Practice Pointer: Challenging the Admission of Asylum Officers' Notes and Assessments as Evidence in Immigration Court

By: David Cleveland, Dree Collopy, and Hilary Han, AILA Asylum and Refugee Liaison Committee

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AILA members have reported increased use of asylum officers' notes and assessments by the Department of Homeland Security (DHS) as evidence in immigration court. Typically, DHS seeks to introduce these documents as a way to impeach the respondent and to challenge his or her credibility. DHS's introduction of and reliance on these documents in immigration court makes it all the more important for practitioners to have access to these documents prior to their clients' hearings and to be prepared to protect their clients' rights by objecting on the record. The AILA Asylum and Refugee Committee (2012-2013) has prepared this practice pointer on how to challenge the introduction and use of these documents as evidence before the immigration courts.

How Can I Obtain Copies of Asylum Officers' Notes and Assessments?

1. Prepare and File a Freedom of Information Act Request.

A good first step in attempting to obtain copies of asylum officers' notes and assessments is to file a Freedom of Information Act (FOIA) request with U.S. Citizenship and Immigration Services (USCIS). Unfortunately, however, access to asylum officers' notes and assessments through FOIA has been inconsistent at best; these documents are frequently withheld by the government, which often cites 5 U.S.C. §552(b)(5) as the applicable exemption. This "Exemption 5" of the FOIA protects "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Whether asylum officers' notes and assessments may be properly exempted and withheld remains an open legal question that is the subject of pending litigation. *See Martins v. USCIS*, No. 13-00591 (N.D. Cal. July, 3, 2013), attached to this article as an appendix. Until the law in this area is clear, practitioners are encouraged to continue requesting these documents through FOIA as a first step on behalf of their clients.

2. Prepare and File a Motion to Compel the Production of Documents.

If a FOIA request does not produce the asylum officers' notes and assessments, practitioners should consider preparing and filing a Motion to Compel the Production of Documents, especially if he or she did not represent the respondent at the asylum interview before USCIS. The motion should ask the immigration court to order DHS to share these documents with the respondent prior to the hearing. The motion should comply with the deadlines and filing requirements set forth for motions in Chapters 3 and 5 of the Immigration Court Practice Manual. The Motion to Compel the Production of Documents, which is similar to

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a Motion for Subpoena, should state the reasons why the documents are necessary; show that the party has made diligent efforts, without success, to obtain the documents; and provide the court with the proposed order. *See id.* at Ch. 4.20.

Of course, the decision to file such a motion should be made on a case-by-case basis depending on the specific circumstances and the immigration court before which you are appearing. For example, in jurisdictions where it is uncommon for DHS counsel to rely on or file asylum officers' notes and assessments, it may not be sound strategy to move to compel the production of these documents, as doing so could bring potentially harmful information to the attention of the immigration judge and DHS.

What Objections Can I Make?

If DHS counsel attempts to introduce asylum officers' notes and assessments in immigration court, practitioners should be prepared to timely object on the record, especially if they have not had the opportunity to review the notes and assessments in advance. Although the immigration courts do not follow the Federal Rules of Evidence and the admissibility of evidence is generally favored, there is authority for making evidentiary objections in immigration court. Practitioners may rely on the Immigration and Nationality Act (INA), federal regulations, the Immigration Court Practice Manual, the August 4, 2000 Operating Policy and Procedures Memorandum (OPPM) 00-01 (discussed *infra*), and case law to support objections against the admission of asylum officers' notes and assessments. Immigration judges and DHS counsel are not free to ignore these authorities, in particular the statute and regulations.

The following objections and supporting authority may be useful in challenging the admission of asylum officers' notes and assessments in immigration court:

1. The Filing of Evidence by DHS with the Court was Untimely

According to the Immigration Court Practice Manual, prior to an individual hearing for a non-detained respondent, DHS must submit evidence at least 15 days prior to the hearing and must file its responses to respondents' filings within 10 days of those documents being filed with the immigration court. *See* Immigration Court Practice Manual, Ch. 3.1(b)(ii)(A); *see also* Immigration Court Practice Manual, Ch. 4.16(a)(i) (requiring the timely-filing of exhibits). If asylum officers' notes and assessments are not filed until the day of the individual hearing (or shortly before), they do not comply with the Practice Manual and should not be accepted into evidence by the immigration judge.

Of course, DHS may accurately counter with the argument that these Practice Manual provisions do not apply to exhibits or witnesses offered solely to rebut and/or impeach. *See id.* However, as discussed below, there are plenty of other objections that can be made against the admission of asylum officers' notes and assessments into evidence.

2. The Office of the Chief Immigration Judge OPPM 00-01 Precludes the Admission of These Documents

In its Operating Policy and Procedures Memorandum (OPPM) dated August 4, 2000, the Office of the Chief Immigration Judge (OCIJ) noted certain due process concerns when an affirmative asylum application is not granted by the asylum office and is then referred to the immigration court. OCIJ stated:

> The copy of the application and supporting documents referred to the Court may not contain any annotation or other information of a deliberative nature regarding the application (other than administrative corrections to the application, as affirmed by the applicant's signature in Part H of the application).... Under no circumstances should any document containing reference to INS credibility findings be filed with the Court. If this does occur, the Court Administrator should promptly notify the INS to discontinue any such filings and return those documents to INS prior to filing the application in the ROP.

See OCIJ Memorandum, Michael J. Creppy, OPPM 00-01 at 13-14 (Aug. 4, 2000), *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf and AILA Doc. No. 00080490. *See also* OCIJ Weekly Electronic Bulletin (June 4, 2009) (reminding immigration judges of this guidance), *available at* http://www.usdoj.gov/eoir/statspub/eoiraila040308.pdf. Asylum officer notes and assessments are documents containing annotations, information of a deliberative nature, and credibility findings. Thus, they should not be filed with the court.

In an unpublished case dated June 14, 2005, the Board of Immigration Appeals (BIA) agreed that asylum officer assessments should not be admitted into evidence. *See Matter of A097-103-163* (Jun 14, 2005), *available at* http://www.lexisnexis.com/community/immigration-law/blogs/inside/archive/2006/06/29/bia-on-asylum-officer_2700_s-assessment-to-refer.aspx (last accessed on July 18, 2013). In that case, the respondent asserted that the assessment contained numerous credibility findings, and that the OCIJ's OPPM precluded the assessment from being admitted into evidence. The Board "agree[d] with the respondent that this document, which contained references to ... credibility findings, should not have been filed with the immigration court…." *Id.* at 1. The Board did not find it necessary to address the other arguments raised on appeal, and remanded the case for a new hearing.

In April 2008, AILA raised this issue with the Executive Office for Immigration Review (EOIR) headquarters, notifying EOIR that many immigration judges continued to admit asylum officer assessments into evidence in contravention of OPPM 00-01 and the unpublished BIA case of 2005. EOIR responded by quoting the OPPM, including the sentence, "[u]nder no circumstances should any document containing reference to INS credibility findings be filed with the Court." *Agenda Items for EOIR/AILA Liaison Meeting 4/3/2008* at 16-17, *available at* AILA Doc. No. 08080461. EOIR also stated that it had reminded the IJs of the OPPM via an electronic bulletin on June 4, 2007. *See id.*

This is, of course, only one possible reading of the OPPM. While the concern expressed by the OCIJ in its OPPM demonstrates that these notes and assessments may not be entirely reliable, it is possible that these statements in the OPPM only refer to the asylum office's referral of the file to the court. It may not necessarily preclude DHS from presenting these documents as evidence in a removal hearing, as those documents may certainly be relevant. Thus, it is important for practitioners not to rely solely on this OPPM language, but to also make relevant evidentiary objections to the documents.

3. Respondent Did Not Have the Opportunity to Examine and Respond to the Evidence

In objecting to the admission of asylum officers' notes and assessments, practitioners should also argue that admitting these documents into evidence is contrary to the respondent's right to examine and respond to evidence presented against him or her. *See* INA §240(b)(4)(B); 8 CFR §1240.10(a)(4). The Immigration Court Practice Manual echoes these rights, requiring that respondents be given a sufficient amount of time to examine and respond to evidence. *See* Immigration Court Practice Manual, Ch. 3.1(d)(ii).

4. The Information Contained in the Notes and Assessments Is Not Reliable

Practitioners should also object and argue that the information contained in the asylum officers' notes and assessments is inherently unreliable. *See, e.g., Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005) (noting the inherent unreliability of the asylum interview process).

Also, it is likely that DHS will not properly authenticate the documents and show its chain of custody. If the notes and assessments are copies, there should be a copy attested by the officer having legal custody of the original record or by the officer's deputy, as well as a certificate that such officer has custody of the document. Otherwise, it is not properly authenticated.

Even if the notes and assessments are properly authenticated, the documents may misquote or mischaracterize the respondent's testimony. There is no way to properly consider the reliability of these documents without the opportunity to cross-examine the asylum officer, a right that is codified by INA §240(b)(4)(B) and recognized in case law... Accordingly, it should be argued that admitting these documents into the record is fundamentally unfair and deprives the respondent of due process of law.

5. When All Else Fails…Fundamental Fairness!

The substantive due process clause of the 5th Amendment of the U.S. Constitution requires that the applicant be given a full and fair hearing on his or her claims. *See Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010); *Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 504 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168 (BIA 1972). If the admission and reliance upon any

evidence would impact the fundamental fairness of the proceedings, practitioners should not be afraid to object and argue that it deprives the applicant of due process. *Id.*

What Should I Do if the Immigration Judge Admits the Documents into Evidence?

If the immigration judge admits the asylum officers' notes and assessments into evidence over your objections, there are still ways that practitioners can protect their clients' rights and maintain these arguments for the record.

1. Request a Motion to Continue on the Record

The statute, regulations, and Immigration Court Practice Manual all require that respondents be given a sufficient amount of time to examine and respond to evidence presented against him or her. *See* INA §240(b)(4)(B); 8 CFR §1240.10(a)(4); Immigration Court Practice Manual, Ch. 3.1(d)(ii). If an immigration judge admits the asylum officers' notes and assessments as evidence on the record, practitioners should make an oral motion for a continuance of the proceedings so that the client has sufficient time to examine and respond to the evidence.

2. Exercise Your Client's Right to Cross-Examine the Asylum Officer

An asylum officer's notes and assessments are not reliable. They may contain statements that the respondent did not make or may misinterpret or mischaracterize the respondent's testimony. Thus, if these documents are going to be admitted into evidence, practitioners should insist that the respondent have the opportunity to cross-examine the asylum officer, a right that is codified in the INA and reinforced by case law. *See* INA §240(b)(4)(B) (a respondent in removal proceedings "shall have a reasonable opportunity ... to cross-examine witnesses…"). *See also Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681-82 (9th Cir. 2005); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997); *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988); *Baliza v. INS*, 709 F.2d 1231, 1233-34 (9th Cir. 1983).

If DHS is not willing to produce the asylum officer, practitioners may request that a subpoena be issued requiring the asylum officer to attend a hearing. *See* 8 C.F.R. §§1003.35, 1287.4(a)(2)(ii). A motion for a subpoena may be written or oral. *See* Immigration Court Practice Manual, Ch. 4.20. A written Motion for Subpoena must comply with the immigration court's deadlines and requirements for filing. *See id.* Whether made orally or in writing, it must: "provide the court with a proposed subpoena," "state what the party expects to prove by such witnesses…," and "show affirmatively that the party has made diligent effort, without success, to produce the witnesses…" *Id.*

Conclusion

Challenging the introduction and use of asylum officers' notes and assessments in

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immigration court is one important aspect of protecting your client's rights through zealous representation. The AILA Asylum and Refugee Committee hopes that this practice pointer makes this an easier feat for practitioners before the immigration courts.

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