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Fixing the “Proof:”

**Evidence in Immigration Court
Made Easy (Easier?)**

By Brian K. Bates

Reina & Bates Immigration and Nationality Lawyers

**123 Northpoint Dr., Suite 190
Houston, TX 77060
(281)820-6100 FAX: (281)820-6105
bbates@reinalaw.com**

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*I'm fixing a hole where the rain gets in
And stops my mind from wandering
Where it will go*

-- The Beatles, *Fixin' a Hole*

It is unpleasant at best to feel the cold rain dripping upon one's head and streaming down one's neck, which is why manmade structures generally have roofs. Evidence is the stuff from which we build our cases.¹ If there isn't enough building material, the resulting gaps expose our clients to the elements. Clients hire us to prevent that from happening to them in Immigration Court. Therefore, a fundamental understanding of the law governing evidence is essential to the removal defense attorney. This paper is intended to contribute to such an understanding.

This paper will be approach the topic in three ways. First, because much of the topic is intuitive, I would like to briefly discuss the psychology that I believe makes it so. Second, some of the basic statutes and cases that define the parameters of evidence law in Immigration Court will be addressed. Finally, I will attempt to make some tactical observations derived from the psychology and law already discussed.

I. Psychology of Judges.

Now, *there's* a presumptuous caption! Hopefully, I have your attention.² Of course, I am not an expert on psychology, so what follows is based upon my amateur, but nonetheless informed, observations of the approximately 50 Immigration Judges before whom I have appeared in over 30 years of practice.

As you probably know, there are generally two famous methods of proof: the “scientific method” and the “historical/legal” method. The “scientific method” determines truth by recreating the conditions as exactly as possible, and making it happen again. The “historical/legal” method of

¹ This concept is so fundamental that a virtual legion of metaphors were struggling within my brain for the honor of leading off this paper. This is what won. Perhaps I should consider a play-off system before starting my next CLE paper.

² And, no doubt, the attention of some of the Judges before whom I must appear (*sigh*).

proof examines the information surrounding an event to determine, as reliably as possible, what is more likely than not to have happened.

The scientific method works fine with immutable things like numbers, elements and molecules. It is inherent in the historic/legal method that, dealing with human events, we cannot make it happen exactly the same way again but can only determine what *probably* happened. The scientific method obviously can't help us determine who kidnaped the Lindbergh infant -- we can't recreate the event and learn exactly how it went down the first time.

Immigration Judges must therefore decide what *probably* happened -- or, in some cases, what probably *will* happen -- in cases before them. They must "decide whether an alien is removable" and that decision must be based "only on the evidence produced at the hearing." Immigration and Nationality Act, hereinafter "INA," §240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A). To that end, Immigration Judges "receive and consider material and relevant evidence," and rule upon objections to that evidence. 8 CFR §1240.1(c). They have the duty to administer oaths, interrogate, examine and cross-examine witnesses. INA §240(b)(1). They must "determine removability" and "determine" various relief applications. 8 CFR §1240.1(a)(1), (2).

In other words, Immigration Judges are charged with determining both the facts and applicable law of the removal case before them. In doing so, they not only rule upon the admission of evidence, they have the authority to participate in the production of that evidence. That is their job; they get paid to do it, and they do it every working day.

Anyone who has the job of an Immigration Judge must necessarily believe that he or she is capable of determining the *truth* of the matter brought before them. I remember a memorable hearing several years ago where a particular Immigration Judge³ somewhat emphatically reminded the attorneys on both sides:

"This is not a game! Not in my Court. It is a *quest for truth*."

In seeking "the truth," about anything, most people would want to examine the matter from as many angles and in as many particulars as possible. A statistician would refer to that as "sample size," and the larger the sample the more reliable the findings. Thus, Immigration Judges generally want to see *more*, rather than *less* evidence on a crucial, disputed point. Even if it is not 100% consistent, *more* evidence engenders greater confidence in determining what is *more likely* to be true.

Given that more evidence fosters greater confidence in the "quest for truth," it necessarily follows that most Immigration Judges are going to be reluctant to keep out evidence being offered for their consideration. That doesn't mean that evidence will *always* be admitted over any objection, nor that all evidence admitted will be considered of equal quality and weight. Sometimes garbage evidence is admitted into the record; that does not prevent the Immigration Judge from considering it as such and disregarding it when reaching a decision. But it does mean that trying to keep evidence

³ Anthony Rogers in Dallas, now retired. Anyone who practiced before Judge Rogers will recall just *how* memorable he could be when he wanted to be emphatic. ☺

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