachment evidence. "Impeachment is an attack on the credibility of a witness, whereas rebuttal testimony is offered to explain, repel, counteract, or disprove evidence of the adverse party."

**Part II - Impeachment v.
Rebuttal Evidence**



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Bondarenko v. Holder, 733 F.3d 899, 907 (9th Cir. 2013)

IJ violated due process in not allowing the petitioner a continuance to investigate a forensic report.

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Rebuttal Evidence**



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Implications:

Impeachment evidence can give rise to motions for continuances

**Part II - Impeachment v.
Rebuttal Evidence**

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Hammad v. Holder, 603 F.3d 536 (9th Cir. 2010): **No due process violation where government informed petitioner of spouse's testimony two days prior to hearing, and petitioner had opportunity to cross-examine spouse and offer rebuttal witness.**

**Part II - Impeachment v.
Rebuttal Evidence**

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Cinapian v. Holder, 567 F.3d 1067, 1075 (9th Cir. 2009): Government's failure to disclose DHS forensic reports in advance of hearing, or make reports' authors available for cross-examination, and IJ's reliance upon reports denied petitioners a fair hearing

**Part II - Impeachment v.
Rebuttal Evidence**



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Shin v. Mukasey, 547 F.3d 1019 (9th Cir. 2008): Admission of deposition testimony from former federal immigration official did not violate due process where official was cross-examined by alien's counsel during the deposition, and official was made available during alien's hearing if additional testimony was needed.

**Part II - Impeachment v.
Rebuttal Evidence**



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Yuk v. Ashcroft, 355 F.3d 1222 (10th Cir. 2004) IJ properly relied upon the State Department report, and was not obligated to find respondent's rebuttal evidence — including expert statement by president of an institute — was more accurate

**Part II - Impeachment v.
Rebuttal Evidence**



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**Part III - Reliability of Government
Interviews and Reports**

**Part III – Reliability of
Government Documents**



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Such documents are frequently used by adjudicators in making credibility determinations, corroboration findings, and burden of proof decisions.

**Part III – Reliability of
Government Documents**



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Matter of J-C-H-F-, 27 I&N Dec. 211 (BIA 2018): Addressed reliability of **border and airport interviews** when making a credibility determination

**Part III – Reliability of
Government Documents**



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Information obtained from DHS interviews conducted at the border or an airport prior to removal proceedings must be both **accurate and reliable for the purposes for which the document is being used.**

**Part III – Reliability of
Government Documents**



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Circuit courts have reversed adverse credibility findings based on such interviews when they lacked adequate safeguards.

**Part III – Reliability of
Government Documents**



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Although the federal courts generally find Government interviews and reports a reliable source of information, the courts have also recognized limitations on their use and reliability.

**Part III – Reliability of
Government Documents**



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However, the Immigration Judge should address any arguments raised regarding the accuracy and reliability of the interview and explain why the arguments are or are not persuasive.

**Part III – Reliability of
Government Documents**



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- (1) verbatim or summary statements;
- (2) questions contain follow-ups;
- (3) mindset of the respondent given past history;
- (4) translation issues.

**Part III – Reliability of
Government Documents**

Reliability Factors

- *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004): less reliable if record merely summarizes or paraphrases alien’s statements; where questions do not “elicit the details of an asylum claim”; where alien appears to have been reluctant to reveal information or where circumstances were coercive; where answers suggest alien did not understand English or translations



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Reliability of Government interviews and reports.

“[T]he government must make a reasonable effort in [immigration] proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her.”

Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir. 1997).

**Part III – Reliability of
Government Documents**



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Reliability of Government interviews and reports.

State Department Reports are probative and usually the best evidence on country conditions.

Hui Lin Huang v. Holder, 677 F.3d 130 (2d Cir. 2012)

IJ did not err in giving more weight to the State Department Report than NGO-prepared reports.

Kassa v. Ashcroft, 83 Fed. App'x 601 (5th Cir. 2003)

**Part III – Reliability of
Government Documents**



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General country conditions information will not suffice to rebut credible testimony establishing past persecution.

Sherrif v. Atty Gen. 587 F.3d 584 (3d Cir. 2009)

**Part III – Reliability of
Government Documents**



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- Consider factors that point to reliability
- Recognize that they may vary depending upon the interview or report involved or circuit precedent.

**Part III – Reliability of
Government Documents**



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A/W/H/CAT

Angov v. Lynch, No. 07-74963 (2015 WL 3540764)

IJ found fraudulent two Bulgarian “subpoenas” submitted by the alien.

State Department investigative report undercut the reliability, and discredited the subpoenas.

**Part III – Reliability of
Government Documents**

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- Be familiar with the differences between the Board of Immigration Appeals and the federal courts regarding what factors or issues are relevant to the issue of a Government document's reliability.

**Part III – Reliability of
Government Documents**

Use Common Sense

Holding that an Immigration Judge's inference is permissible if it is "based upon record facts viewed in the light of common sense and ordinary experience." *Gao v. BIA*, 482 F.3d 122, 134 (2d Cir. 2007) (citing *Siewe v. Gonzales*, 480 F.3d 160, 168 (2d Cir. 2007))



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Questions?

Questions and Conclusions