

APPENDIX 8J

OBJECTIONS IN IMMIGRATION COURT

The following is a list of common objections used in immigration court and tips for using these objections throughout the course of an immigration court hearing. Making objections is an essential aspect of zealous advocacy; objecting on the record of proceedings protects clients' rights and maintains any violations of those rights as issues for appeal. Relevance and fundamental fairness are the principal evidentiary concerns in immigration court. Therefore, even though the Federal Rules of Evidence, which are based on these principles of relevance and fairness, are not binding in immigration court, they are guiding. If DHS seeks to admit evidence that has no probative value or asks questions that are not relevant to the issues in question, object! If the admission of DHS's evidence would deprive the respondent of due process or if DHS's form or manner of questioning is not consistent with a fundamental fairness, object! If DHS or the immigration judge moves for the respondent's documentary or testimonial evidence to be kept out of the record, object! *See* chapter 4.

TIPS FOR RESPONDING TO DHS OBJECTIONS TO RESPONDENT'S DOCUMENTARY OR TESTIMONIAL EVIDENCE

1. **Directly address the specific concern noted by DHS/the immigration judge.**
2. **Keeping the evidence out violates the Respondent's right to present evidence on his or her own behalf.**
 - INA §240(b)(4)(B); 8 CFR §1240.10(a)(4).
3. **The evidence is material to the Respondent's claim. Keeping it out violates fundamental fairness and deprives the Respondent of due process.**
 - Due process requires a full and fair hearing on claims and without this documentation or testimony on the record, this is not a full and fair hearing.
 - *See Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168 (BIA 1972).

TIPS FOR OBJECTING TO DHS EVIDENCE

1. **Object to the evidence and seek to keep it out of the record.**
 - Cite legal authority → the Immigration and Nationality Act, federal regulations, *Immigration Court Practice Manual*, and case law (see below).
 - When all else fails, argue that due process requires a full and fair hearing; the admission of the evidence would violate fundamental fairness.
2. **If the immigration judge admits the evidence.**
 - Request a continuance (if it is damaging and time is needed to prepare a response).
 - Request that the evidence be given less weight.

OBJECTIONS TO DHS EVIDENCE

FUNDAMENTAL FAIRNESS = THE GOLDEN RULE OF EVIDENCE IN IMMIGRATION COURT – if use of the evidence is not consistent with a fair hearing or would deprive the Respondent of due process

- See *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168 (BIA 1972).
- Due process requires a full and fair hearing on claims. See, e.g., *Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002).

RELEVANCE – if the evidence does not have probative value for the facts/issues in dispute

- Along with fundamental fairness, this is the only other bar to admissibility of evidence in immigration court. See *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999).

FOUNDATION – if DHS has not established the basis on which a document is supported

AUTHENTICATION – if DHS has not submitted evidence the document is what it claims to be

- Copies of official records submitted? → Must have attestation by the officer who has legal custody of the original and must be accompanied by a certification that it is a true copy of the document. See 8 CFR §1287.6(a).
- Official records submitted? → Must establish chain of custody.
- Certain documents are self-authenticating (certified copies of public records, statutes printed by a public authority, etc.).

RIGHT TO REVIEW AND RESPOND TO EVIDENCE – if DHS evidence is not reviewable, is illegible, or is not translated, or if evidence submitted late by DHS

- Right to review and respond to evidence presented against him or her → INA §240(b)(4)(B); 8 CFR §1240.10(a)(4).
- Late filing? → Immigration Court Practice Manual requires timely filing (unless submitted for impeachment purposes only). See ICPM 3.1(b)(ii)(A), 4.16(a)(i). Also notes right to sufficient time to review and respond to evidence. See ICPM 3.1(d)(ii).

RIGHT TO CROSS EXAMINE WITNESSES – if the affiant or creator of the document in question is not present for cross examination

- Right to cross-examine witnesses → INA §242(b)(3); 8 CFR §1240.10(a)(14).

EVIDENCE OBTAINED UNLAWFULLY / IN VIOLATION OF THE CONSTITUTION – if the evidence was obtained in violation of applicable laws, including the Constitution, the Respondent may move to suppress that evidence

- 4th Amendment prohibition against unlawful search and seizure (“the exclusionary rule”) → usually only if there is widespread abuse or egregious violations which transgress notions of fundamental fairness. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).
- 5th Amendment due process clause → if evidence obtained by coercion or other activity that violates due process. See *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
- Statutory or regulatory violations → if the actors violated the requirements of the INA and federal regulations in obtaining the evidence in question

OBJECTIONS TO DHS QUESTIONS/ANSWERS SOUGHT

RELEVANCE – if the information sought has no probative value for the facts/issues in dispute

FOUNDATION – if DHS asks about something they assume witness has personal knowledge of

COMPOUND – if DHS asks two or more questions within the framework of a single question, so it

is not clear which part the witness is answering

CONFUSING, AMBIGUOUS, MISLEADING – if a question not posed in a clear and precise manner so that the witness knows with certainty what information is being sought

OVERLY BROAD – if the answer to DHS’s question will permit the introduction of just about anything into the hearing; witness needs to know with certainty what information is sought

MISQUOTES A WITNESS OR EXHIBIT/MISCHARACTERIZES TESTIMONY – if DHS changes a few words and then asks the witness to affirm the misstatement; if DHS misquotes or mischaracterizes what a witness or exhibit says

ARGUMENTATIVE – if DHS states a conclusion and then asks the witness to argue with it, usually in an attempt to get the witness to change their mind

ASKED AND ANSWERED – if DHS asks the same thing again and again, even if rephrasing, in an attempt get the witness to answer differently

PRIVILEGED – if DHS seeks information that is subject to attorney/client privilege or the witness’s 5th Amendment privilege against self-incrimination

SPECULATION – if DHS asks the witness to guess or address a hypothetical; if DHS asks for information that is not based on witness’s first-hand knowledge

IMPROPER OPINION – if DHS asks for an opinion or answer to a hypothetical where the witness is not qualified as an expert on that subject

COMPETENCY OF WITNESS – if the witness isn’t qualified as an expert on that subject; if the witness lacks personal knowledge about the subject; if the witness was not able to observe/remember/communicate that information