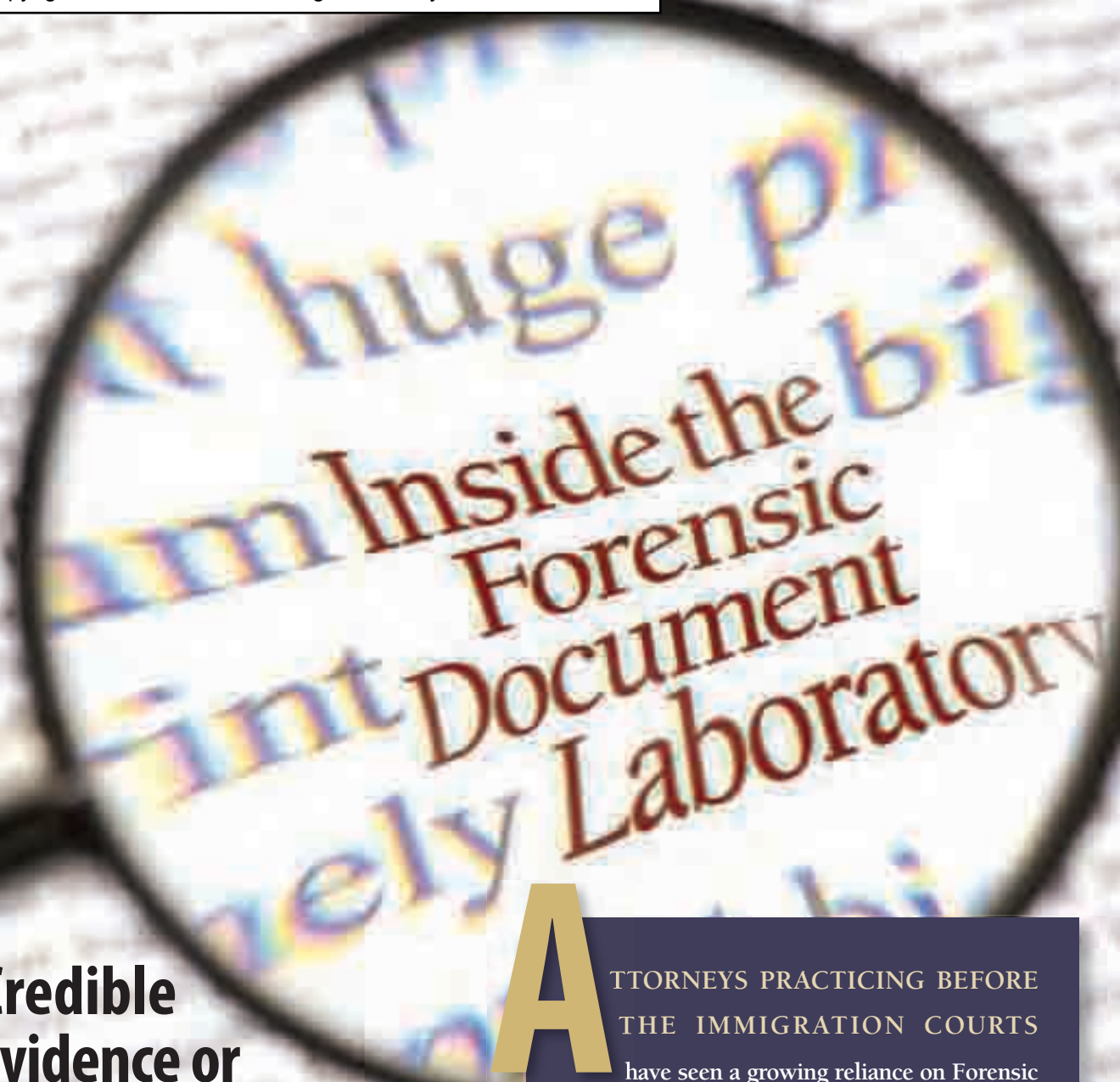


## Credible Evidence or Unreliable Due Process Violations?

by Jason Dzubow



**A**TTORNEYS PRACTICING BEFORE THE IMMIGRATION COURTS have seen a growing reliance on Forensic Document Laboratory (FDL) reports, as the FDL has expanded its mission and operations over the last seven years. In reaching credibility determinations, immigration judges (IJs) give great weight to the FDL reports, and such reports may be determinative of credibility regardless of any other evidence presented. But little is known as to how the FDL determines fraudulent documents, because its chain of custody does not follow a particular pattern.

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The respondent claims to be a male native and citizen of Mauritania. In support of this claim, he proffered documents purporting to be an identity card and a birth extract from the Republic of Mauritania. [T]he Immigration and Naturalization Service submitted into evidence a report from its Forensics Document Laboratory stating that the respondent's identity card is a "known counterfeit" and the birth certificate is "probably counterfeit." The respondent's attorney characterized the report as "conclusory" and questioned its efficacy, absent an opportunity for the parties to examine the documents that the respondent had originally submitted to the Service. The Immigration Judge found the respondent deportable under section 241(a)(1)(B) of the Immigration and Nationality Act, ... [and] denied his applications for asylum and withholding of deportation under sections 208 and 243(h),

— *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998)

The respondent, an Albanian, was active in Albania's Democratic Party in 2000. At her hearing, the immigration service's lawyer presented a forensic document examiner employed by the service named, Gideon Epstein, who testified that four of the nine documents that [the respondent] had attached to her application for asylum were probably fakes (he didn't analyze the other five). He based this assessment on the fact that the documents had been produced by color laser technology, which ... is ... expensive (and Albania is poor). Also, the printed text on the documents ... did not contain the diacritical marks (accents) that are part of the spelling of many of the Albanian words in that text. Epstein acknowledged, however, that he does not speak or read Albanian and had no access to official Albanian texts comparable to [respondent's] documents. Admitting that he could not "rule out" the possibility that they were authentic, he concluded merely that they were "probably not what they're purported to be." The immigration judge concluded that the documents were of "highly questionable authenticity" and solely on this ground rejected [the respondent's] testimony about being persecuted for activities on behalf of the Democratic Party.

— *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005)

The FDL works under U.S. Immigration and Customs Enforcement (ICE) to "combat travel and identity document fraud." Approximately 20 percent of the FDL's forensic work involves criminal matters, and ICE reports that "nearly all" cases in which the FDL provides expert testimony result in either convictions or plea bargains based on the lab's forensic analysis. With findings done behind closed doors, is the FDL report really credible evidence or just another due process rights violation of aliens in immigration proceedings?

### The FDL Report

Most reports from the FDL contain only conclusory information about the document sent for analysis. For example, one report analyzing a police document from Ethiopia states only that a "comparative examination" has revealed that the document "does not conform to genuine specimens of the letters and wet seal impressions on file and was determined to be counterfeit."

The FDL is reluctant to provide insight into its methodology. In a recent letter to the author's firm, a senior forensic document examiner at the FDL states:

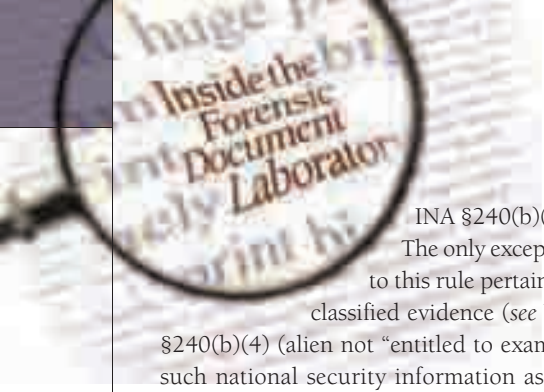
It is not customary for FDL examiners to include comprehensive details of the examination when reporting conclusions ... The FDL does not provide access to the reference collection of specimens to third party entities nor does it disclose provided third party information. To do so would potentially grind government operations to a halt since agencies would not share information if that information were released. The FDL does not provide specimens that, in the wrong hands, could make it easier to counterfeit a document in the future.

However, the examiner assures the firm that the analysis of the FDL is "the product of reliable principles and methods based upon sufficient data, which have been applied to the facts of [the] case." Such principles include "side-by-side comparison" of the alien's document with "genuine specimens" obtained from U.S. government officials assigned to the relevant overseas posts. The examiner concludes, the weight given to an "expert witness's findings can be determined through the expert's testimony both on direct and cross examination."

Thus, the FDL submits conclusory "expert" reports but does not reveal its methodology or allow the alien—or the IJ—to examine the "genuine specimens" used for comparison. It does not reveal where, when, or how the "genuine specimens" were obtained, but assures the alien and the court that its analysis is based on "reliable principles" and "sufficient data." Such standards hardly seem appropriate to a court of law. Yet, IJs now routinely rely on these types of reports to deny applications for relief, even where the applications are otherwise supported by credible evidence (see *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998) (submission of counterfeit document, absent any explanation for such presentation, casts serious doubt on the applicant's overall credibility and diminishes the reliability of his other evidence)). What, then, can be done to counter an FDL report?

### Due Process Violations

Aliens in removal proceedings are entitled to due process of law (see *Reno v. Flores*, 507 U.S. 292, 306 (1993)). One due process right accorded foreign nationals in removal proceedings is the "reasonable opportunity to examine the evidence against the alien." (See →



INA §240(b)(4). The only exception to this rule pertains to classified evidence (see INA §240(b)(4) (alien not “entitled to examine such national security information as the Government may proffer”). The regulations governing removal proceedings under 8 CFR §1240.11(c)(3)(iv) further refine a nonimmigrant’s rights with regard to classified evidence as:

Service counsel may ... present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information, he or she shall inform the alien. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the alien, whenever it determines it can do so consistently with

safeguarding both the classified nature of the information and its sources. The summary should be as detailed as possible, in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state whether such information is material to the decision.

Thus, in cases where classified evidence is proffered by the government, such evidence is submitted to the IJ and an effort is made to provide the nonimmigrant with information about the evidence that is “as detailed as possible.”

In cases involving an FDL report, however, the underlying evidence is not submitted to the IJ, let alone to the foreign national. This means that

ICE is more protective of the evidence relied on by the FDL than it is protective of national security information. Clearly, something is amiss.

#### Not Necessarily “Expert” Report

The FDL justifies its refusal to reveal the data underlying its reports on the basis that the reports are “expert” testimony, and, as such, neither the foreign national nor the IJ may review the evidence used to create the reports. In other words, the report itself is the evidence—the FDL has filtered and analyzed the underlying data and presented its expert finding to the court. The Federal Rules of Evidence, Rule 702, offers guidance about expert testimony<sup>1</sup>:

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.

## Are the courts a forum where aliens’ cases may be reviewed fairly or are they merely a rubber stamp for the U.S. Department of Homeland Security?

FDL reports based on “comparative examinations” do not constitute expert testimony because such reports generally do not require “scientific, technical, or other specialized knowledge.” Any layperson can place one document next to another to determine whether they are the same or different. Under these circumstances, the IJ and the nonimmigrant should be permitted to review the underlying data themselves; they should not be forced to rely on the unsupported conclusions of the FDL.

Further, even if a particular report does require expert knowledge, the IJ is required to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable,” (see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); see also *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005) (Although *Daubert* does not “strictly apply” to immigration proceedings, the “spirit of *Daubert*” is applicable to such proceedings)).

Unless the IJ has reviewed the underlying data and answered these questions, he or she has not fulfilled the duty to ensure the FDL report’s reliability. Such is the minimum requirement for due process. (See *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (requiring some degree of specificity from the FDL).)

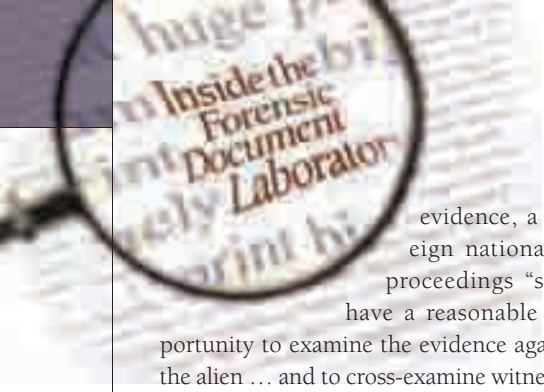
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► **PRACTICE POINTER: The IJ (and the foreign national’s attorney) can improve reliability by insisting on receiving crucial information such as: (1) where the FDL obtained the documents used for comparison; (2) if the FDL has a complete set of all documents used by the issuing government or organization; (3) how the FDL obtained the documents; and (4) methods of examination and the results obtained.**

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#### Unclassified Evidence Review

Except in the case of classified →



evidence, a foreign national in proceedings “shall have a reasonable opportunity to examine the evidence against the alien ... and to cross-examine witnesses presented by the Government,” (see INA §240(b)(4)).

The evidence relied on in the FDL reports is generally not classified evidence. Nevertheless, the FDL justifies its refusal to allow IJs and respondents to review the underlying evidence because releasing the specimens might cause them to fall into the “wrong hands,” which “could make it easier to counterfeit a document in the future.” Not only is this explanation insulting to IJs and the immigration bar, it wholly fails to address the due process concerns raised by the FDL reports. The FDL’s theoretical worries about documents becoming public should not be permitted to trump respondent’s right to due process of law. The act clearly allows nonimmigrants the

right to review the evidence against them; it makes no accommodation for the FDL’s concern that such review might lead to better forgeries. Further, the FDL’s justification provides no basis for refusing to release the documents to the IJ. If judges are trusted with classified evidence, surely they may be trusted with the unclassified documents used to create an FDL report. If the FDL will not release the underlying data used by the FDL, attorneys should move to exclude the report as a violation of due process.

Aside from the right to examine evidence, foreign nationals have the right to cross-examine government witnesses, including the ICE employees who create FDL reports (see INA §240(b)(4)). Courts have held that “INS may not use an affidavit from an absent witness ‘unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing.’” (See *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004) (quoting *Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992); see also *Dallo v. INS*, 765 F.2d 581, 586 (6th Cir. 1985); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997).)

There is no reason why the FDL employees cannot be available in person or by phone. A well-prepared cross-examination could raise serious doubts about the basis for an FDL report, and could lead to that report being excluded from evidence. (See, e.g., *Pasha v. Gonzales*, 433 F.3d 530 (7th Cir. 2005) (government testimony excluded after examination revealed that “expert” on Albanian document does not speak Albanian and is not familiar with the situation in Albania); *Tadesse v. Gonzales*, 492 F.3d 905 (7th Cir. 2007) (Board of Immigration Appeals (BIA) decision reversed where IJ improperly limited cross-examination of FDL expert).)

### Establish Chain of Custody

One strategy to neutralize an FDL report that has gained some traction in the federal courts relates to the “chain of custody” of the document in question. The Second Circuit U.S. Court of Appeals has held that when an applicant whose testimony is otherwise credible claims he or she has no knowledge that a docu-

ment is fraudulent, the IJ “must make an explicit finding that the applicant knew the document to be fraudulent before the IJ can use the fraudulent document as the basis for an adverse credibility determination” (see *Carovic v. Mukasey*, 519 F.3d 90, 97–98 (2d Cir. 2008)). At least two other courts have reached a similar conclusion (see *Koursky v. Ashcroft*, 355 F.3d 1038, 1040 (7th Cir. 2004); *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 913 (9th Cir. 2004); *Matter of O–D–*).

► **PRACTICE POINTER: Thus, where a third party in the respondent’s home country has sent him or her an allegedly fraudulent document, the respondent may avoid an adverse credibility finding by demonstrating that he or she had no knowledge that the document is fraudulent. Since the attorney cannot know in advance which documents will be challenged, it is important to establish the chain of custody of all documents submitted by the alien.**

### An Existential Question

Use of the FDL reports presents an existential question for the immigration court system: Are the courts a forum where aliens’ cases may be reviewed fairly or are they merely a rubber stamp for the U.S. Department of Homeland Security? Attorneys representing immigrants should not allow the reports to go unchallenged. Our clients’ cases—and the integrity of the immigration court system—are at stake. ■

**JASON DZUBOW** is a named partner of the law firm *Mensah, Butler & Dzubow, PLLC* in Washington, D.C.

Articles in *ILT* do not necessarily reflect the views of the American Immigration Lawyers Association.

### Notes

<sup>1</sup> “The Federal Rules of Evidence do not apply in INS proceedings, *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996), but the less rigid constraints of due process impose outer limits based upon considerations of fairness and reliability.” See *Yongo v. INS*, 355 F.3d 27, 30 (1st Cir. 2004).