

SAMPLE

OMB#1125-0006

Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court

Print on light green paper & double-sided

I hereby enter my appearance as attorney or representative for, and at the request of, the following named person:			DATE (mm/dd/yy): <u>06/13/11</u>
NAME:	<u>Jane</u> (First)	<u>C</u> (Middle Initial)	<u>Doe</u> (Last)
ADDRESS:	<u>1234 S. Main Street</u> (Number and Street)	<u>202</u> (Apt. No.)	ALIEN NUMBER(S) and NAME(S) (List lead alien number and all family member alien numbers and names, if applicable. Continue on next page as needed.) Lead Alien Number: <u>012-345-678</u>
	<u>Los Angeles</u> (City)	<u>California</u> (State)	<u>90000</u> (Zip Code)

Please check one of the following:

1. I am a member in good standing of the bar of the highest court(s) of the following state(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia:

Full Name of Court	State Bar No. (if applicable)
<u>Supreme Court of Arizona</u>	<u>22314</u>

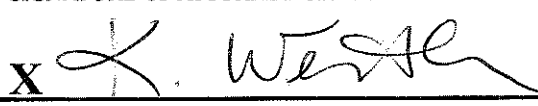
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I am not (or am - explain fully on reverse side) subject to any order of any court or administrative agency disbaring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law and the courts listed above comprise all of the jurisdictions (other than federal courts) where I am licensed to practice law.

2. I am an accredited representative of the following qualified non-profit religious, charitable, social service, or similar organization established in the United States, so recognized by the Executive Office for Immigration Review pursuant to 8 C.F.R. § 1292.2 (provide name of organization and expiration date of accreditation):

3. I am a law student or law graduate, reputable individual, accredited official, or other person authorized to represent individuals pursuant to 8 C.F.R. § 1292.1 (explain fully on reverse side).

I have read and understand the statements provided on the reverse side of this form that set forth the regulations and conditions governing appearances and representation before the Immigration Court. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

SIGNATURE OF ATTORNEY OR REPRESENTATIVE 	EOIR ID# None	DATE (mm/dd/yy) 06/13/11
NAME OF ATTORNEY OR REPRESENTATIVE (type or print) Katka Werth	ADDRESS Public Counsel 610 S. Ardmore Ave Los Angeles, CA 90005	<input type="checkbox"/> Check here if new address
PHONE NUMBER (with area code) (213) 385-2977 ext. 126	FAX NUMBER (with area code) (213) 385-9089	

Proof of Service

I Katka Werth mailed or delivered a copy of the foregoing Form EOIR-28 on 06/13/11
(Name) (Date-mm/dd/yy)

to the DHS (U.S. Immigration and Customs Enforcement - ICE) at 606 S. Olive Street., 8th Floor, Los Angeles, CA 90014
(Number and Street, City, State, Zip Code)

X 

Signature of Attorney or Representative

APPEARANCES - An appearance shall be filed on a Form EOIR-28 by the attorney or representative appearing in each case before an Immigration Judge (see 8 C.F.R. § 1003.17). When an appearance is made by a person acting in a representative capacity, his/her personal appearance or signature constitutes a representation that, under the provisions of 8 C.F.R. part 1003, he/she is authorized and qualified to represent individuals. Thereafter, substitution or withdrawal may be permitted upon the approval of the Immigration Judge of a request by the attorney or representative of record in accordance with 8 C.F.R. § 1003.17(b). Please note that appearances for limited purposes are not permitted, unless specifically authorized by the Immigration Judge. A separate appearance form (Form EOIR-27) must be filed with an appeal to the Board of Immigration Appeals (see 8 C.F.R. § 1003.38(g)). Further proof of authority to act in a representative capacity may be required.

Indicate type of appearance

I am entering an appearance as attorney or representative in this Form EOIR-28 in the capacity of:

Primary Attorney or Representative Non-primary Attorney or Representative On behalf of _____

Check this box if you are entering your appearance pro bono.

AVAILABILITY OF RECORDS - During the time a case is pending, a party to a proceeding or his/her attorney or representative shall be permitted to examine the Record of Proceeding in the Immigration Court having administrative control over the Record of Proceeding, in accordance with the standard procedures of the Court.

REPRESENTATION - A person entitled to representation may be represented by any of the following:

- (1) Attorneys in the United States as defined in 8 C.F.R. § 1001.1(f).
- (2) Law students and law graduates not yet admitted to the bar as defined in 8 C.F.R. § 1292.1(a)(2).
- (3) Reputable individuals as defined in 8 C.F.R. § 1292.1(a)(3).
- (4) Accredited representatives as defined in 8 C.F.R. § 1292.1(a)(4).
- (5) Accredited officials as defined in 8 C.F.R. § 1292.1(a)(5).

All representatives must comply with the specific requirements to represent aliens before the Board of Immigration Appeals. For more information on the requirements, see 8 C.F.R. § 1292.1 and the particular subsections referenced above as applicable. Note that law students and law graduates must submit additional materials pursuant to 8 C.F.R. § 1292.1(a)(2).

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CASES BEFORE THE EOIR - Automated information about cases before the EOIR is available by calling 1-800-898-7180.

ADDITIONAL INFORMATION:

(Please attach additional sheets of paper if necessary.)

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is six (6) minutes. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

SAMPLE

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Pro Bono Attorney for Respondent

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA**

In the Matter of:)
)
Carmen Maria Garcia Trujillo,)
)
Respondent)
)
In Removal Proceedings)
_____)

File No.: A 012-345-333

Immigration Judge: Ashley Tabaddor Next Hearing: September 22, 2010 at 1:00 p.m.

**PRE-HEARING BRIEF
FILED IN SUPPORT OF APPLICATIONS FOR ASYLUM, WITHHOLDING OF
REMOVAL AND RELIEF UNDER THE CONVENTION AGAINST TORTURE**

TABLE OF CONTENTS

I. INTRODUCTION3

II. PROCEDURAL HISTORY3

III. FACTUAL BACKGROUND.....4

 A. CARMEN’S HISTORY4

 B. EL SALVADOR’S CURRENT SOCIAL CONDITIONS INCLUDE WIDESPREAD DOMESTIC VIOLENCE AND AN UNWILLINGNESS OF THE AUTHORITIES TO PROVIDE MEANINGFUL PROTECTION TO CHILDREN ABUSED BY THEIR PARENTS7

IV. STATEMENT OF ISSUES.....10

V. STATEMENT OF BURDEN OF PROOF.....10

VI. ARGUMENT..... 11

 A. CARMEN HAS SUFFERED PAST PERSECUTION WHICH GIVES RISE TO A PRESUMPTION OF FUTURE PERSECUTION..... 11

 B. CARMEN SUFFERED PAST PERSECUTION AND FEARS FUTURE PERSECUTION ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP: HER NUCLEAR FAMILY 13

 C. CARMEN SUFFERED PAST PERSECUTION AND FEARS FUTURE PERSECUTION ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP: YOUNG SALVADORAN WOMEN PERCEIVED AS PROPERTY BY THEIR FATHERS OR SALVADORAN DAUGHTERS WHO CANNOT LEAVE THEIR RELATIONSHIP TO THEIR FATHERS. 15

 D. CARMEN SUFFERED PAST PERSECUTION ON ACCOUNT OF HER POLITICAL OPINION 18

 E. THE SALVADORAN GOVERNMENT CANNOT OR WILL NOT CONTROL MR. GARCIA’S PERSECUTION OF CARMEN..... 18

 F. NO FUNDAMENTAL CHANGE IN CIRCUMSTANCES CAN REBUT CARLA’S WELL-FOUNDED FEAR OF FUTURE PERSECUTION AND CARMEN CANNOT AVOID PERSECUTION BY RELOCATING INTERNALLY.....20

 G. CARMEN IS ENTITLED TO ASYLUM BASED UPON HER WELL-FOUNDED FEAR OF FUTURE PERSECUTION.....21

 H. THIS COURT SHOULD EXERCISE ITS DISCRETION FAVORABLY AND GRANT ASYLUM TO CARMEN.....22

 I. CARMEN IS ALSO ELIGIBLE FOR WITHOLDING OF REMOVAL AND C.A.T. RELIEF..... 23

VII. CONCLUSION24

I. INTRODUCTION

Respondent Carmen Maria Garcia Trujillo (“Carmen”) is a 19-year-old native and citizen of El Salvador. Throughout her young life, Carmen’s father has severely and violently abused her. Salvadoran authorities have repeatedly refused to protect Carmen from her father’s violence. On four occasions Carmen and her family attempted to flee her father’s violence by escaping to Honduras, but on each occasion her father found them and forced them to return to El Salvador.

Carmen fears that if she returns to El Salvador the government will be unable to protect her from her father’s violence, and he will continue to persecute her. Because of her past persecution and fear of future persecution, she is seeking asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”).

II. PROCEDURAL HISTORY

Carmen arrived in the United States without inspection on December 10, 2006 in Texas. Upon her arrival, she was detained by the Department of Homeland Security and placed in removal proceedings in Texas. She was released from custody to a relative in Las Vegas, Nevada on or about February 6, 2007, and venue was then changed from Texas to Nevada. Subsequently, venue was changed to Los Angeles, California after Carmen relocated to the Los Angeles area. On December 6, 2007, Carmen appeared at a master calendar hearing before the Honorable Immigration Judge Tabaddor (“IJ”) in Los Angeles, California and pled to the allegations contained in the Notice to Appear. She admitted all allegations with the exception of Allegation 2, as she is a citizen of El Salvador and not of Guatemala. She conceded removability and sought asylum, withholding of removal, and relief under CAT. She filed an I-589 request for asylum on December 6, 2007, within one year of her entry into the United States.

III. FACTUAL BACKGROUND

A. CARMEN’S HISTORY

Carmen is a 19-year-old native and citizen of El Salvador. Declaration of Respondent (“Exhibit C¹”) ¶ 1. She was born in El Salvador on August 30, 1988 in Colonia San Fernando, Izalco in the Department of Sonsonate, El Salvador. Birth Certificate of Respondent, (“Exhibit A”). She is the sixth of seven children. Carmen’s mother is Rosa Adelina Trujillo (“Ms. Trujillo”), and her father is Juan Garcia Manrique (“Mr. Garcia”). Ms. Trujillo and Mr. Garcia have a common-law marriage. Exhibit C, ¶¶ 5, 8.

As far back as she can remember, Carmen’s father has physically and psychologically abused her. He regularly kicked her, pulled her hair, and beat her with ropes, horse whips, or whatever else he could find. He smashed dishes on her head, telling her she did not clean the dishes well. If Carmen did not hand wash Mr. Garcia’s clothes correctly, he would hit her with his wet pants. *Id.* ¶ 11. Mr. Garcia also verbally abused Carmen both in the home and in public. He called her a “bitch,” “trash,” “piece of shit,” “good for nothing,” and many more insults. Exhibit C ¶ 17.

There are particular incidents of abuse that stand out in Carmen’s memory because of their severity. Once, Carmen’s father beat her all over her body with an extension cord, leaving a permanent scar on her leg. *Id.* ¶ 13. On another occasion, when Carmen was only about seven years old, she tried to defend her mother from Mr. Garcia’s violence. He then attacked Carmen, throwing her so hard to the floor that she dislocated both of her wrists. Her mother took Carmen to the hospital for medical treatment. *Id.* ¶ 12; Letter from Respondent’s Mother, Rosa Adelina Trujillo (“Exhibit E”).

When Carmen was about the age of twelve, her father attempted to molest her. When she resisted, her father said, “You are my daughter and I can do with you as I wish. And I should be

¹ All exhibits referenced herein can be located in the separate packet of documents filed concurrently herewith and captioned “Exhibits Filed In Support of Applications for Asylum, Withholding of Removal and CAT Relief.”

the first one.” Carmen resisted and threatened to cut him with a knife if he touched her, and then ran from the house. From that point on, she was always in fear that her father would molest her. Exhibit C ¶ 15; Exhibit E.

Carmen did not suffer the abuse in silence. Many times when Mr. Garcia beat Carmen, she would ask, “Why do you do this? I haven’t done anything.” His answer was always the same, “Because you *deserve* it.” Carmen believed, and still believes, that her father has no right to abuse his children, but he disagrees. He repeatedly told Carmen, “I conceived you. I feed you. So I can do with you as I wish.” *Id.* ¶ 18.

Carmen suffered additional abuse as a result of being kept in a home where she had to witness her father violently abusing her mother and her siblings. A thorough description of the abuse directed at Carmen’s other family members is included in her declaration, Exhibit C. She describes how Mr. Garcia nearly killed Ms. Trujillo and beat her siblings when they tried to defend their mother. Mr. Garcia did not allow his daughters to go out by themselves or talk to other men. Exhibit C ¶ 17. Carmen’s two older brothers, David and Nicholas, as well as her sister, Teresa, all fled to the U.S. to escape their father’s violence. Carmen has asked Teresa for a statement in support of her asylum claim. However, Teresa told Carmen she would not write a statement or testify, because she is too afraid that she will be deported back to El Salvador, where her father can cause her further harm. *Id.* ¶ 24.

Carmen, her mother, and siblings sought protection from the Salvadoran police on numerous occasions, but such efforts proved futile. The police responses were generally the same over the years. The police, when contacted by Carmen or her family, would promise to come out to the family’s home but never did. Sometimes they said that they did not have

enough personnel to send respond to the call for help. And other times they would explicitly state that the problem was a family problem in which they would not interfere. *Id.* ¶¶ 27-28.

Although Carmen's mother was able to secure a restraining order from a Peace Judge on one occasion, the order did not translate into protection for Carmen's mother and her children. The Judge ordered Mr. Garcia not to go near the family's house, not to drink, not to carry firearms, and not to threaten any family member. Unfortunately, the local police did not enforce the order in any meaningful way. Carmen's home was only patrolled for a few days and then Mr. Garcia returned with a gun, threatening to kill the family if he was not let into his home. With no police to protect them, the family had no choice but to let Mr. Garcia resume living at the home. Exhibit E; Restraining Order ("Exhibit G"). He soon continued his abuse. Exhibit C ¶ 30.

Having no protection from the Salvadoran police, Ms. Trujillo tried to escape Mr. Garcia's violence by fleeing with her children to Honduras on four separate occasions. Each time, her husband found and forced her to return with him to El Salvador. Exhibit C ¶¶ 31-32; Letter from Respondent's Brother, Nicolas Garcia ("Exhibit D").

Unable to escape Mr. Garcia's abuse or secure protection from the Salvadoran government, Carmen made a plan to escape to the United States, and began saving money from her work at the bakery. When her father discovered Carmen's plan, he became enraged. He told Carmen that she was not going to leave. He grabbed his machete and swung it at Carmen. Fortunately he missed Carmen, and she ran for her life. In that instant, Carmen knew that she could no longer be in the same home as her father. She left for the United States the next day. Exhibit C ¶ 34.

In December of 2006 Carmen crossed the United States-Mexico border and was then detained by immigration agents. The agents screamed and used profanity, frightening Carmen.

Before immigration agents questioned her, a Mexican woman who was also detained told Carmen that if she gave a younger age and claimed to be from Guatemala, she would not be deported. Carmen therefore claimed to be Guatemalan and provided her younger sister Victoria's information to the agents who questioned her. (She subsequently disclosed her true name, age and citizenship.) *Id.* ¶ 37. Carmen was placed in a youth shelter until she was released into her Aunt's custody on or about February 6, 2007. Carmen later moved in with her cousin in the Los Angeles area.

Carmen is currently enrolled in English classes at the Long Beach Adult Learning Center. She also attends an evangelical church in Sylmar and has recently begun therapy provided by a domestic violence shelter near her home. *Id.* ¶¶ 38-40. She dreams of being allowed to remain in the United States, where she can live without the threat of violence from her father, and hopes to continue with her schooling so that she can contribute to this country. She has no criminal history. *Id.* ¶ 40-43.

B. EL SALVADOR'S CURRENT SOCIAL CONDITIONS INCLUDE WIDESPREAD DOMESTIC VIOLENCE AND AN UNWILLINGNESS OF THE AUTHORITIES TO PROVIDE MEANINGFUL PROTECTION TO CHILDREN ABUSED BY THEIR PARENTS

El Salvador's social conditions continue to allow for widespread domestic violence as documented in the Department of State's *El Salvador Country Reports on Human Rights Practices – 2007* ("Exhibit M"). The report states:

Violence against women, including domestic violence, was a widespread and serious problem...incidents of domestic violence and rape continued to be underreported for a number of reasons including societal and cultural pressures against victims, fears of reprisal, ineffective and unsupportive responses by the authorities toward victims, fear of publicity, and a perception among victims that cases were unlikely to be prosecuted.

Exhibit M, p. 7. The Department of State's *El Salvador Country Reports on Human Rights Practices – 1999* ("Exhibit Z") contains much of the same analysis, including the language quoted above. *See* Exhibit Z, p. 7. This lack of change between the two reports indicates that little progress in combating domestic violence has been made in nearly a decade.

In 1997, the Intra-Family Violence Law was passed in El Salvador, perhaps suggesting that the Salvadoran government has improved its response to domestic violence. However, Elena Adolfa Robles, an expert on domestic violence in El Salvador, notes that a year later law enforcement was unaware of the new law. *See* Declaration of Expert Witness Elena Adolfa Robles ("Exhibit H"), ¶ 6. According to Ms. Robles, Salvadoran law still does not allow for imprisonment of violent perpetrators and, in effect, women are encouraged to resolve domestic violence problems on their own. *Id.* ¶¶ 8, 14.

In Salvadoran culture, women are considered men's property and are expected to submit to their husbands. Because of this cultural norm, law enforcement agents are unlikely to enforce the protection provisions mandated by the law. *Id.* ¶ 13. In addition to the unwillingness of police to enforce existing laws relating to domestic violence, there are rarely shelters or other services available to domestic violence victims outside of the capital of El Salvador and other large cities. *Id.* ¶ 12. As a result, significant numbers of women are killed by their husbands as a consequence of reporting domestic abuse. *Id.* As mentioned in the U.S. State Department report, many women do not report abuse because they fear lack of protection and further reprisal. Exhibit M, p. 7.

The same forces that lead to severe violence against women have also created rampant domestic violence against children. "Different studies indicate that the Salvadoran society presents extreme characteristics of a patriarchal society. In thousands of cases, the men of the

family are considered with absolute rights on the women of the family group.” Latin American and Caribbean Committee for the Defense of Women’s Rights, *The Rights of the Children and Adolescents in El Salvador: An Alternative Report* (2004) (“Exhibit X”), p. 10. In a letter dated April 20, 2005, Louis Cabal, Director of the International Legal Programs for the United Nations, notes:

Sexual violence also blights the lives of many women and children in El Salvador despite efforts to improve support services and legal remedies...As with domestic violence, the underreporting of sexual violence makes it difficult to assess the true magnitude of the problem. Such under-reporting stems from a host of reasons including societal and cultural pressures against the victim; authorities’ poor response to victims; and doubt that reporting will actually yield a beneficial result. These doubts about the efficacy of reporting appear to be borne out. According to the Special Rapporteur on Violence against Women, reports indicate that of the 10,000 sexual offense cases registered with the police each year, only two out of 100 cases ever reach a judge.

Center for Reproductive Rights, *Letter to the Committee on Economic, Social, and Cultural Rights: Supplementary Information on El Salvador* (Apr. 2005) (“Exhibit T”).

Statistics of child abuse in El Salvador are particularly alarming. Data from 2009 indicates that 70 percent of Salvadoran children have been mistreated in their homes. World Vision, *Information and Facts About El Salvador*, Exhibit BB, p. 152. The 2008 U.S. Department of State Report on Human Rights in El Salvador reports that the government, although committed to improving children’s rights and welfare, did not dedicate sufficient resources to such improvement. Child abuse was serious and widespread. Exhibit Q, p. 98. Data from 2002-2003 indicates that over six percent of Salvadoran woman were sexually abused before the age of 15, and that the most frequent perpetrators of sexual abuse of female children were fathers. U.S.

Center for Disease Control, *Research Brief: Child Sexual Abuse in El Salvador, Guatemala and Honduras*, Exhibit AA, p. 143.

In sum, despite legal reforms, El Salvador's patriarchal culture and the failure of authorities to enforce existing laws allow perpetrators of domestic violence to act with impunity and in this way insure the continuation of such abuse.

IV. STATEMENT OF ISSUES

Whether Carmen is eligible for asylum and whether she merits a grant of that relief in an exercise of discretion; whether Carmen is statutorily eligible for withholding of removal; and whether Carmen is statutorily eligible for withholding of removal under CAT.

V. STATEMENT OF THE BURDEN OF PROOF

Carmen bears the burden of establishing asylum eligibility. Section 208(b)(1)(B)(i) of the Immigration and Nationality Act; 8 C.F.R. § 208.13(a)(2011). To do so, she must show that she has suffered past persecution or has a well-founded fear of future persecution in El Salvador. 8 C.F.R. § 208.13(b). Once she establishes past persecution, there arises a rebuttable presumption of a well-founded fear of future persecution. *Id.* § 208.13(b)(1). DHS bears the burden to rebut the presumption by establishing, by a preponderance of evidence, that either: (1) a fundamental change in circumstances has taken place so as to eliminate a well-founded fear of persecution; or (2) Carmen could avoid persecution by relocating internally within El Salvador. *Id.* § 208.13(b)(1)(iii).

To establish eligibility for withholding of removal, Carmen must establish that it is more likely than not that she will be persecuted if returned to El Salvador,

on account of one of the statutory grounds. To establish eligibility for CAT relief, she must establish that it is more likely than not that she will be tortured if returned to El Salvador. She is not required to establish that the Salvadoran government will participate in her torture, but merely that her father's torture will be done with the government's consent or acquiescence. 8 C.F.R. § 208.18(a)(1).

VI. ARGUMENT

A. **CARMEN HAS SUFFERED PAST PERSECUTION WHICH GIVES RISE TO A PRESUMPTION OF FUTURE PERSECUTION**

An alien who is seeking a discretionary grant of asylum must show that she falls within the definition of refugee as set forth in INA §101(a)(42). A refugee is someone who has either suffered past persecution or has a well-founded fear of future persecution in her country of nationality, or last habitual residence, on account of race, religion, nationality, political opinion or membership in a particular social group. The persecution must be perpetrated by the government or by a group the government will not or cannot control. *Tchoukhrova v. Gonzalez*, 404 F.3d 1181, 1195 (9th Cir. 2005).

Courts have consistently held that threats to life or freedom, or other egregious physical and psychological harms inflicted by the government or by persons the government is unable or unwilling to control, constitute persecution. *See, e.g., Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002); *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001); *Shoafra v. INS*, 228 F.3d 1070 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996); *Kovac v. INS*, 407 F.2d 102, 105-07 (9th Cir. 1969). The U.S. Department of Homeland Security has recognized domestic violence as a form of persecution. *Gao v. Gonzalez*, 440 F.3d 62, 68 n.3 (2d Cir. 2006).

In August of 2007, the Ninth Circuit Court of Appeals joined the Second, Sixth and Seventh Circuits in holding that the level of persecution faced by a child may be less than that necessary for an adult in order to qualify for asylum. The courts held that injuries to the asylum applicant's family must be considered where the events that form the basis for the persecution claim took place when the applicant was a child. *Hernandez-Ortiz v. Gonzalez*, 496 F.3d 1042, 1045 (9th Cir. 2007). In *Hernandez-Ortiz*, two young Guatemalan brothers watched the military beat and take away their father after the military attempted to force their brother to join the military. After fleeing to Mexico, they learned the military had killed their brother.

In its decision, the Ninth Circuit found that the brothers had suffered past persecution and quoted from an opinion by the Chief Judge of the Seventh Circuit:

[A]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of persecution. The Guidelines for Children's Asylum Claims advises that "harm a child fears or has suffered...may be relatively less than that in an adult and still qualify as persecution."

Hernandez-Ortiz, quoting *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004).

The persecution suffered by Carmen far exceeds the persecution suffered by the brothers in *Hernandez-Ortiz*. Carmen's father beat her routinely, attacked her with a machete, threatened to sexually abuse her, and threatened to kill her. As a young child, until the day she fled, Carmen watched her father beat her mother and other siblings ruthlessly. Mr. Garcia attempted to drown Carmen's mother by forcing her head into a barrel of water and threatened to hang her by a rope. Exhibit C ¶ 4. She witnessed her father beat her brother with a sewing machine and attack her siblings with a knife. All of this occurred before Carmen's 18th birthday. *Id.* ¶¶ 8-12. Even under the higher adult standard of persecution, Carmen has established past persecution. But keeping in mind her young age and how *Hernandez-Ortiz* instructs a fact finder to analyze

persecution occurring to a child, there is no question that Carmen suffered atrocious and extreme persecution giving rise to a presumption of future persecution.

B. CARMEN SUFFERED PAST PERSECUTION AND FEARS FUTURE PERSECUTION ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP: HER NUCLEAR FAMILY

Carmen's continuous persecution at the hands of her father took place on account of her being a member of a particular social group: the Garcia family. Carmen's membership in this social group is consistent with well-established precedent recognizing the family as a particular social group giving rise to an asylum claim.

In *Matter of Acosta*, the BIA ruled that the defining characteristics of a particular social group must be either immutable or fundamental. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *modified*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Subsequently, the immutable/fundamental criteria set out in *Acosta* has been widely accepted by federal courts across the United States. *See Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

Here, the social group to which Carmen belongs is one defined by the immutable characteristic of family relationships. Kinship is a defining characteristic that *Acosta* specifically identifies as immutable or fundamental. *Acosta*, 19 I&N Dec. at 233. Federal courts agree that the family constitutes a particular social group. *Lin v. Ashcroft*, 356 F.3d 1027, 1040 (9th Cir. 2004); *Chen v. Ashcroft*, 289 F.3d 1113, 1115 (9th Cir. 2002); *Iliev v. INS*, 127 F.3d 638, 642 & n.4 (7th Cir. 1997); *Gebremichael v. INS*, 10 F.3d 28, 36 n.21 (1st Cir. 1993). In fact, the Ninth Circuit has explained that "perhaps a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concern and common interests for most people." *Sanchez-Trujillo*, 801 F.2d 1571,

1586 (9th Cir. 1986). The familial relationship that exists between Carmen and her father is the type of characteristic that “the members of the group either cannot change, or should not be required to change because it is required to their individual identities and consciences.” *Acosta*, 19 I&N Dec. at 233.

Whenever there is a causal relationship, or nexus, between the persecution and membership in a particular social group, asylum may be granted. Nexus is established when the persecutor is motivated by a cognizable ground in inflicting the harm, or the harm is directed at the applicant because of the protected characteristic. *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996). Additionally, the BIA has ruled that societal and cultural factors should be included in determining nexus. *Matter of Fauziya Kasinga*, 21 I&N Dec. 357, 366-67 (BIA 1996).

Here, Carmen faced repeated abuse based on her familial relationship to her father. Mr. Garcia has shown through both his words and actions that he believes he has a right to abuse Carmen based on their relationship. He has told Carmen “You belong to me.” He explains to her that that the abusive nature of their relationship is “just the way it is” and nothing can change. Mr. Garcia’s persecution of Carmen is based on his perceived right to control her as a member of his family. In addition to beating Carmen, Mr. Garcia regularly beats his wife and Carmen’s brothers and sisters. Time and time again, the beatings became more forceful in response to his family members’ assertions of their right to be free of abuse, or to form relationships outside of the family. Mr. Garcia told all three of his daughters they had no right to talk to boys or have a boyfriend. He asserted his right to molest Carmen, because he had fathered her. Mr. Garcia often told Carmen “I brought you to this world; I can do with you what I please.”

In addition to Mr. Garcia's words and actions, societal and cultural norms support the finding that as a persecutor, Mr. Garcia is motivated by his purported role of controlling his family. Prevalent beliefs within Salvadoran society include the family is subordinate to its male leader and the enforcement of domestic violence laws is not important. *See* Section IV, *supra*. When Carmen's family sought protection from Salvadoran authorities, the police explicitly told them that they would not become involved in a "family matter."

C. CARMEN SUFFERED PAST PERSECUTION AND FEARS FUTURE PERSECUTION ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP: YOUNG SALVADORAN WOMEN PERCEIVED AS PROPERTY BY THEIR FATHERS OR SALVADORAN DAUGHTERS WHO CANNOT LEAVE THEIR RELATIONSHIP TO THEIR FATHERS

As explained above, Carmen's asylum claim clearly establishes past persecution based on her membership in the social group consisting of her nuclear family. However, Carmen's eligibility for asylum can also be based on two alternative definitions of social group: 1) young Salvadoran women perceived as property by their fathers; or 2) Salvadoran daughters who cannot leave their relationship to their fathers.

The two social group definitions proposed here are similar to those proposed by the government in the recent domestic violence based asylum case, *Matter of L-R-*. The respondent in *L-R-* was a Mexican citizen who suffered years of abuse from her common-law husband. On appeal to the BIA, the government articulated its current position that a Mexican victim of domestic violence perpetrated by her domestic partner could define a social group for the purpose of asylum eligibility as "Mexican women in domestic relationships who are unable to leave" or as "Mexican women who are viewed as property by virtue of their positions within a domestic relationship." *See* DHS's Supplemental Brief, *Matter of L-R-*, ("Exhibit L") at 14.

DHS's Supplemental Brief clarifies the standards governing domestic violence based asylum claims:

DHS suggests that the particular social group in asylum and withholding of removal claims based on domestic violence is best defined in light of the evidence about how the respondent's abuser and her society perceive her role within the domestic relationship. The evidence in this case at least raises the possibility that [the abuser] believes that women should occupy a subordinate position within a domestic relationship and that, in his eyes, the female respondent remains in this subordinate position in the relationship even though she has physically separated from [him]. The evidence further suggests that [the abuser] believes that abuse of women within such a relationship can therefore be tolerated, and that social expectations in Mexico reinforce this view."

Exhibit L at 14. In August 2010, on remand from the BIA, an immigration court granted asylum to the Respondent in *L-R-*, and the government did not appeal.

Shortly before the resolution of *L-R-*, the government agreed to a grant asylum in *Matter of R-A-*, a domestic violence based claim which had been pending for over a decade. *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I-N Dec. 694 (A.G. 2005), *remanded*, 24 I&N Dec. 629 (A.G. 2008). In *R-A-*, the government struggled for years with the question as to whether the Respondent Rodi Alvarado, a Guatemalan victim of severe domestic violence, could establish asylum eligibility on the basis of her membership in a particular social group. Following the government's clarification of its position in *L-R-*, the government finally recommended a grant of asylum to Rodi Alvarado based on her membership in a social group, defined as "married women in Guatemala unable to leave the relationship."²

² *R-A-* was litigated before a series of BIA decisions requiring an asylum to establish the social visibility of the defined social group. See *Matter of S-E-G*, 24 I&N Dec. 579 (BIA 2008). Because the record in *R-A-* did not address social visibility, Rodi Alvarado's attorneys asked DHS to join in a motion to remand the case back to the immigration court so that evidence on social visibility could be presented. In remanded proceedings, DHS agreed that the social group as defined by Ms. Alvarado's counsel met the social visibility requirement.

The government's actions in *R-A-* and *L-R-* evidence a clear signal that the government now recognizes the validity of domestic violence based asylum claims. Specifically, the government now agrees that domestic violence victims can establish persecution based on membership in a particular social group, where the group is defined in light of evidence about how the respondent's abuser and her society perceive her role within the domestic relationship.

In this case the record is every bit as compelling as the records in *R-A-* and *L-R-*, and the social group is similarly defined. The evidence in this case establishes that Carmen's father persecuted her because he believed she was his property, and because he believed she would always remain his property by virtue of being his biological daughter. As his property, she occupied "a subordinate position within" that domestic relationship and, in his eyes, Carmen would always remain in this subordinate position in the relationship wherever she went. The evidence further establishes that Carmen's father believed and in fact knew that the abuse of his daughter would be tolerated, given societal norms in El Salvador. Despite years of abuse, the Salvadoran authorities never took any meaningful action to stop Carmen's father from continuing his violent abuse of his daughter. The authorities likewise never took any meaningful action to stop the violence Carmen's father perpetrated against all of Carmen's immediate family members. It is difficult to imagine more severe abuse than that faced by Carmen over the 18 years she lived with her father. The police and judiciary's failure to protect Carmen, despite countless requests for protection, leaves no doubt that El Salvador's legal system and social norms perpetuate the epidemic of domestic violence in that country.

The court should rule that Carmen was persecuted based on her membership in a social group defined as either "Salvadoran women who are unable to leave domestic relationships with their fathers," or "young Salvadoran women viewed as property by virtue of their Salvadoran

fathers.” The evidence in this case, including Carmen’s testimony and the written testimony of expert witness Elena Adolfa Robles, support either of these social group definitions. Both definitions are nearly identical to those proposed by the government in *Matter of L-R-*.

D. CARMEN SUFFERED PAST PERSECUTION ON ACCOUNT OF HER POLITICAL OPINION

Asylum claims often involve overlapping grounds of persecution. *See, eg., Gafoor v. INS*, 231 F.3d 645 (9th Cir. 2000) (race and imputed political opinion); *Lal v. INS*, 225 F.3d 998, *as amended*, 268 F.3d 1148 (9th Cir. 2001) (religion and political opinion). Here, Carmen was not only persecuted on account of her membership in a social group, but also on account of her political opinion.

Carmen’s father persecuted her because she asserted her political belief that children have rights, including the right not to be subject to a father’s absolute domination. When faced with her father’s abuse, Carmen would frequently question him by asking, “Why do you hit me? You have no right to treat me this way!” Mr. Garcia would answer, “I brought you into this world; I can do with you what I please.” Often times, Mr. Garcia’s abuse towards Carmen increased when she questioned his absolute power. He insisted he had the right to control every aspect of Carmen (and her mother and siblings’) lives. His severe beatings of his other daughters were provoked by their assertion of their right to have boyfriends. Mr. Garcia did not only prohibit Carmen from having a boyfriend, but would not even allow her to talk with a boy. In fact, he believed he had the right to sexually abuse her, or, in his words, “be your first.” Mr. Garcia’s belief that a father has the right to completely control (and even abuse) his children was, and continues to be, a belief sustained by the extremely patriarchal nature of Salvadoran society.

E. THE SALVADORAN GOVERNMENT CANNOT OR WILL NOT CONTROL MR. GARCIA’S PERSECUTION OF CARMEN

For purposes of asylum, persecution may be “inflicted either by the government or by persons or organizations which the government is unable or unwilling to control.” *Sangha v. I.N.S.*, 103 F.3d 1482, 1487 (9th Cir. 1997). An asylum applicant need not show that the government sponsors or promotes persecution or violence, just that it is unable or unwilling to control it. *Thomas v. Ashcroft*, 359 F.3d 1169, 1179 (9th Cir. 2004).

Despite the scores of calls Carmen and her family members placed to government authorities, police only responded on a handful of occasions. Even when the police did respond, they either expressed their inability to help, or simply removed Carmen’s father from the house for a short period of time, without deterring or preventing future harm to Carmen or the rest of her family members.

On one occasion, amidst the lifetime of abuse Carmen endured, a Judge placed a restraining order on Mr. Garcia. *See* Restraining Order, (“Exhibit G”). The protections delineated in this restraining order were adhered to for a total of two days. For only two days, the police patrolled Carmen’s home. After two days, they left and Mr. Garcia returned with a firearm, threatening the lives of his family members who dared call the police.

Other than that one occasion, despite hundreds of phone calls to the police and numerous visits to the local Peace Judge, Carmen and her family never secured protection from her father. Instead, the police told them either they did not have the personnel to help Carmen’s family or that domestic violence was a “family” issue.

Carmen’s testimony concerning the inability and unwillingness of the police to protect her is corroborated by the Department of State’s Reports and the testimony of expert witness, Elena Adolfa Robles. *See* Exhibit H. According to the Department of State’s 2006 Report, “violence against women, including domestic violence, was a widespread and serious problem.”

However, “incidents of domestic violence and rape continued to be underreported for a number of reasons...ineffective and unsupportive responses by the authorities toward victims...and a perception among victims that cases were unlikely to be prosecuted.” Department of State, *El Salvador Country Reports on Human Rights Practices – 2006* (Mar. 2007) (“Exhibit P”). Furthermore, Ms. Robles explains that Peace Judges are not an efficient mechanism to enforce domestic violence protections in El Salvador because such protections require follow-up from local police who often refuse to comply. Exhibit G ¶ 12.

The evidence clearly establishes that local police in El Salvador were both unable and unwilling to prevent Carmen’s father from savagely persecuting her and all the members of her immediate family over the 18 years that Carmen lived in her father’s home.

F. NO FUNDAMENTAL CHANGE IN CIRCUMSTANCES CAN REBUT CARLA’S WELL-FOUNDED FEAR OF FUTURE PERSECUTION AND CARMEN CANNOT AVOID PERSECUTION BY RELOCATING INTERNALLY

Once an alien establishes past persecution, there arises a rebuttable presumption of a well-founded fear of future persecution, unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant’s country have changed to such an extent that the applicant no longer has a well-founded fear of persecution. 8 C.F.R. §208.13(b); *see also Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999). Once an applicant establishes past persecution, the burden shifts to the government to show by a preponderance of the evidence that either: 1) a fundamental change in circumstances has taken place such as to eliminate a well-founded fear of persecution, or 2) the applicant could avoid persecution by relocating internally within the country of origin. *Id.*

Even where the government has met the heavy burden of rebutting the presumption of a well-founded fear, asylum may be granted in the exercise of discretion whenever the applicant

“has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,” or whenever the applicant may suffer other serious harm if returned to the home country. 8 C.F.R. § 1208.13(b)(1)(iii).

Here, there is simply no evidence of changed conditions which could rebut the presumption of future persecution. To the contrary, Carmen’s father continues to abuse his family members and the recent efforts of Carmen’s mother to obtain police protection have proved futile. Moreover, there are no facts which indicate that Carmen could reasonably relocate within El Salvador. Even when the family fled to Honduras on four separate occasions, each time Mr. Garcia found the family and forced them back to their home in El Salvador.

Even if the government could rebut the presumption of future persecution (which we believe it cannot), Carmen should still be granted asylum for humanitarian reasons given the severity of her past persecution. This is particularly true when the past persecution is viewed from the perception of a child, which Carmen was throughout the time that her father abused her. *See Matter of Chen*, Int. Dec. 3104 (BIA 1989).

G. CARMEN IS ENTITLED TO ASYLUM BASED UPON HER WELL-FOUNDED FEAR OF FUTURE PERSECUTION

As outlined above, Carmen merits asylum based on past persecution. However, she also has an independent well-founded fear of persecution that qualifies her for asylum regardless of the presumption. *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 864, 870 (9th Cir. 2003). Even a ten percent chance that the asylum applicant will be persecuted in the future is enough to establish well-founded fear. INA § 101(a)(42)(A). Carmen’s fear of being threatened, abused, beaten, raped or killed constitutes a well-founded fear of persecution based on this standard. *Sael v. Ashcroft*, 386 F.3d 922,925 (9th Cir. 2004) (applicant established well-founded fear based on membership in disfavored group that creates a ten percent likelihood of being targeted for

abuse). Carmen's fear is subjectively present. Her fears and anxiety are obviously palpable and vivid to her, as they have resulted in serious psychological torment. That her fear is objectively reasonable is established through her detailed testimony describing a lifetime of abuse.

Carmen's belief that her father will harm her is particularly reasonable given his history of abusing her from a very young age up until she left his home. Exhibit C, ¶¶ 7-11.

The reasonableness of Carmen's fear is further underscored by the conditions for women in El Salvador, discussed at length above. The Salvadoran government continues to be unable and unwilling to protect women from domestic violence, thus Carmen's father would not be constrained from further torturing Carmen with impunity. Carmen's father seeks to persecute her for the same protected grounds on which he persecuted her years ago. As outlined in the sections above, the Salvadoran government is unable and unwilling to protect Carmen, and she cannot safely or reasonably relocate to escape her father's persecution.

H. THIS COURT SHOULD EXERCISE ITS DISCRETION FAVORABLY AND GRANT ASYLUM TO CARMEN

Asylum is a discretionary remedy. INA §208(a). In exercising discretion, the adjudicator must consider both favorable and unfavorable factors, including the severity of the past persecution suffered. *See Gulla v. Gonzales*, 498 F.3d 911, 917-919 (9th Cir. 2007). Here, the only unfavorable factor in Carmen's history is her failure to disclose her true name and nationality when arrested by immigration agents. While Carmen in no way minimizes the wrongfulness of this behavior, it should be viewed in context. Carmen suffered extremely severe persecution throughout her life. She lied about her name and nationality because she was terrified of being returned to her abusive father; and she was only seventeen years old when she

provided the false information. She timely retracted the false information and corrected the record by providing true information.

Here the favorable factors clearly outweigh any unfavorable factors. *See Kazlauskus v. INS*, 46 F.3d 902, 907 (9th Cir. 1995). Carmen has never committed a crime. Since arriving in the United States, she has worked diligently to improve herself and forge a new life. She is attending English classes, goes to church each Sunday, and dreams of going to college so that she can find a good job and contribute to this country. All of these factors, along with the severity of the persecution she suffered and still fears, merit a favorable exercise of the court's discretion.

I. CARMEN IS ALSO ELIGIBLE FOR WITHHOLDING OF REMOVAL AND CAT RELIEF

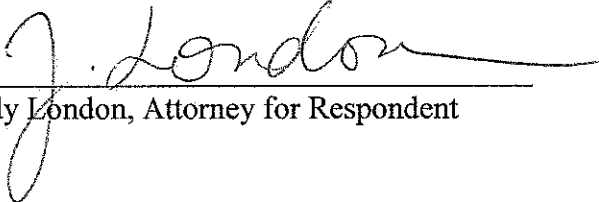
Carmen also qualifies for withholding of removal as the evidence of her persecution and the government's unwillingness to protect her establishes the higher burden required in a withholding claim: it is more likely than not that Carmen will be further persecuted by her father if returned to El Salvador. *See INS v. Stevic*, 467 U.S. 407 (1984) (establishing burden of proof for withholding cases). Finally, Carmen qualifies for CAT relief, as she need only establish that it is more likely than not that her father will torture her if she returns to El Salvador (8 C.F.R. § 1208.16(c)(2) (establishing burden of proof under CAT)) and that her government will "acquiesce" to such torture. Acquiescence does not require that the state consent to torture, but only that government officials know of, or remain willfully blind to, the torture. *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003). Carmen has established that time and time again, the government knew of her father's torture of her and her family, but turned a blind eye to it. The police took no meaningful steps whatsoever to stop Mr. Garcia from repeatedly and violently beating Carmen.

VII. CONCLUSION

Based on the existing record and upon such further evidence as may be produced at her merits hearing, Carmen asks that the Court grant her applications for asylum, withholding of removal and CAT relief.

Dated: 9-5-2010

Respectfully Submitted,



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Attorney for Respondent Jane Doe

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

_____)	
In the Matter of:)	
)	
Jane DOE,)	File no.: A 012-345-678
)	
Respondent.)	
)	
In Removal Proceedings)	
_____)	

Immigration Judge Ashley Tabaddor Next Hearing: January 21, 2011 at 1:00 p.m.

PROPOSED EXHIBITS

**FILED IN SUPPORT OF APPLICATION FOR ASYLUM, WITHHOLDING OF
REMOVAL AND RELIEF UNDER THE CONVENTION AGAINST TORTURE**

EXHIBIT	DESCRIPTION	PAGES
A	Declaration of Jane Doe	1-20
B	Copy of Jane Doe’s Cameroon Passport including I-94 Departure Record	21-39
C	Copy of Jane Doe’s Birth Certificate	40
D	Copy of Jane Doe’s Cameroon Identity Card	41-42
E	Psychological Report by Dr. Mary Livegood	43-50
F	Curriculum Vitae of Dr. Mary Livegood	51-52
G	Medical Report by Dr. Charles Jones	53-54
H	Curriculum Vitae of Dr. Charles Jones	55-56
I	Report of Country Condition Expert Prof. John Smith	57-61
J	Curriculum Vitae of Prof. John Smith	62
K	Declaration of Mary Doe, Jane Doe’s Sister and Its English Translation	63-65
L	Birth Certificate of Jennifer Smith, Jane Doe’s daughter and Its English Translation	66-67
M	COUNTRY CONDITIONS MATERIALS FOR CAMEROON 2010	
	Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, <i>Cameroon Country Reports on Human Rights Practices – 2010</i> (April 2011), available at http://www.state.gov/g/drl/rls/hrrpt/2010/af/154335.htm	68-93
	According to this report, security forces continue to carry out human rights abuses, “including torture, beatings, and other abuses, particularly of detainees and prisoners.” “Security forces reportedly detained and tortured persons at specific sites, including temporary holding cells within police or gendarme facilities and cells.” Furthermore, prison conditions remain harsh and life threatening. According to the report, “numerous international human rights	

organizations and some prison personnel reported that torture was widespread” in Cameroonian prisons.

**N COUNTRY CONDITIONS MATERIALS FOR CAMEROON
2009**

Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Cameroon Country Reports on Human Rights Practices – 2009* (Mar. 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135942.htm>. 94-121

The State Department found “credible reports” that despite a constitutional ban on such practices, **security forces still torture, beat, harass, and otherwise abuse citizens, prisoners, and detainees. Outspoken women are also still targeted** in a very gendered way. “In February 2008 the Douala antiriot police arrested, beat, dragged on the floor, and **stripped naked** Aicha Ngo Eheg, a human rights activist with “Cri des Femmes,” a Douala-based human rights group.” **The government rarely investigates or punishes any of the officials involved. In fact, “government officials repeatedly impeded the effectiveness of local human rights NGOs during the year by harassing their members, limiting access to prisoners, refusing to share information, threatening violence, and using violence against NGO personnel. The law provides for freedom of association, but the government limits this right in practice. “Authorities sometimes refused to grant permission to hold rallies and meetings.”** Furthermore, “the conditions for government recognition of political parties, NGOs, or associations are arduous, interminable, and unevenly enforced.”

Amnesty International, *Annual Report – Cameroon (2010)*, available at <http://www.unhcr.org/refworld/docid/4c03a839c.html>. 122-124

According to this report **prison and detention conditions remain harsh** and are often life-threatening. Furthermore members of security forces implicated in human rights violations continue to enjoy impunity from the Cameroon government.

**O COUNTRY CONDITIONS MATERIALS FOR CAMEROON
2008**

Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Cameroon Country Reports on Human Rights Practices – 2008* (Feb. 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/118990.htm>. 125-150

Report indicates that the Government of Cameroon's human rights record remains poor. Security forces continue to commit **numerous human rights abuses**, including **unlawful killings, torture, beatings and other abuses**, particularly of **detainees and prisoners, including women and children**. "For example, on March 4, during his trial in Douala, Bernard Songo, a student from the University of Douala arrested during the February riots, **reported that police officers severely beat him and two co-detainees in the judicial police precinct cells.**" Journalists covering the trial reported that **evidence of the beatings was visible on the victims' bodies.** In addition, **prison conditions remain "harsh and life threatening."** There were incidents of prolonged and sometimes incommunicado pretrial detention and infringement on citizens' privacy rights. The government restricted citizens' freedoms of speech, press, assembly, and association, and harassed journalists.

Amnesty International, *Annual Report – Cameroon (2009)*, available at <http://report2009.amnesty.org/en/regions/africa/cameroon>. 151-153

According to the report **Cameroonian security forces killed as many as 100 people during protests** against the government. Amnesty reports the some people were **shot in the head at point-blank range**. Furthermore, security officers **shot and killed fifteen individuals when some prisoners escaped from a state prison** including Rene Bouyam someone who hid one of the prisoners and the prisoner they found in Rene's home. As part of a strategy to stifle opposition, the government perpetuated and condoned human rights violations including arbitrary arrests and unlawful detentions.

Amnesty International, "Cameroon: Impunity Underpins Persistent Abuse" (Jan. 2009), available at <http://www.amnesty.org/en/library/info/AFR17/001/2009/en>. 154-203

This report highlights examples of the **systematic torture of suspects by police and gendarmes after their arrest**. The perpetrators almost always enjoying impunity. According to the report **"some victims of torture have died in custody."** Furthermore it reports "severe overcrowding in prisons, with life threatening conditions amounting to cruel, inhuman and degrading treatment."

P COUNTRY CONDITIONS MATERIALS FOR CAMEROON 2007

Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Cameroon Country Reports on Human Rights Practices – 2007* (Mar. 2008), available at 204-229

<http://www.state.gov/g/drl/rls/hrrpt/2007/100470.htm>.

Report describes the continued poor human rights record of the Government of Cameroon. Numerous human rights abuses occurred from security forces including: **unlawful killings, arbitrary arrests, torture, beatings**, and other abuses, particularly of detainees. Women detainees were subjected to abuse and were routinely placed in overcrowded complexes with men. **Rape and sexual harassment are rarely investigated and prosecuted by the police and courts.** Detainees were subjected to degrading treatment and forced to strip, and stay in unsanitary conditions without access to toilets. State security informants reportedly operated on university campuses. **Police used excessive force against demonstrators that resulted in injuries, arrests and deaths of demonstrators.**

Amnesty International, *Annual Report – Cameroon (2008)*,
available at

230-231

<http://archive.amnesty.org/air2008/eng/regions/africa/cameroon.html>.

According to this report “**at least 17 prisoners were killed by members of the security forces** during an operation to recapture prisoners who had escaped from Yoko prison. Also, **three students were killed during demonstrations protesting school conditions.**”

**Q COUNTRY CONDITIONS MATERIALS FOR CAMEROON
2006**

Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Cameroon Country Reports on Human Rights Practices – 2006 (Mar. 2007)*, *available at*
<http://www.state.gov/g/drl/rls/hrrpt/2006/78723.htm>.

232-264

Report indicates that the Government of Cameroon’s human rights record remains poor. The Government continues to commit **numerous human rights abuses**, including **unlawful killings, torture, beatings** and other **abuses**, particularly of detainees and prisoners. **Security forces continue to torture, beat, and otherwise abuse prisoners and detainees, including women and children.** One form of physical abuse, known as the “**bastonnade**,” involved **beating the victim on the soles of the feet.** Security forces subject prisoners and detainees to degrading treatment, including stripping and beating them. **Prison conditions remain harsh and life threatening** by being overcrowded, unsanitary and inadequate. **During the year strikes in the state universities of Yaoundé I, Yaoundé II, and Douala deteriorated and resulted in violent confrontations between students and**

security forces. Police forcibly dispersed student demonstrators during the year, which resulted in deaths and injuries.

Amnesty International, *Annual Report – Cameroon (2007)*, available at <http://www.amnesty.org/en/region/cameroon/report-2007>. 265-268

Report provides an overview of the country conditions in Cameroon in 2004, 2005 and 2006. Report describes how scores of people were tortured by members of security forces. **Protesting students were killed and many other students detained during clashes with government forces. Several university student leaders in Yaoundé received prison sentences for their role in clashes between students and members of the security forces. At least eight Buea university students were arrested and at least two were shot dead during demonstrations in November 29, 2005. The authorities did not hold any formal investigation into the killings.**

R COUNTRY CONDITIONS MATERIALS FOR CAMEROON 2005

Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Cameroon Country Reports on Human Rights Practices – 2005* (Mar. 2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61558.htm>. 269-300

Report describes **numerous unlawful killings by security forces**, including violence, rape and discrimination against women. Although the law prohibits such practice, **security forces continued to regularly beat, torture and abuse prisoners and detainees.** In April, 2005, security forces shot and killed two university students during a protest and strike in Buea. A third student died of wounds she sustained during the clash and many others were taken to the hospital as a result of security forces' use of tear gas and water cannons. **No action was taken against the members of security forces who forcibly dispersed demonstrations in 2003 and 2004.** The government did not effectively enforce laws against the **assault on women** and there were **no gender-specific assault laws. The problem of rape became acute, especially in Douala and Yaoundé.** Customary law is more discriminatory against women; civil laws protecting women often were not respected.

Amnesty International, *Annual Report – Cameroon (2006)*, available at <http://www.unhcr.org/refworld/country,,AMNESTY,,CMR,,447ff7a311,0.html>. 301-303

Report states that human rights defenders are harassed, assaulted and detained in life threatening conditions. **Women remain without adequate protection in law against violence.**

Clovis Atatah and Kini Nsom, “Troops Stop Striking Yaoundé Students,” *Afrika News Update* (Dec. 05, 2005), *available at* <http://www.afrika.no/Detailed/10979.html>. 304-306

The article recounts that **anti-riot troops brutalized striking University of Yaoundé I students**, seriously injuring one student who was rushed to the hospital. **Police and gendarmes attacked about 3000 demonstrating students on campus.** The president and deputy of the ADDEC were brutalized and taken into detention at the Gendarmerie Headquarters in Yaoundé. Following the incident, the **university campus looked like a place under siege, with armed gendarmes and policemen on campus.**

Kini Nsom, “Student Leaders Still Detained,” *The Post Online* (Dec. 05, 2005), *available at* http://www.postnewsline.com/2005/12/student_leaders.html. 307-311

Article describes how two **student leaders were arrested, brutalized and dragged into detention after gendarmes disrupted a meeting** of the Cameroon Association for the Protection of Students’ Rights, known by its French acronym as ADDEC. Calls by students on the authorities to release their colleagues have fallen on deaf ears. The situation continued to breed **tension** on the Yaoundé’s university campus that has been **invaded by troops.**

Association for the Defense of Cameroonian Students’ Rights “Who We Are” Statement, (Oct. 13, 2005) *available at* <http://addec.over-blog.com/article-1001851.html>. 312-314

The ADDEC statement listing its **objectives and goals**, mainly a **reform of the education system** to allow all Cameroonians equal access to education regardless of their financial means, gender, tribal affiliation or religion. The statement emphasizes ADDEC’s **dedication to obtain its goals through peaceful means.**

Peter Mu-nyete, “Dschang University Students On Strike,” *The Post Online* (May 13, 2005), *available at* http://www.postnewsline.com/2005/05/strongdschang_u.html. 315-317

Article provides evidence that in May 2005, **students** of the University of Dschang have joined in the **nation-wide strike** after their sister **universities of Yaoundé I, Douala and Buea** respectively. **Protesting**

students issued the following **grievances**: total cancellation of registration fees, the construction of public toilets on campus and installation of portable water points on campus among other grievances. **Rector bribed** some students with the sum of FCFA 5000 each to **spy on those leading the strike**.

Mirabel Azangeh Tandafor, “Unity Is Strength-ADDEC SG,” *The Post Online* (May 10, 2005), available at http://www.postnewsline.com/2005/05/strongunity_is_.html. 318-322

This article provides evidence that Jacques Missi Balla, **Secretary General of the ADDEC, masterminded a student strike at the University of Yaoundé, which started in April 2005**. He recounts that there were at least 1500 gendarmes on campus and over 600 policemen. **They were maltreating students and firing teargas canisters**. Two students were killed at this time at the University of Buea and multiple arrests took place at the Universities of Doula, Yaoundé, Buea and Dschang. **Mr. Balla was molested by the police and was afraid he would die before he got medical attention**. The President of ADDEC was also arrested.

Unrepresented Nations and Peoples Organization (UNPO) Press Release, “Southern Cameroons: National Council Condemns Student Killings,” (May 05, 2005) available at <http://www.unpo.org/article/2441>. 323-324

This article provides evidence that gendarmes murdered two students during the **student strike at the University of Buea on April 27, 2005**. The **students** who started the strike, pledged to make it **peaceful** for the purpose of **demanding for improved conditions for effective learning**. They joined their colleagues of the University of Yaoundé who had been on strike. Gendarmes and police used **teargas, batons, gun boots and bullets to disperse the unarmed students, who were armed with a catalogue of legitimate demands**. Armed troops took over the University campus, invading students’ hostels, looting and seizing valuables, such as cell phones, jewels and TV sets. **Although the right to peaceful strike is protected by the law and constitution of Cameroon**, university officials with the help of government forces continue to **widely disregard it**.

S COUNTRY CONDITIONS MATERIALS FOR CAMEROON 2004

Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Cameroon Country Reports on Human Rights Practices – 2004* (Feb. 2005), available at 325-353

<http://www.state.gov/g/drl/rls/hrrpt/2004/41592.htm>.

Report states that this year the Government of Cameroon continued to commit numerous **serious human rights abuses**, such as **unlawful killings, regular torture, beatings** and other abuses of persons, particularly detainees and prisoners. Prison conditions remained harsh and life threatening. **State security informants operated on university campuses**. Professors stated that participation in opposition political parties would severely hinder their professional opportunities and advancement. **During the year, free political discussion at Yaoundé's universities was hindered by armed government security forces that harassed students**. Women did not enjoy the same rights and privileges as men.

**T COUNTRY CONDITIONS MATERIALS FOR CAMEROON
2003**

Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Cameroon Country Reports on Human Rights Practices – 2003* (Feb. 2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27716.htm>.

354-378

According to this report, the security forces continued to use excessive, lethal force against private citizens and committed unlawful killings during the year. Security forces subjected detainees to degrading treatment, including stripping and confinement to severely overcrowded cells. Police and gendarmes often beat detainees to extract confessions. State security informants operated on university campuses. **At Yaoundé's universities, armed government security forces harassed students.**

**U COUNTRY CONDITIONS MATERIALS FOR CAMEROON
2002**

Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Cameroon Country Reports on Human Rights Practices – 2002* (Mar. 2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18172.htm>.

379-407

Report indicates that although the law prohibits such practices, security forces, including Operational Command, continued to torture, beat, and otherwise abuse prisoners and detainees, including women, children and elderly persons. **Free political discussion at the University of Yaoundé and Yaoundé II was hindered. On May 27, gendarmes stormed at Yaoundé II university dormitory and arrested five students who were members of a student group that had voiced**

grievances against the administration. The University failed to validate some of the students' previous courses, which barred them from registering for the third year curriculum. **The students who passed out anti-University literature later became suspects and were arrested. They were held in police custody for two days.**

V **COUNTRY CONDITIONS MATERIALS FOR CAMEROON
2001**

Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Cameroon Country Reports on Human Rights Practices – 2001* (Mar. 2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8285.htm>.

408-444

This report indicates that the Government's human rights record remained poor and it continued to commit numerous serious abuses. Security forces tortured, beat, raped and otherwise abused detainees and prisoners. Prisons remained seriously overcrowded, unsanitary and inadequate. **Although there were no legal restrictions on academic freedom, state security informants operated on university campuses. Free political discussion at the University of Yaoundé was dampened by the presence of armed government security forces.**

Criminal History Chart

Respondent's Name: John Smith
Respondent's A Number: 123-456-789

SAMPLE

Tab, Pages	Court Docket No.	Charges	Disposition	Immigration Consequences
T, 785-788	97CF0060	<p>Cal. H. & S. Code § 11351: Poss'n of narcotic for sale</p> <p>Cal. H. & S. Code § 11378: Poss'n of controlled substance for sale</p>	<p>Guilty plea entered for both counts on 01/21/1997. 120 days jail, 3 years probation.</p> <p>Probation revoked after re-arrest for vehicle theft and sentenced to 16 months prison on 01/02/1998.</p>	Not a particularly serious crime for withholding purposes.
T, 789-792	97CF2547	<p>Cal. Pen. Code § 487(D): Grand theft</p> <p>Cal. Veh. Code § 10851(A): Vehicle taking</p>	<p>Guilty plea entered for both counts on 12/15/1997. 16 months prison.</p>	Not a particularly serious crime for withholding purposes.
T, 793-800	05NF3781	<p>Cal. H. & S. Code § 11350(a): Poss'n of controlled substance</p> <p>Cal. H. & S. Code § 11550(a): Misd. under the influence of a controlled substance</p>	<p>Guilty plea entered for both counts on 10/06/2005. 3 years probation.</p> <p>Probation revoked for violation and sentenced to 180 days jail on 05/15/2006.</p>	Not a particularly serious crime for withholding purposes.

Criminal History Chart

Respondent's Name: John Smith

Respondent's A Number: 123-456-789

			Probation revoked after re-arrest for being under the influence of alcohol and sentenced to 90 days jail on 01/10/2007.	
T, 801-806	07-00302	<p>Cal. Penal Code § 647(f): Misd. under the influence of alcohol.</p> <p>Cal. Penal Code § 148.9(a): Misd. false representation to police officer.</p>	Guilty plea entered on 01/02/2007. 30 days jail, 3 years informal probation.	Not a particularly serious crime for withholding purposes.

Judy London
Public Counsel
610 S. Ardmore Ave.
Los Angeles, California 90005
Tel.: (213) 385-2977, ext. 103
Fax: (213) 385-9089

SAMPLE

Pro Bono Attorney for Respondents

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
LOS ANGELES IMMIGRATION COURT

In the Matters of:)	
)	File Nos.: A xxx-xxx-xxx
John Doe,)	A yyy-yyy-yyy
Jane Doe,)	A zzz-zzz-zzz
Jimmy Doe)	
)	
In Removal Proceedings)	
_____)	

Immigration Judge Ashley A. Tabbador

Next Hearing: March 6, 2008 at 9:00 a.m.

RESPONDENTS' WITNESS LIST

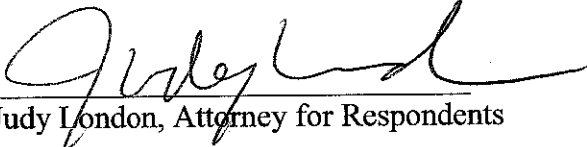
Respondents, through counsel, intend to call the following witnesses in support of their claims for asylum, withholding of removal, and relief under the Convention Against Torture:

- 1) Respondent John Doe (English) – estimated length of direct examination: 90 minutes.
- 2) Respondent Jane Doe (English) – estimated length of direct examination: 60 minutes.
- 3) Respondent Jimmy Doe (English) – If necessary, Respondent Jimmy Doe will be called to testify concerning his fears of persecution. The estimated length of his direct examination if it becomes necessary is 30 minutes.
- 4) Expert Witness Ken Louria– estimated length of direct examination: 40 minutes. He is a United States citizen and will testify in English. His psychological evaluation of Respondent John Doe and curriculum vitae are attached as Exhibits B and C to the packet titled Exhibits Filed In Support of Respondent John Doe’s Claims for Asylum, Withholding and CAT Relief. His psychological evaluation of Respondent Jane Doe is attached as Exhibits G to the separately filed packet titled Supplemental Exhibits G-J Filed In Support of Jane Doe’s Applications for Asylum, Withholding of Removal and CAT Relief.

Summary of Ken Louria's Testimony: he will testify that he has performed a psychological evaluation of Respondent John Doe and Respondent Jane Doe and diagnosed each Respondent with post traumatic stress disorder. He will describe the symptoms he observed leading to the diagnosis and explain why he finds both Respondents highly credible.

Dated: January 25, 2009

Respectfully submitted,



Judy London, Attorney for Respondents

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THE PUBLIC INTEREST LAW OFFICE OF THE LOS ANGELES COUNTY AND BEVERLY HILLS BAR ASSOCIATIONS
The Southern California Affiliate of The Lawyers' Committee for Civil Rights Under Law

August 30, 2004

Court Clerk
Immigration Court
Executive Office for Immigration Review
606 S. Olive Street, 15th Floor
Los Angeles, California 90014

Re: _____, A#:

Dear Clerk:

I represent the above referenced Respondent. I am requesting an appointment at your office to review the record of proceedings in this matter. I am enclosing my Notice of Entry of Appearance.

Please contact me at your earliest convenience so that I may arrange a date to conduct this review. Thank you very much for your assistance with this matter.

Very truly yours,

Katka Werth
Staff Attorney
Immigrants' Rights Project
(213) 385-2977 ext. 126

Enclosure

SAMPLE

attach EOIR-21

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LOUISA RAFTI



**INSTRUCTIONS FOR SUBMITTING CERTAIN APPLICATIONS IN IMMIGRATION COURT
AND FOR PROVIDING BIOMETRIC AND BIOGRAPHIC INFORMATION TO U. S. CITIZENSHIP AND IMMIGRATION SERVICES**

** If you are filing both an I-589 Form and any additional forms (such as I-485, EOIR-40, EOIR-42A, EOIR-42B, or I-881), you must follow BOTH INSTRUCTIONS A & B.*

A. Instructions for Form I-589 (Asylum and for Withholding of Removal)*
In addition to filing your application for asylum and supporting documents with the Immigration Court, you must complete the following requirements before the Immigration Judge can grant relief or protection in your case:

SEND these 3 items to the address below:

- (1) A clear copy of the first three pages of your completed Form I-589 (Application for Asylum and for Withholding of Removal) that you will be filing or have filed with the Immigration Court, which must include your full name, your current mailing address, and your alien number (A number). (Do Not submit any documents other than the first three pages of the completed I-589).

- (2) A copy of Form EOIR-28 (Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court) if you are represented, and

- (3) A copy of these instructions.

USCIS Nebraska Service Center
Defensive Asylum Application With Immigration Court
P.O. Box 87589
Lincoln, NE 68501-7589

Please note that there is no filing fee required for your asylum application.

After the 3 items are received at USCIS Nebraska Service Center, you will receive:

- A USCIS receipt notice in the mail indicating that USCIS has received your asylum application, and
- An ASC notice for you, and separate Application Support Center (ASC) notices for each dependent included in your application. Each ASC notice will indicate the individual's unique receipt number and will provide instructions for each person to appear for an appointment at a nearby ASC for collection of biometrics (such as your photograph, fingerprints, and signature). If you do not receive this notice in 3 weeks, call (800) 375-5283. If you also mail applications under Instructions B, you will receive 2 notices with different receipt numbers. You must wait for and take both scheduling notices to your ASC appointment.
- You (and your dependents) must then:
 - Attend the biometrics appointment at the ASC, and obtain a biometrics confirmation document before leaving the ASC, and
 - Retain your ASC biometrics confirmation as proof that your biometrics were taken, and bring it to your future Immigration Court hearings.

IMPORTANT: Failure to complete these actions and to follow any additional instructions that the Immigration Judge has given you could result in a delay in deciding your application or in your application being deemed abandoned and dismissed by the court.

B. Instructions for Form(s) I-485, EOIR-40, EOIR-42A, EOIR-42B, or I-881*
You must complete the following requirements before the Immigration Judge can grant relief in your case:

SEND these 5 items to the address below:

- (1) A clear copy of the entire application form that you will be filing or have filed with the Immigration Court. (Do not submit any documents other than the completed form itself).

- (2) The appropriate application fee. (The fee can be found in the instructions with the application, the regulations, and at www.uscis.gov or for the EOIR forms, at www.usdoj.gov/eoir).

- (3) The \$70 USCIS biometrics fee.

- (4) A copy of Form EOIR-28 (Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court) if you are represented, and

- (5) A copy of these instructions.

USCIS Texas Service Center
P.O. Box 852463
Mesquite, Texas 75185-2463

Both fees must be submitted in the form of a check or a money order (or 2 separate checks/money orders) and be made out to: "Department of Homeland Security."

After the 5 items are received at the USCIS Texas Service Center, you will receive:

- A USCIS notice with your USCIS receipt number and with instructions to appear for an appointment at a nearby Application Support Center (ASC) for collection of your biometrics (such as your photograph, fingerprints, and signature). Your dependents will receive separate notices if they are required to provide biometrics. If you do not receive this notice in 3 weeks, call (800) 375-5283. If you also apply for asylum, take both scheduling notices to your ASC appointment (see side A).
- You (and your dependents) must then:
 - Attend this biometrics appointment at the ASC, and obtain a biometrics confirmation document from the ASC.
 - File the following with the Immigration Court within the time period directed by the Immigration Judge: (1) the original application Form, (2) all supporting documentation, and (3) the USCIS notice that instructs you to appear for an appointment at the ASC, and serves as a receipt for your filing fees, and
 - Retain your ASC biometrics confirmation as proof that your biometrics were taken, and bring it to your future Immigration Court hearings.

IMPORTANT: Failure to complete these actions and to follow any additional instructions that the Immigration Judge has given you could result in a delay in deciding your application or in your application being deemed abandoned and dismissed by the court.

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 The Southern California Affiliate of The Lawyers' Committee for Civil Rights Under Law

Via Certified Mail

April 1, 2011

USCIS Nebraska Service Center
 Defensive Asylum Application with Immigration Court
 P.O. Box 87589
 Lincoln, NE 68501-7589

Re: Frank Jones (A#: 012-345-678)

To Whom It May Concern:

I am *pro bono* counsel to Frank Jones (A#: 012-345-678) in his asylum case before the Los Angeles Immigration Court. Enclosed please find the following:

1. A copy of the first three pages of Mr. Jones Form I-589,
2. A copy of Form EOIR-28,
3. A copy of USCIS' Instructions for Submitting Certain Applications in Immigration Court and for Providing Biometric and Biographic Information to USCIS.

There is no filing fee required for the submission of an asylum application, or to comply with biometrics procedures. Please issue Mr. Jones' a biometrics appointment, and send notice of the appointment date to:

Talia Inlender
Public Counsel
610 S. Ardmore Ave.
Los Angeles, CA 90005

If you have any questions or concerns, please contact me at: (213) 385-2977, ext. 235 or tinlender@publiccounsel.org.

Sincerely,

Talia Inlender
 Staff Attorney

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**INFORMATION ON OBTAINING A BIOMETRICS APPOINTMENT FOR AN
ASYLUM APPLICANT IN REMOVAL PROCEEDINGS
IF THE APPLICANT PREVIOUSLY COMPLETED BIOMETRICS
VIA THE PROCEDURE THROUGH THE NEBRASKA SERVICE CENTER.**

The biometrics results are valid for 15 months from the date your client appears for biometrics processing at an Application Support Center. As a reminder, every applicant who is filing an asylum application in removal proceedings in Immigration Court has to comply with a requirement of sending a packet of documents to the USCIS' Nebraska Service Center in order to obtain an initial biometrics appointment. Please see Appendix 3G for the complete instructions on this requirement.

If your client's biometrics have expired or will expire by the date of the client's merits hearing, you need to get your client re-fingerprinted. The U.S. Department of Homeland Security now issues appointment notices only 60 days or less prior to the hearing. Public Counsel recommends you calendar this 60-day deadline once the immigration judge schedules the merits hearing.

An appointment notice for a biometrics appointment can be obtained at **Room 8036 at 300 N. Los Angeles Street, Los Angeles, CA 90012¹**. The client will need to present the original immigration court hearing notice for her next court hearing and an identification document, if available. If possible, have the client bring a document indicating that she has an asylum case pending, as asylum applicants do not pay a fee for biometrics (applicants for other types of immigration relief generally do). Such documents include the asylum application receipt notice, appointment notice for the previous biometrics appointment, or asylum application filing with the Immigration Court's receipt stamp. The officer will issue an appointment notice for the Application Support Center closest to the client's place of residence.

Public Counsel recommends that the volunteer attorney obtain the appointment notice for her client if the client does not have a valid ID. In addition to the hearing notice and a proof of an asylum claim pending, the attorney should bring a client signed G-28 form to the Room 8036.

¹ Please note that the front entrance of the federal building at 300 N. Los Angeles is currently under construction. The building is accessible from Temple Street. Please expect delays in getting into the building.

INTERPRETER RELEASES[®]

Report and analysis of immigration
and nationality law

THOMSON
WEST

Vol. 82, No. 30 • August 1, 2005

IN THIS ISSUE

USING EXPERTS FOR ASYLUM CASES IN IMMIGRATION COURT

- by Rachael Keast* 1237
1. Senate Committee Conducts Hearing on
Immigration Reform Legislation 1243
 2. BIA Considers the Period during which Good Moral
Character Must be Shown in order to Establish
Eligibility for Cancellation of Removal 1249
 3. Federal Case Summaries 1251
 4. GAO Official Testifies Before Congress on Federal
Efforts At Combating Alien Smuggling 1255
 5. On-going Management Challenges in DHS
Agencies 1256
 6. USCIS Revises N-336, DOJ Revises EOIR-27 1257
 7. BIA Announces Address Change 1257
 8. Correction Notice 1257

USING EXPERTS FOR ASYLUM CASES IN IMMIGRATION COURT

by Rachael Keast*

WHY SHOULD I USE AN EXPERT WITNESS?

An expert witness can be useful to provide the immigration judge (IJ) with background information about an

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applicant's country or a region within it. In addition, by linking those country conditions to an applicant's particular situation, an expert can often attest to the reasonableness of his or her fear. An expert can sometimes help establish the existence of a particular social group and/or an applicant's membership in that social group.¹ Expert witnesses are not only important on country conditions or in demonstrating that the claim has merit but also on other issues relevant to the asylum determination, such as credibility, the existence of post-traumatic stress disorder (PTSD), torture, etc.

WHEN DO I NEED AN EXPERT WITNESS?

Hiring an expert witness can be costly, and those who will testify *pro bono* often have limited availability. Fortunately, in many cases, you can prepare a complete and convincing record without the use of expert testimony. Where reliable documentary evidence² is available that corroborates your client's claim, expert testimony may be unnecessary. Cases in which expert testimony may prove especially useful are those where: (1) there is a lack of documentary evidence focusing on the particular issue or geographical area; (2) conditions in the client's country are rapidly changing so current and reliable information is not available; and (3) the facts are very specific to the client, such as in cases involving psychological or physical conditions, or cultural norms as they impact the client's demeanor or ability to testify.

WHO QUALIFIES AS AN EXPERT WITNESS?

The Federal Rules of Evidence (FRE) do not govern in immigration proceedings,³ but they can provide guidance in the absence of specific statutory or regulatory rules. The federal rules on qualification of an expert witness state the following:

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Appendix 3J - 000001

have to make the argument that the testimony violates due process. Since due process is granted by the Fifth Amendment to persons against government action, not the other way around, this argument is a weak one.

If the expert's opinion is already in the record in written form, the IJ may have authority to deny a request for telephonic testimony. The First Circuit upheld an IJ's refusal to allow telephonic expert testimony where the judge had already "received and considered" the expert's statement of opinion.¹⁶ The court opined that judges must have "considerable leeway in cutting off cumulative or redundant testimony."¹⁷ Clearly, a case where an expert's opinion had *not* already been received into evidence and considered by the IJ would be distinguishable. Also, if an IJ does reject expert testimony on the grounds that an affidavit is already in the record, you should seek assurances that the affidavit will be afforded the same weight as if the expert had testified (see discussion below).

There are no other specific holdings on the admissibility of telephonic testimony in immigration proceedings, but two circuits have acknowledged the practice without criticism.¹⁸ Also, the Seventh Circuit harshly criticized an IJ recently for not allowing an expert to testify by telephone from Prague after already having ruled that she could testify by telephone from New Hampshire.¹⁹

Finally, it should be noted that it is more often than not that the government is the major proponent of telephonic testimony, and counsel for the applicant should point out that it would be inconsistent and unfair for the government to be permitted to present testimony in this manner while the applicant is not permitted.

CAN I SUBMIT AN AFFIDAVIT WRITTEN BY AN EXPERT WITHOUT HIS OR HER BEING PRESENT AT THE HEARING?

An affidavit (i.e., a sworn statement submitted under penalty of perjury) written by an expert witness is admissible in immigration court to support an applicant's claim so long as it is "relevant, material, and noncumulative."²⁰

When an affidavit is submitted by the government, however, without giving the respondent the opportunity to cross-examine the author, the test to decide whether the affidavit has been properly admitted is "whether the statement is probative and whether its admission was

fundamentally fair."²¹ The admission of such documents has been found fundamentally unfair where the government made no reasonable efforts to obtain the affiant's presence.²² The fundamental fairness standard has been used only to prohibit the government's introduction of evidence, not that of the respondent.

CAN THE IJ GIVE THE EXPERT AFFIDAVIT LESS WEIGHT IF THE EXPERT IS NOT AVAILABLE FOR CROSS-EXAMINATION?

In the Ninth Circuit, the IJ must have "specific and cogent reasons" to discount the credibility of an affidavit submitted by the respondent.²³ In *De Brown v. DOJ*,²⁴ the respondent submitted an affidavit from his relative claiming that the respondent was born in the United States. There was other evidence in the record, including a Mexican birth certificate, that severely discredited this claim. The court upheld the IJ's discounting the affidavit, citing the facts that "many years had elapsed since events referred to in affidavit, and affiant was not subject to cross-examination" as its "specific and cogent reasons."²⁵

Should the DHS or the IJ attempt to rely on this case, you can easily distinguish the nature of the two affidavits in question. First, an expert affidavit is generally current and will not require the author to remember events occurring many years ago. More to the point, an affidavit from the respondent's relative claiming that he was born in the U.S., when all other evidence showed he was born in Mexico, is inherently less trustworthy and more in need of cross-examination than an affidavit from a respected expert in the field who has no personal stake in the outcome of the case. The bare observation that the affiant is not present for cross-examination, therefore, should not suffice to reduce the weight that the affidavit is given.

There exist cases in the Third and Ninth Circuits that discount the credibility of affidavits submitted by the government against a respondent.²⁶ These cases are inapposite, however, in considering a respondent's expert affidavit, because they were decided based on the individual rights of a respondent. Not only do non-citizens have procedural due process rights in removal proceedings but also they have a statutory right to cross-examine witnesses presented by the government.²⁷ Since neither of these rights is granted to the DHS,²⁸ reliance by the IJ on these cases would be error.

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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.⁴

An expert witness in an asylum case should be a person who has studied the applicant's country extensively and/or traveled to or lived in the country and who has a deep knowledge of the conditions there and how they may affect the applicant. Often, expert witnesses are scholars who have published books or other articles about the country, but note that the FRE do not require this.⁵ The witness simply must have "knowledge, skill, experience, training, or education" that will assist the judge to understand the evidence or determine a fact in issue. A human rights advocate or public health worker, for example, with many years of working in the country could qualify as an expert and could testify as long as his or her testimony is based on "sufficient facts or data." Bear in mind, however, that an expert whose experience in the country reveals a particular political leaning may appear biased, and less credible, than one who has studied the situation academically. An expert witness in an asylum case can also be a health worker (doctor, therapist, etc.) who has knowledge, skill, experience, training, or education in identifying and treating physical and mental ailments resulting from persecution, such as post-traumatic stress disorder.

While, again, the FRE do not govern removal proceedings, Judge Posner, of the Seventh Circuit, has commented that "it would be odd for an agency to adopt an even more stringent filter for expert testimony than that used by the courts for judicial proceedings."⁶ In that case, the Seventh Circuit ruled that the exclusion of the expert's affidavit and testimony was arbitrary because there was no evidence that she was unqualified to give expert evidence.⁷

HOW DO I PROVE MY EXPERT IS QUALIFIED?

You should submit a curriculum vitae prior to the hearing that details the expert's education, experience, and research and any publications to his or her credit. In

addition, your direct examination should begin by asking the witness to highlight his or her expertise in the area. It is advisable to present such matters in writing to preserve the record for possible appeal; therefore, a general proffer of what the witness would be testifying to and why it is relevant to the case would be in order.

In addition, the practitioner should always consult the local court rules that apply to the presentation of witnesses, which sometime require that a list of witnesses must be provided a specific number of days prior to the hearing.⁸

CAN I HAVE THE EXPERT TESTIFY TELEPHONICALLY?

Live, in-court testimony is preferable to telephonic testimony because the IJ can observe the demeanor of the expert witness. There is, however, authority in several circuits for permitting telephonic testimony.⁹

The Ninth Circuit has ruled that telephonic testimony is permitted in immigration proceedings, unless it is a violation of due process.¹⁰ The court in that case found that telephonic testimony of the government's witness was fair and did not violate due process because the witness was subject to cross-examination.¹¹ The court also noted that the testimony would be allowable under the Federal Rules of Civil Procedure (FRCP), which state "the court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."¹² The court found good cause because the hearing was in San Diego and the witness was in Missouri.

Citing this Ninth Circuit case, the First Circuit recently made a similar ruling on the permissibility of telephonic testimony in *Akinwande v. Ashcroft*.¹³ As in the case above, the government's witness was subject to cross-examination, and a due process violation was therefore not found.¹⁴ Additionally, the court rejected Akinwande's argument that telephonic testimony violated 8 CFR § 1003.25.¹⁵ The court found that 8 CFR § 1003.25 referred to the alien's right to proceed and appear in person, not to in-person appearances by witnesses.

Even if the Department of Homeland Security (DHS) attempted to distinguish these cases (if, for example, the expert witness was not in another state), it would

You can also point out to the IJ that almost *all* documents submitted in immigration court are written by people who are not available for cross-examination. In fact, as the Supreme Court has noted, the Record of Deportable Alien (Form I-213), which the DHS often uses to establish alienage and initiate proceedings, is itself a hearsay document whose author is usually not present for cross-examination.²⁹ If expert affidavits are discredited because their authors are not available to be cross-examined, so should be newspaper articles, books, and human rights reports from Amnesty International and other organizations. In fact, the FRE *would* exclude such documents as inadmissible hearsay for that very reason.³⁰ In short, when the agency and courts determined that federal hearsay rules would not apply in immigration court,³¹ they did so knowing that it would mean foregoing cross-examination where federal courts would have required it. To pick and choose which documents require that the author be cross-examined is arbitrary.

Under the statute, the IJ is required to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."³² If an IJ reads this as a mandate to cross-examine an expert affiant, in addition to the arguments above, you could argue that the provision simply outlines an IJ's procedural duties when witnesses are called. Here, the expert has not been called as a witness by either side, and the affidavit is offered as documentary evidence that need only be "receive[d]."

DOES THE AFFIDAVIT HAVE TO BE AN ORIGINAL OR CAN I SUBMIT A COPY?

Under the FRE, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstance it would be unfair to admit the duplicate in lieu of the original."³³ If an IJ ignores this rule because the FRE do not apply in immigration court, you can point out that the nonapplicability of the FRE is meant to be a "relaxation" of "strict" federal rules³⁴ and should not be used to tighten them. Unless there is a genuine question as to the authenticity of the copy, the FRE provide a strong argument for its admission. The same argument can be made for any signed translation that may accompany the affidavit. The EOIR regulation setting forth the requirements for a certified translation does not on its face require that the document or signature be original.³⁵

However, it is best practice to submit the original affidavit if it is available.

CAN I GET A CHANGE OF VENUE TO ALLOW AN EXPERT WITNESS TO TESTIFY?

In *Matter of Bader*, the Board upheld an IJ denial of a respondent's motion to change venue for availability of expert testimony on the issue of moral turpitude.³⁶ In the denial, however, the Board provided useful hints on how such a motion may have been granted. Specifically, the Board pointed out that:

neither the witness' identity nor his qualifications were presented to the immigration judge. Respondent made no attempt to submit an offer of proof related to the witness' testimony and qualifications, or to state his opinion by way of an affidavit. The respondent has at no time stated that his witness would have concluded that [Respondent's conviction] did not involve a crime of moral turpitude.³⁷

The opinion suggests that, had such evidence been presented with the change of venue motion, the results may have been different.

The Ninth Circuit in *Baires v. INS* reversed and remanded a case where the IJ denied a change of venue from Florence, Arizona, despite the fact that the respondent's residence, counsel, expert witness, and two other witnesses were in San Francisco.³⁸ Without the ability to present this evidence, Baires was deprived of the fair opportunity to prepare and present his case. Compare this case, however, to a D.C. Circuit case that examined *Baires* but came to the opposite conclusion because the witnesses in the case were unnamed.³⁹

HOW MUCH CONSIDERATION DO JUDGES GIVE TO EXPERT TESTIMONY?

Even where expert testimony and/or affidavits are admitted, courts can vary in their application of the testimony to the claim of past or future persecution. The following is a survey of several cases and their respective treatment of expert testimony. It should be remembered, of course, that the value of the expert testimony will depend on how well it fits with the facts of the case and how well it is presented to the IJ.

Ninth Circuit. The Ninth Circuit has been somewhat inconsistent in its approach to expert testimony, especially on the question of whether testimony about a group in general can link to the individual's fear of persecution. In *Ramirez-Rivas v. INS*, an expert testified that military death squads in El Salvador often targeted and killed relatives of members of guerrilla organizations.⁴⁰ She also testified that the respondent's having visited her guerrilla relatives in prison probably placed her name on a list of military targets. The following statement of the court seems key: "Prof. Karl's testimony linked Ms. Ramirez's conduct to larger patterns of politically motivated violence to show that her conduct endangered her personally."⁴¹

Six years later, however, the court ignored testimony of three expert witnesses in the case of the daughter of a retired Filipino military police officer who combated terrorist groups.⁴² All three experts testified that the New People's Army (NPA) and the Moro National Liberation Front (MNLF) targeted innocent family members of former government officials and that the respondent would be at risk of retaliation in the Philippines.⁴³ Yet, as the dissent points out, the majority "ignored this very substantial and admittedly credible evidence" and found that there was "no indication of a threat to a person in Ms. Aruta's situation."⁴⁴

In *Avetova-Elisseva v. INS*, the respondent introduced an expert affidavit as well as live testimony. The IJ excluded the live testimony, calling it "cumulative" given that the affidavit was already in the record.⁴⁵ The court reversed the IJ's denial of asylum and remanded, noting that "[i]t is particularly troubling to find Dr. Papazian's opinions, which were the most current and particularized in the record and hence the most salient evidence as to Avetova's potential future in Russia, discounted in that fashion."⁴⁶

Recently, the Ninth Circuit gave significant weight to a Latin American history and culture professor who testified that homosexual men who "assume the stereotypical 'female'...role" are subject to greater abuse in Mexican society than others.⁴⁷ This testimony led the court to conclude that the respondent was a member of the particular social group "of gay men in Mexico with female sexual identities."⁴⁸ The professor was also able to place the respondent within that social group and concluded, and the court so held, that he would face persecution if forced to return to Mexico.

Other Circuits. The Third Circuit recently remanded a case to the BIA to decide the issue of well-founded fear of persecution with the following instruction:

We find Dr. Dicklich's testimony to have been important regarding a number of aspects of Lukwago's claims. However, her testimony is not discussed in the BIA's opinion and we are not certain to what extent the BIA took it into account. Obviously, as we are remanding, the BIA should give due consideration to this evidence if it did not do so previously.⁴⁹

In another recent Third Circuit case, the court remanded to the BIA finding that:

The BIA abused its discretion in approving sub silentio the IJ's decision to reject [the expert's] testimony regarding the then-current political conditions in the Ukraine.⁵⁰

These cases can be used, at least in the Third Circuit, to argue that expert testimony must be considered where it is probative.⁵¹

In *Castaneda-Hernandez v. INS*,⁵² the Sixth Circuit reversed the BIA, noting in particular that the BIA gave too much weight to a one-paragraph Department of State advisory opinion that simply stated that the respondent did not have a well-founded fear of persecution in El Salvador. In doing so, said the court, the BIA overlooked the credible testimony of three expert witnesses, professors at Harvard and American Universities, and a journalist. The court remanded so that the BIA could consider this testimony.⁵³ If nothing else, this case can be the basis for arguing that it is error not to *consider* expert testimony.

The First Circuit decided a similar case where the BIA again relied too heavily on a Department of State advisory opinion.⁵⁴ The court explained that while:

State Department opinions receive considerable weight in the courts because of the State Department's expertise[.] Gailius' expert also possessed a high degree of expertise, including both academic credentials and practical direct experience working in post-independence.⁵⁵

The court remanded, ordering the BIA to consider the issue of threats to the respondent that it had failed to do in its decision.⁵⁶

In *Eta-Ndu v. Gonzales*,⁵⁷ the Eighth Circuit recently ignored what the dissent termed the “critical and uncontroverted testimony”⁵⁸ of an expert witness and affirmed the BLA’s denial of asylum to a Cameroonian man fleeing persecution on the basis of his affiliation with an opposition party. The dissent found:

a complete absence of any explanation as to why the IJ, BIA, and majority failed to acknowledge the thrust of [the expert’s] testimony, which was highly probative.⁵⁹

Notes

- ¹ See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1089 (9th Cir. 2000).
- ² BIA cases have considered various sources of documentary evidence when they have been submitted, including Department of State reports, Amnesty International reports and newspaper articles, among others. See, e.g., *In re J-E-*, 23 I. & N. Dec. 291, 306-09 (BIA 2002). The IJ will likely give more weight to articles and reports from well-known sources with a reputation for trustworthiness than to those whose source is unidentified or unfamiliar.
- ³ *Matter of P-N-*, 8 I. & N. Dec. 456, 457 (BIA 1959); *Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992); *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974); *Dallo v. I.N.S.*, 765 F.2d 581, 586 (6th Cir. 1985).
- ⁴ FRE 702 (2004).
- ⁵ See also *Niam v. Ashcroft*, 354 F.3d 652, 659 (7th Cir. 2004).
- ⁶ *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004).
- ⁷ *Id.*
- ⁸ In a recent case, the Sixth Circuit found that the immigration judge did not violate due process in refusing to allow an expert witness to testify when the record showed that the immigration judge based her decision on “the fact that the [applicant’s] counsel failed to obtain, in advance of the removal hearing, an order from the IJ permitting the admission of expert testimony. Singh has failed to demonstrate how a requirement that a party obtain an IJ’s advance permission to present expert witness testimony during a removal proceeding effects a violation of due process, and thus we decline to grant Singh relief on this ground.” *Singh v. Ashcroft*, 398 F.3d 396, 407 (6th Cir. 2005).
- ⁹ Additionally, the argument can be made that observable factors, such as demeanor and tone of voice, are less important when it comes to expert witnesses whose reliability is supposed to be based on their expertise rather than on what they claim to have witnessed.
- ¹⁰ *Beltran-Tirado v. INS*, 213 F.3d 1179, 1185-86 (9th Cir. 2000).
- ¹¹ *Id.* at 1186.
- ¹² *Id.*; FRCP 43(a).
- ¹³ *Akinwande v. Ashcroft*, 380 F.3d 517, 522 (1st Cir. 2004).
- ¹⁴ *Id.* at 522.
- ¹⁵ *Id.* at 521-522.
- ¹⁶ *Laurent v. Ashcroft*, 359 F.3d 59, 63 (1st Cir. 2004).
- ¹⁷ *Id.*
- ¹⁸ *Mayo v. Ashcroft*, 317 F.3d 867, 870 (8th Cir. 2003) (“Testimony was taken by telephone and in person through the latter part of 1991 and parts of 1992.”); *Brathwaite v. INS*, 633 F.2d 657, 658 (2nd Cir. 1980) (“In seeking to meet this burden, petitioner testified before the immigration judge and submitted a psychologist’s report concerning her son; in addition, the judge conducted a telephonic interview with the psychologist during the course of the hearing.”).
- ¹⁹ *Niam v. Ashcroft*, 354 F.3d 652, 659 (7th Cir. 2004).
- ²⁰ *Matter of Exame*, 18 I. & N. Dec. 303, 305 (BIA 1982) (specifically listing the documents that the IJ wrongly excluded, including “reports by Amnesty International and the Lawyers Committee for International Human Rights, Country reports on Human Rights Practices from the United States Department of State, transcripts of court testimony of expert witnesses and Haitian individuals, and the testimony or affidavits of alleged corroborative witnesses and/or experts on conditions in Haiti.”) (emphasis added). Note that, in addition to providing authority for admitting affidavits, you could also argue for admitting transcripts from prior expert testimony in similar cases.
- ²¹ *Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983); *Nyama v. Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004); *Kiareldeen v. Ashcroft*, 273 F.3d 542, 549 (3d Cir. 2001); *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990); *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004).
- ²² See, e.g., *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989) (holding that a letter to the affiant requesting his presence at the hearing was insufficient for fundamental fairness); compare *Matter of DeVera*, 16 I. & N. Dec. 266, 268 (BIA 1977) (finding no violation of fundamental fairness where the government unsuccessfully subpoenaed the affiant).
- ²³ *Zahedi v. INS*, 222 F.3d 1157, 1164 (9th Cir. 2000).
- ²⁴ *De Brown v. DOJ*, 18 F.3d 774, 778 (9th Cir. 1994).
- ²⁵ *Id.*
- ²⁶ *Kiareldeen v. Ashcroft*, 273 F.3d 542, 549 (3d Cir. 2001) (“Though the hearsay nature of evidence certainly affects the weight it is accorded, it does not prevent its admissibility in immigration cases.”) (upholding the government’s submission of out-of-court statements by the respondent’s ex-wife regarding their relationship); *Martin-Mendoza v. INS*, 499 F.2d 918, 921-22 (9th Cir. 1974) (finding that the weight of affidavit was impaired by the government’s failure to produce the witness for cross-examination).
- ²⁷ INA § 240(b)(4)(B) [8 USCA § 1229A(b)(4)(B)] (“[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government ...”).
- ²⁸ It is true that, under the regulations, the DHS attorney has the “duty” (not the right) to conduct “interrogation, examination

- and cross-examination of the respondent or other witnesses." 8 CFR § 1240.2(a). This administrative "duty" set forth in an executive regulation cannot be equated with a person's Constitutional due process rights nor with a statutory right guaranteed by Congress.
- ²⁹ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1035-36 (1984); *Kiareldeen v. Ashcroft*, 273 F.3d 542, 549 (3d Cir. 2001).
- ³⁰ 55 A.L.R.3d 663 § 2[a].
- ³¹ *Matter of P-N-*, 8 I. & N. Dec. 456, 457 (BIA 1959); *Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992); *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974).
- ³² INA § 240A(b)(1) [8 USCA § 1229A(b)(1)].
- ³³ FRE 1003.
- ³⁴ *Matter of Khalifah*, 21 I. & N. Dec. 107, 110 (BIA 1995); see also *Matter of Koden*, 15 I. & N. Dec. 739, 749 (BIA 1976).
- ³⁵ 8 CFR § 1003.33 ("Any foreign language document offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed. Such certification must include a statement that the translator is competent to translate the document, and that the translation is true and accurate to the best of the translator's abilities.").
- ³⁶ *Matter of Bader*, 17 I. & N. Dec. 525, 526 (BIA 1980).
- ³⁷ *Id.* (footnote omitted).
- ³⁸ *Baires v. INS*, 856 F.2d 89, 93 (9th Cir. 1988).
- ³⁹ *Maldonado-Perez*, 865 F.2d 328, 335 (C.A.D.C. 1989).
- ⁴⁰ *Ramirez-Rivas v. INS*, 899 F.2d 864, 869 (9th Cir. 1990).
- ⁴¹ *Id.*
- ⁴² *Aruta v. INS*, 80 F.3d 1389, 1392-93 (9th Cir. 1996).
- ⁴³ *Id.* at 1397-98 (Hug, Chief Judge, dissenting).
- ⁴⁴ *Id.* at 1399, 1394. The majority also noted other facts that undermined Aruta's reasonable fear, but I concentrate here on the court's direct contradiction of the expert witnesses' testimony. This case, while it may be an aberration in the Ninth Circuit's treatment of expert witnesses, certainly serves to remind practitioners that experts alone cannot make the case.
- ⁴⁵ *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1199 (9th Cir. 2000).
- ⁴⁶ *Id.* at 1199, n. 18.
- ⁴⁷ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1089 (9th Cir. 2000).
- ⁴⁸ *Id.* at 1095. See also *Lolong v. Gonzales*, 400 F.3d 1215, 1220 (9th Cir. 2005).
- ⁴⁹ *Lukwago v. Ashcroft*, 329 F.3d 157, 179 (3rd Cir. 2003).
- ⁵⁰ *Leia v. Ashcroft*, 393 F.3d 427, 434 (3rd Cir. 2005).
- ⁵¹ Note, however, that in a recent Third Circuit case, the court found that the expert's testimony was "too general and broad-brushed to overcome the 1998 Country Report's account of greatly improved conditions for Armenians in Georgia" and denied a petition for review. *Ambartousiam v. Ashcroft*, 388 F.3d 85, 88 (3rd Cir. 2004).
- ⁵² *Castaneda-Hernandez v. INS*, 826 F.2d 1526, 1531 (6th Cir. 1987).
- ⁵³ *Id.*
- ⁵⁴ *Gallius v. INS*, 147 F.3d 34, 46 (1st Cir. 1998).
- ⁵⁵ *Id.*
- ⁵⁶ *Id.* at 47.
- ⁵⁷ *Eta-Ndu v. Gonzales*, 411 F.3d 977 (8th Cir. 2005).
- ⁵⁸ *Id.* at 987.
- ⁵⁹ *Id.* at 995. ■

1. Senate Committee Conducts Hearing on Immigration Reform Legislation

On July 26, 2005, the Senate Judiciary Committee held a hearing on comprehensive immigration reform.⁶⁰ This was the first judiciary committee hearing on two immigration bills recently introduced in the Senate. S. 1033, introduced by Senators Edward Kennedy (D-Mass.) and John McCain (R-Ariz.),⁶¹ and S. 1438, introduced by Senators Jon Kyl (R-Ariz.) and John Cornyn (R-Tex.).⁶² All four senators were present, as well as a second panel of witnesses that consisted of Hal Daub. President and CEO of the American Health Care Association (AHCA) and testifying on behalf of the Essential Worker Immigration Coalition, which he is a member of, Tamar Jacoby, senior fellow at the Manhattan Institute, and Gary Endelman, author and immigration practitioner from Houston, Texas. The hearing was conducted by Senate Judiciary Chairman Arlen Specter (R-Pa.).

Originally scheduled to appear were White House administration officials Michael Chertoff, Secretary of the Department of Homeland Defense, and Elaine L. Chao, Secretary of the Department of Labor. Their absence was noted with regret by Sen. Kennedy and also Sen. Specter, who stated, "the absence of the administration officials is not going to slow us down; in due course they'll have their input."

Chairman Specter began the hearing with an itinerary of the speakers, followed by background information regarding the immigration issue, which he called "one of the major problems facing the United States today." He stated that more than 11% of the U.S. population consists of those born outside of the U.S. and that statistics estimate illegal immigrants to be anywhere from 10 million to more than 13 million. He also touched upon labor's dependency of immigration, stating that the Bureau of Labor estimates that, by 2010, the U.S. will experience a

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SAMPLE

9 Attorneys for Respondent,
10 _____,

11 UNITED STATES DEPARTMENT OF JUSTICE
12 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
13 IMMIGRATION COURT
14 LOS ANGELES, CALIFORNIA

15 IN THE MATTER OF:
16 _____,

CASE NO. A _____

17 Respondent.

18 IN REMOVAL PROCEEDINGS.
19

20
21 Honorable Judge Latimore Hearing Date and Time: July 24, 2008 at 8:30 a.m.
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23 **Respondent's Objection To Providing Witnesses' Alien Registration**
24 **Numbers and Waiving Confidentiality of A-Files**
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27
28

TABLE OF CONTENTS

Page

I. INTRODUCTION..... 1

II. ARGUMENT..... 1

 A. There Is No Legal Basis for Requiring Witnesses To Disclose Their Alien
 Registration Numbers and Waive the Confidentiality of Their A-files..... 1

 B. Requiring Witnesses To Disclose Their Alien Registration Numbers and
 Waive the Confidentiality of Their A-files Violates Statutory Provisions
 Governing Proceedings in Immigration Courts..... 2

 C. Requiring Witnesses To Disclose Their Alien Registration Numbers and
 Waive the Confidentiality of Their A-files Violates Due Process..... 3

 D. The Federal Rules of Evidence's Minimal Standards of Witness Competency
 Suggest a Federal Policy Against Arbitrary Barriers To Witness Testimony..... 5

 E. Even If There Were a Legal Basis for Requiring Witnesses To Disclose Their
 Alien Registration Numbers and Waive the Confidentiality of Their A-files,
 Such Information Is Irrelevant and Inadmissible in This Case..... 6

III. CONCLUSION..... 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

1

2

3

4 *Campos-Sanchez v. INS*, 164 F.3d 448, 550 (9th Cir. 1999).....3

5 *Del Pilar Delgado v. Mukasey*, 508 F.3d 702, 706 (2nd Cir. 2007).....3

6 *Garcia v. INS*, 208 F.3d 725, 727 (9th Cir. 2000)3, 4

7 *Kerciku v. INS*, 314 F.3d 913 (7th Cir. 2005).....4

8 *Nain Tun v. Gonzales*, 485 F.3d 1014, 1026-27 (8th Cir. 2007)4

9 *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004)6

10 *United States v. Cook*, 949 F.2d 289, 293 (10th Cir. 1991).....5

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12 *Varela-Guiterrez v. Gonzalez*, 2006 U.S. App. LEXIS 27254 (9th Cir. Nov. 1, 2006).....4

13 *Zolotukhin v. Gonzales*, 417 F.3d 1073 (9th Cir. 2005)4

STATUTES

14 8 C.F.R. § 1208.6(b)3

15 8 C.F.R. § 1240.46.....2

16 8 U.S.C. § 1103(g)(2)2

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18 8 U.S.C. § 1229a(b)(4)(B) 1, 3

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20 Fed. R. Evid. 6015

21 Fed. R. Evid. 6025

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23 Fed. R. Evid. 6065

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I. INTRODUCTION

On June 23, 2008, Respondent _____ filed with this Court her witness list for the July 24, 2008 merits hearing on her application for asylum and withholding of removal. Ms. _____ files this objection in the event the Department of Homeland Security argues that, unless she provides the government with witnesses' alien registration numbers and has them sign a waiver of confidentiality with respect to their immigration case histories (known as "A-files"), the witnesses should not be able to testify at the July 24, 2008 hearing. There is no legal basis for requiring witnesses to disclose their alien registration numbers or to waive the confidentiality of their A-files as a condition of testifying before an immigration court. Furthermore, such a requirement would violate Ms. _____ statutory and constitutional rights to present evidence in support of her application for asylum.

II. ARGUMENT

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A. **There Is No Legal Basis for Requiring Witnesses To Disclose Their Alien Registration Numbers and Waive the Confidentiality of Their A-files**

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Neither the United States Code nor the Code of Federal Regulations contain any requirement that witnesses testifying before this Court must disclose their alien registration numbers or waive the confidentiality of their A-files. The statutorily-proscribed procedures for removal proceedings are located at 8 U.S.C. § 1229a. This section discusses witnesses in several places, but does not provide that witnesses testifying in support of an alien must satisfy any prerequisites before testifying in removal proceedings. *See* 8 U.S.C. § 1229a(b)(1) (immigration judge allowed to cross-examine any witness or issue subpoenas for the attendance of witnesses); *id.* § 1229a(b)(4)(B) (alien has right to cross-examine any witness); *id.* § 1229a(c)(4)(C) (standards for evaluating credibility of witness testimony). The other provisions in Title 8 of the United States Code referring to witnesses make no mention of any prerequisites for testifying and do not authorize the Court to require witnesses to disclose their alien registration numbers and waive the confidentiality of their A-files. Likewise, Title 8 of the Code of Federal Regulations contains few provisions related to witnesses and none that lend support for the requirement. The only provision regarding witnesses at removal proceedings is a

1 simple requirement that the "[t]estimony of witnesses appearing at the hearing shall be under oath or
2 affirmation administered by the immigration judge." 8 C.F.R. § 1240.46.

3 Furthermore, the recently implemented Immigration Court Practice Manual does not provide
4 a legal basis for requiring witnesses to provide alien registration numbers or waive the confidentiality
5 of their A-files. *See* Office of the Chief Immigration Judge, *Immigration Court Practice Manual*
6 (2008), available at http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm. The Practice
7 Manual does not contain any requirement that witnesses must waive the confidentiality of their A-
8 files or otherwise specify that a witness that does not provide an alien registration number or sign a
9 waiver of confidentiality should be excluded from testifying. Although it is true that the Practice
10 Manual provides that a witness list should include "if applicable, the alien registration number ('A
11 number')" of each witness,¹ *id.* at 50 (emphasis added), it does not cite to any law or regulation that
12 justifies this requirement.² Moreover, the Practice Manual only requires disclosure of alien
13 registration "if applicable." This condition is not satisfied in this case because the immigration
14 histories of Ms. _____'s witnesses have no bearing on her application and thus are not
15 applicable to her case.

16 **B. Requiring Witnesses To Disclose Their Alien Registration Numbers and Waive**
17 **the Confidentiality of Their A-files Violates Statutory Provisions Governing**
18 **Proceedings in Immigration Courts**

19 An alien has a right to "have a reasonable opportunity to . . . present evidence on the alien's
20 own behalf" in a removal proceeding. 8 U.S.C. § 1229a(b)(4)(B). In conjunction with this provision,
21 courts have recognized that immigration judges have an "affirmative obligation to help establish and
22

23 ¹ Ms. _____ filed a witness list with the Court on June 23, 2008, before the July 1, 2008
24 implementation date of the Practice Manual. The local operating procedures of the Los Angeles
25 Immigration Court, which were in effect on June 23, 2008, do not contain any provision requiring
the disclosure of witnesses' alien registration numbers. *See* Executive Office for Immigration
Review, Local Operating Procedures for Los Angeles, San Pedro and Lancaster, available at
<http://web.archive.org/web/20070305181734/www.usdoj.gov/eoir/efoia/ocij/localop/LOS.pdf>.

26 ² The Practice Manual purports to derive its authority from that of the Attorney General. *See*
27 Office of the Chief Immigration Judge, *Immigration Court Practice Manual* 1. While the
Attorney General does have statutory authority to establish regulations necessary for enforcing
and administering the provisions of the Immigration and Naturalization Act, *see*
28 8 U.S.C. § 1103(g)(2), requiring witnesses to disclose their alien registration numbers when
testifying cannot be considered "necessary" for enforcing and administering the INA.

1 develop the record." *Del Pilar Delgado v. Mukasey*, 508 F.3d 702, 706 (2nd Cir. 2007). If the Court
2 were to require witnesses supporting Ms. _____ to disclose their alien registration numbers and
3 to waive their legal right³ to the confidentiality of the information in their A-files, it would have the
4 effect of denying Ms. _____ a reasonable opportunity to present testimonial evidence on her
5 behalf and substantially limiting the development of the record.

6 This is so because any requirement of disclosure and waiver of confidentiality would have a
7 chilling effect on the willingness of potential witnesses to testify in support of asylum applicants.
8 For example, a potential witness that has their own pending asylum application would justifiably be
9 reluctant to allow the disclosure of details about past events in their home country for fear of future
10 repercussions towards themselves or family members. Witnesses may also want to avoid the
11 revelation of sensitive personal information contained in an immigration file. Moreover, even if the
12 disclosure and waiver would not have an actual impact on the legal interests or immigration status of
13 a witness, potential witnesses may nonetheless assume that their testimony will be linked with their
14 immigration file and therefore their immigration status might be jeopardized if they testify. The
15 result is that the proposed requirement, which appears to still allow witnesses to testify as long as
16 they disclose their alien registration numbers and sign waivers of confidentiality, is in reality a
17 Hobson's choice: an apparently free choice, but with no real alternative. The lack of any clear
18 justification, and in light of its potential chilling effect, makes this requirement a violation of Ms.
19 _____'s rights under 8 U.S.C. § 1229a(b)(4)(B).

20 **C. Requiring Witnesses To Disclose Their Alien Registration Numbers and Waive**
21 **the Confidentiality of Their A-files Violates Due Process**

22 "The Fifth Amendment guarantees due process in deportation proceedings." *Garcia v. INS*,
23 208 F.3d 725, 727 (9th Cir. 2000) (quoting *Campos-Sanchez v. INS*, 164 F.3d 448, 550 (9th Cir.
24 1999)); U.S. Const. amend. V. "Although the 'traditional rules of evidence do not apply in
25 immigration proceedings,' due process concerns dictate that immigration judges do not enjoy
26 complete discretion in the admission and exclusion of evidence." *Nain Tun v. Gonzales*, 485 F.3d
27 _____

28 ³ The confidentiality of a person's A-file is protected by regulation. *See, e.g.*, 8 C.F.R. § 1208.6(b)
(prohibiting disclosure of information in an asylum application to third parties).

1 1014, 1026-27 (8th Cir. 2007). "Due process requires that an alien receive a full and fair hearing."
2 *Garcia*, 208 F.3d at 727. When an alien is denied a reasonable opportunity to present evidence, "and
3 such denial results in prejudice, the constitutional guarantee of due process has been denied." *Id.* at
4 728. As described in Section B, *supra*, requiring witnesses to disclose their alien registration
5 numbers and waive the confidentiality of their A-files will create a chilling effect that will effectively
6 prevent Ms. _____ from introducing a significant amount of evidence, which in turn will
7 significantly harm her case and result in prejudice and, therefore, would deny to Ms. _____ the
8 constitutional guarantee of due process.

9 Appellate courts have held in several cases that the exclusion of witnesses by an immigration
10 judge in removal proceedings constitutes a denial of due process. In *Zolotukhin v. Gonzales*, 417
11 F.3d 1073 (9th Cir. 2005), an immigration judge excluded the testimony of several key witnesses of
12 an asylum applicant. The court, after concluding that the denial stemmed from the immigration
13 judge's prejudgment of the merits of the asylum claim, held that the exclusion of the witnesses denied
14 the alien "a full and fair opportunity to present evidence on his behalf" and thus denied the alien due
15 process. *Id.* at 1075. In *Varela-Guiterrez v. Gonzalez*, 2006 U.S. App. LEXIS 27254 (9th Cir. Nov.
16 1, 2006), the court was faced with very similar facts as in *Zolotukhin* and it reached the same
17 conclusion: that the exclusion of key witnesses resulted in a denial of due process. In *Kerciku v. INS*,
18 314 F.3d 913 (7th Cir. 2005), the court explained that:

19 [W]e distinguish between two types of situations when analyzing due process
20 challenges. In the first type of situation, the immigration judge limits the extent
21 of some testimony or frequently interrupts the applicant's presentation. These
22 limitations, however, do not violate due process because they serve to focus
the proceedings and exclude irrelevant evidence. *In the second type of
situation, by contrast, the immigration judge violates due process by barring
complete chunks of oral testimony that would support the applicant's claims.*

23 *Id.* at 917-18 (emphasis added) (citations omitted). Applying this standard to the facts of the case, the
24 court concluded that the second situation was applicable – and thus due process was violated –
25 because the immigration judge did not allow the alien to make any presentation at all. Here, as in
26 these cases, due process will be denied if the Court excludes witnesses for failure to disclose their
27 alien registration numbers and waive the confidentiality of their A-files because this will result in
28

1 barring several of Ms. _____'s key witnesses and complete chunks of oral testimony that would
2 support her claims.

3 **D. The Federal Rules of Evidence's Minimal Standards of Witness Competency**
4 **Suggest a Federal Policy Against Arbitrary Barriers To Witness Testimony**

5 Rule 601 of the Federal Rules of Evidence provides that "[e]very person is competent to be a
6 witness."⁴ Fed. R. Evid. 601. The notes to Rule 601 explain that the rule is a "general ground-
7 clearing" that eliminates outmoded reasons for preventing a witness from testifying, such as religious
8 belief or conviction of a crime. *See* Fed. R. Evid. 601, Notes of Advisory Committee on Rules.
9 From the terms of Rule 601, it is clear that the drafters of the Rules and Congress now believe that
10 there should be practically no restrictions upon who can testify in a legal proceeding. *See, e.g.,*
11 *United States v. Cook*, 949 F.2d 289, 293 (10th Cir. 1991) (explaining that "that the evolution of the
12 law in the area of witness competency has resulted in federal rules that deem virtually all persons
13 competent"); *United States v. Odom*, 736 F.2d 104, 112 (4th Cir. 1984) (stating that "Rule
14 601 . . . represents, in the words of the leading commentator on the Rules, 'the culmination of the
15 modern trend . . . [that has] steadily mov[ed] towards a realization that judicial determination of the
16 question of whether a witness should be heard at all should be abrogated in favor of hearing the
17 testimony for what it is worth'" (citing Weinstein, *Evidence*, Witnesses § 601[05])).

18 Although the Federal Rules of Evidence do not mandatorily apply in immigration courts, they
19 are a guide, and where the Rules and the practice of immigration courts differ there is a distinct trend
20 in favor of admission of a greater amount of evidence in immigration proceedings. The most
21 prominent example of this trend is the differing treatment of hearsay evidence. Unlike under the
22 Federal Rules of Evidence, in immigration courts hearsay is generally admissible. This practice
23 significantly expands the amount of evidence that is admissible in immigration courts. If the Court
24 were to exclude the testimony of witnesses for failure to disclose their alien registration numbers or
25 waive the confidentiality of their A-files, it would be deviating from the Federal Rules of Evidence in
26 the opposite direction – towards restricting more evidence than other federal courts. Deviations by

27 _____
28 ⁴ The main exceptions to this rule are that judges and jurors are not allowed to serve as witnesses
and testimony must come from personal knowledge. *See* Fed. R. Evid. 605; *id.* 606; *id.* 602.

1 immigration courts that create stricter rules than used by other federal courts are invalid. *See Niam v.*
2 *Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004) (discussing the standard for expert testimony used by
3 immigration courts and stating that "it would be odd for an agency to adopt an even more stringent
4 filter for expert testimony than that used by the courts for judicial proceedings"). Given the unique
5 nature of immigration courts, particularly with respect to the difficulties aliens often face in
6 mustering adequate evidence to support their cases, such a result is incongruous and inappropriate.
7 Just as evidence of past conviction of a crime no longer prevents a person from testifying in other
8 federal courts, immigration status should not prevent a person from testifying in this Court.⁵ The
9 Court should follow the Federal Rules of Evidence's move towards eliminating arbitrary and often
10 inconsistent barriers to witness testimony – and thus towards admitting more, not less, evidence – by
11 rejecting the proposed requirement in this case.

12 **E. Even If There Were a Legal Basis for Requiring Witnesses To Disclose Their**
13 **Alien Registration Numbers and Waive the Confidentiality of Their A-files, Such**
14 **Information Is Irrelevant and Inadmissible in This Case**

15 Unlike other immigration cases, such as those involving several aliens (*e.g.*, a family) that
16 entered the United States at the same time, the immigration histories of Ms. _____'s proposed
17 witnesses are entirely unrelated to the facts of her case. The witnesses generally entered the United
18 States and obtained legal status many years before Ms. _____. *See, e.g.*, Declaration of _____
19 (July 13, 2007) (United States citizen and resident in the United States for 22 years); Declaration of
20 _____ (July 13, 2007) (lawful permanent resident of the United States and resident in the United
21 States for 11 years); Declaration of _____ (July 13, 2007) (lawful permanent resident of the United
22 States and resident in the United States for 9 years); Declaration of _____ (July 13, 2007) (lawful
23 permanent resident of the United States and resident in the United States for 5 years). If the Court
24 forces witnesses to waive the confidentiality of their immigration files, the contents of which are
25 unrelated to Ms. _____'s case, it will be creating a barrier to the presentation of highly relevant
26 evidence in order to compel the disclosure of wholly irrelevant evidence. Clearly, the alien

27 ⁵ The proposed requirement in this case is even more pernicious than consideration of criminal
28 history, since it is a burden borne only by a protected class – those of a foreign national origin.
Such a fundamentally unfair and discriminatory requirement violates the Equal Protection Clause,
because there is no legitimate governmental purpose that might justify the requirement.

1 registration numbers of Ms. _____'s witnesses are "[not] applicable" to this case, *see* Office of
2 the Chief Immigration Judge, *Immigration Court Practice Manual* 50, and thus their disclosure and
3 the related waiver of confidentiality should not be required.

4 **III. CONCLUSION**

5 For all the foregoing reasons, the Court should allow Ms. _____'s witnesses to testify
6 without requiring them to disclose their alien registration numbers or waive the confidentiality of
7 their A-files.

8 DATED: July 24, 2008

GIBSON DUNN & CRUTCHER LLP

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10
11 By: _____
J. Christopher Jennings

12 Attorneys for Respondent _____

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4 ANDREW R. KEATS, SBN 254503
5 333 South Grand Avenue
6 Los Angeles, California 90071-3197
7 Telephone: (213) 229-7000
8 Facsimile: (213) 229-7520

SAMPLE

9 Attorneys for Respondent,
10 _____,

11 UNITED STATES DEPARTMENT OF JUSTICE
12 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
13 IMMIGRATION COURT
14 LOS ANGELES, CALIFORNIA

15 IN THE MATTER OF:
16 _____,

CASE NO. A _____

17 Respondent.

18 IN REMOVAL PROCEEDINGS.
19 _____

20
21 Honorable Judge Latimore Hearing Date and Time: July 24, 2008 at 8:30 a.m.

22
23 **Respondent's Objection To Providing Witnesses' Alien Registration**
24 **Numbers and Waiving Confidentiality of A-Files**
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27
28

TABLE OF CONTENTS

Page

I. INTRODUCTION..... 1

II. ARGUMENT 1

 A. There Is No Legal Basis for Requiring Witnesses To Disclose Their Alien
Registration Numbers and Waive the Confidentiality of Their A-files..... 1

 B. Requiring Witnesses To Disclose Their Alien Registration Numbers and
Waive the Confidentiality of Their A-files Violates Statutory Provisions
Governing Proceedings in Immigration Courts 2

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Waive the Confidentiality of Their A-files Violates Due Process..... 3

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Alien Registration Numbers and Waive the Confidentiality of Their A-files,
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III. CONCLUSION..... 7

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12
13
14
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16
17
18
19
20
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25
26
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TABLE OF AUTHORITIES

Page(s)

CASES

Campos-Sanchez v. INS, 164 F.3d 448, 550 (9th Cir. 1999).....3
Del Pilar Delgado v. Mukasey, 508 F.3d 702, 706 (2nd Cir. 2007).....3
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8 C.F.R. § 1208.6(b)3
8 C.F.R. § 1240.462
8 U.S.C. § 1103(g)(2)2
8 U.S.C. § 1229a(b)(1).....1
8 U.S.C. § 1229a(b)(4)(B)1, 3
8 U.S.C. § 1229a(c)(4)(C)1
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I. INTRODUCTION

On June 23, 2008, Respondent _____ filed with this Court her witness list for the July 24, 2008 merits hearing on her application for asylum and withholding of removal. Ms. _____ files this objection in the event the Department of Homeland Security argues that, unless she provides the government with witnesses' alien registration numbers and has them sign a waiver of confidentiality with respect to their immigration case histories (known as "A-files"), the witnesses should not be able to testify at the July 24, 2008 hearing. There is no legal basis for requiring witnesses to disclose their alien registration numbers or to waive the confidentiality of their A-files as a condition of testifying before an immigration court. Furthermore, such a requirement would violate Ms. _____ statutory and constitutional rights to present evidence in support of her application for asylum.

II. ARGUMENT

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A. **There Is No Legal Basis for Requiring Witnesses To Disclose Their Alien Registration Numbers and Waive the Confidentiality of Their A-files**

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1 simple requirement that the "[t]estimony of witnesses appearing at the hearing shall be under oath or
2 affirmation administered by the immigration judge." 8 C.F.R. § 1240.46.

3 Furthermore, the recently implemented Immigration Court Practice Manual does not provide
4 a legal basis for requiring witnesses to provide alien registration numbers or waive the confidentiality
5 of their A-files. *See* Office of the Chief Immigration Judge, *Immigration Court Practice Manual*
6 (2008), available at http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm. The Practice
7 Manual does not contain any requirement that witnesses must waive the confidentiality of their A-
8 files or otherwise specify that a witness that does not provide an alien registration number or sign a
9 waiver of confidentiality should be excluded from testifying. Although it is true that the Practice
10 Manual provides that a witness list should include "if applicable, the alien registration number ('A
11 number')" of each witness,¹ *id.* at 50 (emphasis added), it does not cite to any law or regulation that
12 justifies this requirement.² Moreover, the Practice Manual only requires disclosure of alien
13 registration "if applicable." This condition is not satisfied in this case because the immigration
14 histories of Ms. _____'s witnesses have no bearing on her application and thus are not
15 applicable to her case.

16 **B. Requiring Witnesses To Disclose Their Alien Registration Numbers and Waive**
17 **the Confidentiality of Their A-files Violates Statutory Provisions Governing**
18 **Proceedings in Immigration Courts**

19 An alien has a right to "have a reasonable opportunity to . . . present evidence on the alien's
20 own behalf" in a removal proceeding. 8 U.S.C. § 1229a(b)(4)(B). In conjunction with this provision,
21 courts have recognized that immigration judges have an "affirmative obligation to help establish and

22 _____
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25 Immigration Court, which were in effect on June 23, 2008, do not contain any provision requiring
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26 ² The Practice Manual purports to derive its authority from that of the Attorney General. *See*
27 Office of the Chief Immigration Judge, *Immigration Court Practice Manual* 1. While the
28 Attorney General does have statutory authority to establish regulations necessary for enforcing
and administering the provisions of the Immigration and Naturalization Act, *see*
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8 constitutional guarantee of due process.

9 Appellate courts have held in several cases that the exclusion of witnesses by an immigration
10 judge in removal proceedings constitutes a denial of due process. In *Zolotukhin v. Gonzales*, 417
11 F.3d 1073 (9th Cir. 2005), an immigration judge excluded the testimony of several key witnesses of
12 an asylum applicant. The court, after concluding that the denial stemmed from the immigration
13 judge's prejudgment of the merits of the asylum claim, held that the exclusion of the witnesses denied
14 the alien "a full and fair opportunity to present evidence on his behalf" and thus denied the alien due
15 process. *Id.* at 1075. In *Varela-Guiterrez v. Gonzalez*, 2006 U.S. App. LEXIS 27254 (9th Cir. Nov.
16 1, 2006), the court was faced with very similar facts as in *Zolotukhin* and it reached the same
17 conclusion: that the exclusion of key witnesses resulted in a denial of due process. In *Kerciku v. INS*,
18 314 F.3d 913 (7th Cir. 2005), the court explained that:

19 [W]e distinguish between two types of situations when analyzing due process
20 challenges. In the first type of situation, the immigration judge limits the extent
21 of some testimony or frequently interrupts the applicant's presentation. These
22 limitations, however, do not violate due process because they serve to focus
the proceedings and exclude irrelevant evidence. *In the second type of
situation, by contrast, the immigration judge violates due process by barring
complete chunks of oral testimony that would support the applicant's claims.*

23 *Id.* at 917-18 (emphasis added) (citations omitted). Applying this standard to the facts of the case, the
24 court concluded that the second situation was applicable – and thus due process was violated –
25 because the immigration judge did not allow the alien to make any presentation at all. Here, as in
26 these cases, due process will be denied if the Court excludes witnesses for failure to disclose their
27 alien registration numbers and waive the confidentiality of their A-files because this will result in
28

1 barring several of Ms. _____'s key witnesses and complete chunks of oral testimony that would
2 support her claims.

3 **D. The Federal Rules of Evidence's Minimal Standards of Witness Competency**
4 **Suggest a Federal Policy Against Arbitrary Barriers To Witness Testimony**

5 Rule 601 of the Federal Rules of Evidence provides that "[e]very person is competent to be a
6 witness."⁴ Fed. R. Evid. 601. The notes to Rule 601 explain that the rule is a "general ground-
7 clearing" that eliminates outmoded reasons for preventing a witness from testifying, such as religious
8 belief or conviction of a crime. *See* Fed. R. Evid. 601, Notes of Advisory Committee on Rules.
9 From the terms of Rule 601, it is clear that the drafters of the Rules and Congress now believe that
10 there should be practically no restrictions upon who can testify in a legal proceeding. *See, e.g.,*
11 *United States v. Cook*, 949 F.2d 289, 293 (10th Cir. 1991) (explaining that "that the evolution of the
12 law in the area of witness competency has resulted in federal rules that deem virtually all persons
13 competent"); *United States v. Odom*, 736 F.2d 104, 112 (4th Cir. 1984) (stating that "Rule
14 601 . . . represents, in the words of the leading commentator on the Rules, 'the culmination of the
15 modern trend . . . [that has] steadily mov[ed] towards a realization that judicial determination of the
16 question of whether a witness should be heard at all should be abrogated in favor of hearing the
17 testimony for what it is worth'" (citing Weinstein, *Evidence, Witnesses* § 601[05])).

18 Although the Federal Rules of Evidence do not mandatorily apply in immigration courts, they
19 are a guide, and where the Rules and the practice of immigration courts differ there is a distinct trend
20 in favor of admission of a greater amount of evidence in immigration proceedings. The most
21 prominent example of this trend is the differing treatment of hearsay evidence. Unlike under the
22 Federal Rules of Evidence, in immigration courts hearsay is generally admissible. This practice
23 significantly expands the amount of evidence that is admissible in immigration courts. If the Court
24 were to exclude the testimony of witnesses for failure to disclose their alien registration numbers or
25 waive the confidentiality of their A-files, it would be deviating from the Federal Rules of Evidence in
26 the opposite direction – towards restricting more evidence than other federal courts. Deviations by

27 _____
28 ⁴ The main exceptions to this rule are that judges and jurors are not allowed to serve as witnesses
and testimony must come from personal knowledge. *See* Fed. R. Evid. 605; *id.* 606; *id.* 602.

1 immigration courts that create stricter rules than used by other federal courts are invalid. *See Niam v.*
2 *Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004) (discussing the standard for expert testimony used by
3 immigration courts and stating that "it would be odd for an agency to adopt an even more stringent
4 filter for expert testimony than that used by the courts for judicial proceedings"). Given the unique
5 nature of immigration courts, particularly with respect to the difficulties aliens often face in
6 mustering adequate evidence to support their cases, such a result is incongruous and inappropriate.
7 Just as evidence of past conviction of a crime no longer prevents a person from testifying in other
8 federal courts, immigration status should not prevent a person from testifying in this Court.⁵ The
9 Court should follow the Federal Rules of Evidence's move towards eliminating arbitrary and often
10 inconsistent barriers to witness testimony – and thus towards admitting more, not less, evidence – by
11 rejecting the proposed requirement in this case.

12 **E. Even If There Were a Legal Basis for Requiring Witnesses To Disclose Their**
13 **Alien Registration Numbers and Waive the Confidentiality of Their A-files, Such**
14 **Information Is Irrelevant and Inadmissible in This Case**

15 Unlike other immigration cases, such as those involving several aliens (*e.g.*, a family) that
16 entered the United States at the same time, the immigration histories of Ms. _____'s proposed
17 witnesses are entirely unrelated to the facts of her case. The witnesses generally entered the United
18 States and obtained legal status many years before Ms. _____. *See, e.g.*, Declaration of _____
19 (July 13, 2007) (United States citizen and resident in the United States for 22 years); Declaration of
20 _____ (July 13, 2007) (lawful permanent resident of the United States and resident in the United
21 States for 11 years); Declaration of _____ (July 13, 2007) (lawful permanent resident of the United
22 States and resident in the United States for 9 years); Declaration of _____ (July 13, 2007) (lawful
23 permanent resident of the United States and resident in the United States for 5 years). If the Court
24 forces witnesses to waive the confidentiality of their immigration files, the contents of which are
25 unrelated to Ms. _____'s case, it will be creating a barrier to the presentation of highly relevant
26 evidence in order to compel the disclosure of wholly irrelevant evidence. Clearly, the alien

27 ⁵ The proposed requirement in this case is even more pernicious than consideration of criminal
28 history, since it is a burden borne only by a protected class – those of a foreign national origin.
Such a fundamentally unfair and discriminatory requirement violates the Equal Protection Clause,
because there is no legitimate governmental purpose that might justify the requirement.

1 registration numbers of Ms. _____'s witnesses are "[not] applicable" to this case, *see* Office of
2 the Chief Immigration Judge, *Immigration Court Practice Manual* 50, and thus their disclosure and
3 the related waiver of confidentiality should not be required.

4 **III. CONCLUSION**

5 For all the foregoing reasons, the Court should allow Ms. _____'s witnesses to testify
6 without requiring them to disclose their alien registration numbers or waive the confidentiality of
7 their A-files.

8 DATED: July 24, 2008

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11 By: _____
J. Christopher Jennings

12 Attorneys for Respondent _____

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