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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:

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

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.

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 BIA’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); *Kiarelddeen 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 *Gailius 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