Chapter 11 Evidence.

11.1 Consideration of Evidence
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11.1 Submission of Supporting Documents and Consideration of Evidence.

(a) General. A major part of your duties as an adjudicator will involve gathering, handling and evaluatin
The purpose of gathering evidence is to establish the truth or falsity of some fact or matter at issue. Th
Rules of Evidence (FRE) are a good reference point for discussions of evidence. See also *Special Age
Manual,* Appendix 11-3. You should be aware that these rules, while they may be instructive, are not s
binding in administrative proceedings. Generally, any evidence that would be admissible under the Fed
of Evidence should be admitted in administrative proceedings. But so also, generally, should any oral o
documentary evidence that is relevant and material be accepted into the administrative record. This m
particular piece of evidence must have a tendency (no matter how small) to either prove or disprove a
has a bearing on the issue at hand (materiality). Despite the relatively broad admissibility of evidence in
administrative proceeding, you should familiarize yourself with the rules of evidence relating to these
proceedings.

(b) Certain Legal Considerations. There are certain basic legal issues that you should be aware of in y
as an adjudicator. For example, the administrative record you create will often be crucial in later proce
relating to the same individual, such as a rescission of status, possible removal proceedings and relief
deportation, and investigations of fraud. The administrative record will be crucial to a special agent's ex
of any fraud or abuse of the immigration laws. The administrative record may even end up before a fed
court judge on review for abuse of discretion or in a federal tort claim or habeas case.

The Jencks Act (18 U.S.C. 3500) requires that a statement in the possession of the United States whi
made by a government witness be produced after the government witness has testified upon demand
defense. (There is no such requirement with regard to witnesses other than government witnesses.) F
the government to produce the statement will require the suppression of the testimony of that witness.
"government witness" means someone called by the government to testify at a later criminal proceedin
necessarily the administrative proceeding. Thus, anyone who provides a statement at an administrativ
proceeding is a potential government witness within the meaning of the rule. The term "statement" has
broadly defined by the courts to include, besides written and signed affidavit form statements, such ite
interview notes and tape recordings or other transcriptions of an oral statement. To avoid jeopardizing
criminal cases, the following steps should be taken:

- Retain all original notes of witness or defendant interviews;
- Retain all original notes made during surveillance operations; and
- Retain all original drafts of reports concerning interviews or surveillance operations if they are the record of the interview or surveillance.

(c) Burden of Proof and Standard of Proof. [Revised as of 01-11-2006; AD06-12]

The burden is on the petitioner to establish that he or she is eligible for the benefit sought. **Matter of B** 11 I&N Dec. 493 (BIA 1966). This means that if an alien seeking a benefit has not shown eligibility, the should be denied. The government is not called upon to make any showing of ineligibility until the alien shown that he is eligible. You may contrast this in your mind with a criminal case or with a removal hea which the government must first prove its case.

Once an applicant has met his or her initial burden of proof, he or she can be said to have made a "pri case." This means that the applicant has come forward with the facts and evidence which show that, a minimum, and without any further inquiry, he or she has initial eligibility for the benefit sought. This does that your inquiry is over. An alien may have established initial eligibility, but it is up to you to determine i any discretionary reasons why an application should be denied, or if there are any facts in the record (facts developed during the course of the adjudicative proceedings, such as during an interview) which make the applicant ineligible for the benefit. If such adverse factors do exist, it is again the applicant's b overcome these factors.

The standard of proof should not be confused with the burden of proof. *See* **Appendix 74-14**. The sta proof applied in most administrative immigration proceedings is the "preponderance of the evidence" s Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, a evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the or petitioner has satisfied the standard of proof. *See* **U.S. v. Cardozo-Fonseca**, 480 U.S. 421 (1987) ("more likely than not" as a greater than 50 percent probability of something occurring). If the director c articulate a material doubt, it is appropriate for the director to either request additional evidence or, if th leads the director to believe that the claim is probably not true, deny the application or petition.

The preponderance of the evidence standard of proof, however, does not apply to those applications a petitions where a higher standard is specified by law. The statute provides for a higher standard in so such as the "clear and convincing evidence" standard required to rebut the presumption of a prior frau marriage pursuant to section **245(e)(3)** of the Act and to determine citizenship of children born out of w pursuant to section **309(a)(1)** of the Act.

Additionally, the "preponderance of the evidence" standard does not relieve the petitioner or applicant satisfying the basic evidentiary requirements set by regulation. Therefore, if the regulations require sp evidence, the applicant is required to submit that evidence. *Cf.* **8 CFR 204.5(h)(3)** (requiring that spec objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability).

(d) Evidentiary Standards. Because the strict rules of evidence used in judicial proceedings do not app administrative proceedings, a wide range of oral or documentary evidence may be used in a visa petiti proceeding or other immigration benefit application proceeding. A copy of a public record (birth certifica marriage or divorce certificates, adoption decrees, and similar documents) is admissible if the person custody over the original records has certified the copy. For example, a copy of a divorce decree is ac the clerk of the court has certified the copy. A regulation, **8 CFR 287.6**, provides that a certified copy c public record (other than a Canadian record) should also be authenticated by a U.S. Foreign Service c the country is a party to the Hague Convention on abolition of legalization requirements for foreign pub by a higher-level official of the foreign country. [See Chapter **11.1(h)(1)** of this Field Manual and *Specia*

Field Manual, Chapter 4.6 for more information on the Hague Convention and *Special Agents Field Ma*
Appendix 4-3 for a list of signatory countries.] Note, however, that in 1990, the Service announced tha
matter of policy, it would accept copies of public records that have been certified by the custodian of t
even if they are not authenticated by a U.S. Foreign Service officer (or for signatories to the Hague Co
on abolishing legalization requirements for foreign public records, by a higher-level official of the foreig
as provided for under **8 CFR 287.6**. (See Memorandum from Gene McNary to INS Field Offices (Nove
1990), **Appendix 11-1** of this field manual.) For this reason, only the custodian of the record needs to
foreign public record in order for the foreign public record to be admissible.

(e) <u>Best Evidence Rule</u>. In adjudicating a petition or application for a benefit, you will often deal with evi
facts which are of a documentary nature, such as marriage dates, dates of birth, death, divorce, crimi
school records, etc. This often brings into play what is known as the "best evidence rule." While the be
evidence rule is not strictly applicable in an administrative proceeding, you should adhere to it as close
can. The rule states that where the contents of a document are at issue in a case, the document itself
introduced rather than secondary evidence as to its content. For example, if an issue in an interview is
on which a divorce decree became final, the divorce decree itself should be introduced, rather than a l
when the decree became final or a second marriage certificate stating the date of the first divorce. As
see, the rule provides an external basis for verifying claimed facts. In considering the rule, you should
of one major exception. When a document is a public document, the contents of that document may b
a certified copy. Also, when a document is prepared in carbon or multiple copies (as opposed to photo
created after the fact), each copy is an "original" for purposes of the rule.

(f) <u>Primary and Secondary Evidence</u>. Closely related to the best evidence rule is the concept of prima
secondary evidence. Primary evidence is evidence which on its face proves a fact. For example, the
certificate is primary evidence of a divorce. Secondary evidence is evidence which makes it more like
fact sought to be proven by the primary evidence is true, but cannot do so on its own face, without an
reference. In the above example, church records showing that an individual was divorced at a certain
be secondary evidence of the divorce. You will often encounter situations in which primary evidence is
unavailable. This gives rise to a presumption of ineligibility, which is the applicant or petitioner's burden
overcome. Title **8 CFR 103.2(b)(2)** sets out the procedures relating to unavailability of documents. A p
applicant cannot simply assert that the primary evidence does not exist. The absence of a primary rec
instead, must be proven either:

- By a written statement from the appropriate issuing authority attesting to the fact that no record ex
  be located, or that the record sought was part of some segment of records which were lost or des

- By evidence (such as an affidavit) "that repeated good faith attempts were made to obtain the requ
  document or record."

Note that Appendix C to the Department of State's Foreign Affairs Manual, which is available on the int
http://travel.state.gov/reciprocity/index.htm, provides country-specific information on availability o
foreign documents. If this Appendix shows that a particular record is generally not available in a partic
country, USCIS may accept secondary evidence without requiring the written statement from the issui
authority.

(g) <u>Testimony of Witnesses: Competency and Credibility</u>. You will frequently take testimony from witne
course of your duties. The strict evidentiary standards that would be followed in a Federal court are n
applicable in an administrative proceeding. Thus, you will usually be free to take the testimony of most
(However, you also have the authority to decline to accept testimony which is irrelevant or immaterial,
simply "overkill.") In making an evaluation of witnesses, it is helpful to be familiar with some of the conc
relating to witnesses. In order for a witness to be legally fit to testify, he or she must be competent to d
referred to as having the organic capacity to testify). Competency should be distinguished from credib
involves a witness' trustworthiness and believability. For example, a sane person who tells lies may be

competent, but not credible. An insane person who testifies insanely may be considered incompetent. Competency should be distinguished from credibility, which involves a witness' trustworthiness and be For example, a sane person who tells lies may be competent, but not credible. An insane person who insanely may be considered incompetent. In regards to competency, you should remember a few poir

- First, the witness only needs to be mentally competent at the time he is to testify. Past or future m deficiency may be relevant to credibility (believability), but does not affect a witness' ability to testif

- Also, you should note that children are not incompetent to testify merely because of their age. Age factor insofar as it renders a witness untrustworthy in his powers of observation, recollection and communication.

- A witness may be under the influence of medication or a substance which adversely affects his or to testify. If so, the taking of the testimony should be postponed (if possible) until such time as the regains his or her faculties. (Conversely, in some cases a person who is normally unable to testify certain ongoing mental problems may only be able to testify competently while under proper medic

- Finally, you should note that criminal convictions, even for the offense of perjury, do not disqualify witness, although they certainly have a bearing on credibility.

In any situation where the testimony of a witness is questionable, you should supplement the record w testimony of another witness or with other evidence relating to the same matter. In doing so you will be that your decision will stand up to review in further administrative proceedings.

(h) Documentary Evidence. Documentary evidence includes all types of documents, records and writi subject to the same considerations regarding competency and credibility as is testimonial evidence, di the preceding paragraph. Documentary evidence may be divided into two categories: public documen private documents.

(1) Public Documents. Public documents are the official records of legislative, judicial and administ bodies. Such documents, or copies thereof duly certified by their custodian, are generally admissib evidence without the testimony of the officer who made the records. In administrative proceedings documents are generally admissible.

At **8 CFR 287.6**, regulations indicate the proper method for authenticating public records. As noted the Service announced in 1990 that, as a matter of policy, the Service would no longer require the of the authentication of the certification of a copy of a public record. For both domestic and foreign records, the certification of the custodian of the record is enough to make the copy admissible. No **CFR 103.2(b)(4)**. permits the submission of copies, rather than the original, of documents. This re does NOT mean that public records need not be certified. In the case of domestic or foreign public the correct interpretation of 8 CFR 103.2(b)(4) is that:

- The petitioner or applicant MUST obtain a certified copy of the record, but need not have the c authenticated by a U.S. Foreign Service Officer as described in 8 CFR 287.6(b) or (c);

- The petitioner or applicant may then make a plain copy (i.e., it need not be endorsed as a true U.S. consular officer, a U.S. Immigration Officer, or an attorney) of the certified copy, and subm copy of the certified copy to USCIS;

- If the petitioner or applicant submits a plain copy of the certified copy, the petitioner or applican

retain the certified copy and submit it upon the request of the USCIS officer.

Birth or baptismal records maintained by church officials are not considered public documents, but accepted as secondary evidence of birth, if the actual place of birth is indicated on the certificate. [birth certificates are also not considered as conclusive evidence of birth.

(2) Nonexistence. The absence of an official record may be proven by a certified written statemen official ordinarily having custody of such records, or by an appointed deputy that, after diligent sea record of the event is found to exist. Such a statement must be accompanied by a duly authorized authentication that the writer has legal custody of such records. Although generally accepted, ther inherent weakness to a statement of nonexistence...it relies on the other unsubstantiated evidence about the location of the claimed event and record.

(3) Private Documents. Private documents include all documents other than official records of legis judicial or administrative bodies of government. Private documents, especially business records ar records are often introduced as supporting evidence for visa petitions. Circumstances surrounding creation of such records, such as evidence that a document was created immediately at the time c it purports to record, as part of the regular conduct of business, may affect the weight given to the

(i) Expert and Opinion Evidence. On occasion, you may require the testimony of an expert witness to completing a case. Such a witness may be in the field of handwriting, fraudulent documents or a variet subjects. A petitioner or applicant may also occasionally offer testimony from someone claimed to be a Generally, in federal court, testimony of lay witnesses regarding their opinions or inferences is limited t opinions or inferences which are rationally based on the perception of the witness and helpful to a clea understanding of his/her testimony or the determination of a fact at issue. See Rule 701, Federal Rules Evidence.

Unlike most witnesses, an expert is permitted to give his or her opinion on a particular set of facts or circumstances involving scientific, technical, or other specialized knowledge. In order to provide such testimony, the witness must be qualified as an expert by knowledge, skill, experience, training or educa

When an expert witness is offered, the person offering the testimony of the witness must prove the ex and qualifications of the witness and the facts of the case at hand. The testimony of expert witnesses accepted by USCIS, and findings based on their testimony have been upheld by the courts. In cases i handwriting, counterfeit and altered documents, the ICE Forensic Document Laboratory may be used.

(j) Privileged Information. While rare (especially in the case of family based petitions and applications), you may encounter the issue of privilege. A testimonial privilege allows the holder who invokes it to ba that would violate the privilege. In Federal Court, as well as in an immigration proceeding, a claim of pri be decided on a case by case basis. See FRE 501. In contrast to incapacity of a witness, which cann waived, a privilege may be waived by the holder. Such a privilege may be waived by a failure to invoke privilege. Some of the more common testimonial privileges are lawyer-client, husband-wife, and the pri against self-incrimination.

Each privilege differs slightly as to details, such as whose testimony may be barred and who may invc privilege. The scope of the material covered by the privilege also differs.

(1) Lawyer-Client Privilege. The lawyer-client privilege may be invoked by the client to prevent any testifying about confidential communications between the lawyer and client made for the purpose o legal services.

(2) Husband-Wife Privilege. There are two separate evidentiary privileges arising from the marital r First, the marital adverse testimony privilege protects one spouse from testifying against the other

marriage. A witness spouse alone has the privilege to refuse to testify adversely and may be neith compelled to testify nor foreclosed from testifying. See *Trammel v. U.S., 445 U.S. 40 (1980).* The s privilege prohibits disclosure of confidential communications made during the marriage. This secon can be invoked by the alien to prevent his or her spouse from giving certain testimony. Generally, i judicial or administrative proceedings, one spouse can testify in a matter involving the other spouse testimony is:

- On behalf of the other spouse;
- Against the other spouse, if the matters arose before the marriage;
- Against the other spouse where it appears the marriage was not entered into in good faith, but intention of using the marriage ceremony in a scheme to defraud under the immigration laws;
- Against the other spouse in a prosecution under **section 278** of the Act (importation of alien fo immoral purpose).

Whenever possible, you should supplement the adverse testimony of one spouse against the othe evidence.

Note: You should also recall that it is the applicant or petitioner's burden to establish eligibility for a Thus, the failure to provide necessary evidence may result in denial of a petition if this burden has met. See **8 CFR 103.2(b)(13)** -**(15)**. For this reason, it is extremely unlikely that you will ever enco claim of husband-wife privilege in an adjudication proceeding.

(3) Self-Incrimination. Under the Fifth and Fourteenth Amendments of the Constitution, a witness n to answer questions and to give testimony if the answers will incriminate or tend to incriminate the under Federal or state criminal laws. If a witness has already been convicted or if prosecution is b privilege ceases to be applicable.

Removal or other similar proceedings are not criminal proceedings. An alien required to give self-in evidence in such administrative proceedings cannot invoke the privilege against self-incrimination, or her testimony might bring or tend to bring the alien within the proscription of a United States fede criminal statute.

If an alien is apprehended and (before being advised of the “Miranda” rights) makes certain admis produces documents which are used to establish deportability, such evidence does not violate his against self-incrimination. Removal proceedings are civil in nature and not subject to the same con safeguards as in criminal proceedings (*Chavez-Raya v. INS 519 F.2nd 397 (7th Cir. 1975)).*

Self-incrimination relates to the disclosure of facts. The facts which are protected from disclosure distinctly facts involving criminal liability. The immunity afforded relates to the past and does not en person who testified with a license to commit perjury. Thus, where a witness had previously testifie way but now claims the possibility of being prosecuted for perjury if required to testify again, the wi cannot claim the privilege as a prospective perjurer. The privilege applies only to the person himse not to any third person or corporation.

(k) Rebutting Derogatory Evidence. Derogatory information, like supporting documentation, need not c the strict rules of evidence. However, the adjudicating officer must keep in mind that the applicant or pe must be afforded an opportunity to inspect and rebut adverse information, except certain classified ma which should be discussed in general terms without jeopardizing the security of the information or the

[See **8 CFR 103.2(b)(16)** and ***Matter of Tahsir***, 16 I&N Dec. 56 (BIA 1976). See also **Appendix 10-5**
manual.]

(l) Impeachment. Impeachment is the process of discrediting a witness. In both judicial and administrati
proceedings, a witness' reputation for veracity is a pertinent avenue of attack for impeachment purpos
Questioning with a view to impeachment is often directed toward showing the witness' conviction of a c
affecting the witness' veracity or other matters tending to show insensibility to the obligations to tell the
under oath. A conviction for perjury is particularly pertinent. However, the fact that a witness is shown
under oath on one occasion does not necessarily require a conclusion that the entire testimony is to b
discredited.

Discrepancies in statements made by a witness do not necessarily discredit the witness. The fact that
is sometimes confused and self-contradictory goes only to the weight of testimony, not to the witness'
competency. It is to be expected that even an honest witness, in speaking of a past event, will not rep
reproduce it in its entirety with unchanged fullness of detail. A variation in recollection does not necess
damage credibility. In fact, if a number of witnesses agree exactly in their testimony as to the details of
event, collusion may be suspected. Of course, certain discrepancies on important points tend to discr
witness. Bias for or against a party to a proceeding, interest in the outcome, and corruption (bribery or
subordination of perjury or of other improper act) strongly tend to discredit a witness and are always a
subjects of inquiry for impeachment purposes. Where it is anticipated that important issues of fact will b
contested in judicial or administrative proceedings, obtain and report all available information concernin
witnesses that tends to impeach them.

Aliens or witnesses who have signed statements sometimes indicate that they desire to retract them c
will give contrary testimony when later called upon to testify. Such witnesses cannot be prevented fror
or changing prior statements. However, retraction of prior statements made under oath may, under ce
conditions, render the witnesses liable for perjury. Furthermore, witnesses have a legal right to claim tl
statements are not true, or that they were obtained by fraud or duress. Any such statements or claims
prospective government witness should always be reported. (Likewise, when taking written statement
prudent to indicate that the statement was made voluntarily and without duress.)

If you decide that the statement or testimony of a petitioner or applicant, or of any other witness, is not
your written decision should indicate this conclusion. It generally is not enough simply to say that the v
not credible. Instead, your decision should give the specific reason or reasons for your conclusion, an
the elements of the record that support the conclusion.

(m) Submission of Photocopy in Lieu of Original Document. Generally speaking, if a supporting docum
prepared by the issuing authority **solely for the purpose of presentation to USCIS**, an applicant or
must submit the original document with the application or petition. Examples of supporting documents v
be presented in the original are:

- Form I-20 issued by a Designated School Official to a foreign student;
- Form DS-2019 issued by a Program Officer to an Exchange Visitor;
- Home study for an orphan adoption (Form I-600A or I-600) case;
- Labor Certification issued by the Department of Labor;
- Labor Condition Application endorsed by the Department of Labor;

- Form I-693 Medical Examination Certificate issued by an authorized civil surgeon;
- Vaccination Sign-off Supplement to Medical Examination Certificate;
- Attestations, formal consultations and advisory opinions (e.g., a letter from a recognized expert att someone's extraordinary professional skills);
- Affidavits prepared in lieu of unavailable documents (e.g., an affidavit in lieu of a birth certificate wh official records were destroyed by fire); and
- Translations of documents (even when the rules allow submission of a photocopy of the documen

Note: An exception is made to this general rule if the applicant or petitioner has already submitted the document to USCIS in connection with another matter, in which case he or she submits a photocopy a an explanation of when and why the original was previously sent to USCIS.

For all other documents, the applicant may submit a photocopy of the document; however, he or she v required to present the original:

- In person, upon the request of a USCIS or consular official during an interview, or
- By mail, in response to a written request from USCIS.

Note 1: Although the law prohibits duplication of naturalization certificates, certificates of citizenship, ar Permanent Resident Cards (formerly known as Alien Registration Cards and commonly called "Greer for some purposes, that prohibition does not apply to making a photocopy for submission to USCIS in with an application or petition.

Note 2: As indicated in **Chapter 11.1(h)(1)**, public records may, but need not be, authenticated by a U Service Officer as described in 8 CFR 287.6. But any copy of any public record MUST be certified by custodian of the record.

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