CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Pointer[1]

Refreshing Recollection in Immigration Court Proceedings

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Being able to successfully refresh a witness's memory, and preserve the witness's credibility in the process, is an important immigration court skill. This practice pointer provides information about and tips for refreshing witness recollection in immigration court proceedings.

What Is "Refreshing Recollection"?

Human beings are fallible. All humans deal at times with lapses in memory. "Refreshing recollection" is the trial technique that practitioners use when a witness states that they are unable to answer a question due to a lack of memory. Refreshing recollection refers to the process during which the practitioner conducting the witness examination shows the witness something to refresh their memory. After remembering the answer to the question, the witness then testifies from memory. Federal Rule of Evidence 612 discusses the adverse party's options when the other party uses a writing to refresh a witness's memory.

[1] This practice pointer is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice nor is it a substitute for independent analysis of the law applicable in the practitioner's jurisdiction. The authors of this practice advisory are Amanda McShane, Research Assistant (2019), University of St. Thomas School of Law, Michelle Mendez, Director of CLINIC's Defending Vulnerable Populations (DVP) Program, and Rebecca Scholtz, Senior Attorney with CLINIC's DVP Program. The authors would like to thank the following individuals for their contributions to this advisory: Carol King, retired Immigration Judge; Victoria Neilson, Managing Attorney with CLINIC's DVP Program; Denise Noonan Slavin, retired Immigration Judge; and Tom Swett, Attorney.

Why Would a Practitioner Use the Refreshing Recollection Technique in Immigration Court Proceedings?

Respondents in immigration court may suffer from the current effects of past trauma on memory, and are likely also experiencing the anxiety of facing potential removal. Either of these conditions, along with many other circumstances, may cause memory failure during immigration court testimony. In addition, because of the immense backlog in the immigration court system,[2] an applicant may have to wait years between filing for relief and having their day in court, and memory could fade during that time.

In immigration court, the noncitizen respondent has the burden of proof on an application for relief.[3] This burden includes submitting documentary evidence by the deadlines set out in the Immigration Court Practice Manual or imposed by the immigration judge (IJ) and presenting testimony in support of the application. During an individual hearing in immigration court, the practitioner must present the respondent's case in a credible manner that convinces the IJ that the respondent qualifies for and merits relief. Oral testimony from the respondent and any supporting witnesses is often the most crucial form of evidence in support of an application for relief.[4] The respondent's credible, persuasive, and specific testimony is extremely important to satisfy the burden of proof.[5] Credibility is especially critical in asylum cases, because credible testimony alone can suffice to meet the burden of proof in an asylum claim.[6] The practitioner should present a witness's testimony in a cogent and clear manner, based on the witness's personal experience.

Practitioners must prepare witnesses carefully for testimony, in order to minimize memory problems and to deal with memory lapses when they occur, warding off any credibility concerns by explaining and contextualizing them. Refreshing recollection, when done properly, is one tool for achieving this goal.

What Are the Downsides to Using the Refreshing Recollection Technique in Immigration Court?

If a witness's recollection has to be frequently refreshed during testimony, it may lead the IJ to make an adverse credibility determination. The IJ's credibility determination will heavily influence the outcome of the case and whether the applicant is awarded relief. The Immigration and Nationality

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[2] As of the date of this resource's publication, there were more than a million pending cases in immigration courts nationwide. See TRACImmigration, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Mar. 6, 2020).

[3] See Immigration and Nationality Act (INA) § 240(c)(4); 8 CFR § 1240.8(d).

[4] One exception is where the Department of Homeland Security (DHS) stipulates to relief, in which case the IJ may rely on the written declaration and other evidence in the record. Whether DHS stipulates to relief and whether an IJ will rely on documentation over testimony will depend on the DHS attorney, the IJ, the particular jurisdiction, and the facts of the case.

[5] See § 240(c)(4)(B), (C).

[6] INA § 208(b)(1)(B)(ii); 8 CFR § 1208.13(a).

Act (INA) directs the IJ to evaluate the credibility of witness testimony.[7] Section 240(c)(4)(C) of the INA directs IJs to consider the "totality of the circumstances, and all relevant factors" in making credibility determinations.[8] The IJ's credibility determination may be based:

> on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements . . . , the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . , and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.[9]

An IJ's consideration of inconsistencies in testimony, or between testimony and other evidence, is a "a fundamental component of an adverse credibility determination."[10] An IJ can consider "even minor inconsistencies" as part of an adverse credibility determination.[11] An adverse credibility finding can be devastating to a respondent's claim, and credibility determinations are afforded substantial deference on appeal.[12]

Unpublished federal appellate decisions illustrate the importance of establishing credibility with the IJ in light of a lapse in memory. In a 2010 Ninth Circuit decision, the petitioner had appeared to be reading from notes during his immigration court testimony and had been unable to account for an affidavit from his father that was dated years after the father's alleged disappearance.[13] The Ninth Circuit, noting that it was "plausible that [the petitioner] referred to notes during his testimony to assuage his nervousness or to refresh his memory" rather than that he was reading from a script, reversed an IJ's frivolous asylum application finding[14] but upheld an adverse credibility determination, dooming the petitioner's applications for asylum and related relief.

Likewise, in an unpublished 2014 decision, the Tenth Circuit upheld an adverse credibility finding where the petitioner had responded to questions about his entry into the United States, his jobs in the United States, and the names of his employers and friends, by saying he did not know or he had

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[7] INA § 240(c)(4)(B).
[8] *See also* INA § 208(b)(1)(B)(iii) (discussing credibility determinations in asylum cases).
[9] INA §§ 240(c)(4)(C), 208(b)(1)(B)(iii).
[10] *Matter of Y-I-M-*, 27 I&N Dec. 724, 726 (BIA 2019).
[11] *Id.* at 731.
[12] *See* 8 CFR § 1003.1(d)(3)(i) ("Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.").
[13] *Singh v. Holder*, 371 F. App'x 788 (9th Cir. 2010) (unpublished).
[14] An individual is permanently barred from receiving "any benefits" under the INA (other than withholding of removal), if they "knowingly made a frivolous application for asylum"—that is, one where any material element has been deliberately fabricated. INA § 208(d)(6); *see* 8 CFR § 1208.20.

forgotten.[15] In that case, however, the petitioner had stated that he still could not remember anything about his entry into the United States even after his counsel attempted to refresh his recollection with a writing he made shortly after he crossed the border. The IJ had found inexplicable the petitioner's inability to remember the names of his former employer and roommate, and the Tenth Circuit concluded that the agency had provided adequate reasons for finding him not credible.

An unpublished 2018 Board of Immigration Appeals (BIA) decision considered how refreshing recollection affected credibility during an individual hearing involving an application for cancellation of removal.[16] After the respondent stated that he was unable to remember the details of his arrests and criminal history, both the Department of Homeland Security (DHS) Office of Chief Counsel (OCC) attorney and the respondent's attorney refreshed his recollection, and then he was able to testify about the charges. The IJ found that, given the totality of the circumstances, the respondent had indeed presented credible testimony that warranted a grant of discretionary relief. DHS appealed, arguing that the respondent lacked good moral character because his initial failure to disclose his full criminal history on direct examination (presumably before his memory had been refreshed) amounted to false testimony. The BIA upheld the IJ's credibility finding and grant of relief. This case is an example of how refreshing recollection can be used in immigration court to elicit witness testimony after a memory lapse, without leading to an adverse credibility determination.

Refreshing recollection is no substitute for preparing the witness ahead of time by reviewing the documents that have been submitted to the immigration court and questions they will be asked at the hearing (both planned direct examination questions and anticipated DHS cross examination questions). Preparing the witness adequately will both help prevent the need to use the refreshing recollection technique and ensure that the witness understands the refreshing recollection process, if it is needed. Taking the time to practice the direct examination and cross examination will ensure that the witness is familiar with the relevant questions and facts. However, since humans are fallible, particularly those with a history of trauma, the practitioner may have to invoke refreshing recollection. Practitioners can explain to the witness that it is okay to say "I don't remember" and, likewise, that if the practitioner asks "Do you remember X?" or "Are you having trouble remembering?" it is okay to say "yes." Practitioners can then explain and practice the remaining steps of the refreshing recollection technique.

What the IJ may regard as an inconsistency, and therefore credibility problem, may actually be a lapse in memory. Explaining any perceived inconsistencies, including a witness's inability to remember something they once knew, is particularly important given the credibility standard in immigration court. In the 2019 decision *Matter of Y-I-M-*, the BIA held that an IJ may rely on inconsistencies to make an adverse credibility determination even if the IJ did not specifically identify those inconsistencies to the respondent, if the inconsistency is "obvious" or it is "reasonable to assume

[15] *Hai Ou Chen v. Holder*, 585 F. App'x 945, 946 (10th Cir. 2014) (unpublished).
[16] Bernardino Montano, Jr., AXXX XX8 809, 2018 WL 4692837 (BIA Aug. 29, 2018) (unpublished).

that the applicant was aware of it and had an opportunity to offer an explanation."[17] The BIA directed that "it is incumbent on [the respondent] to raise and clarify information that is obviously inconsistent" and noted the role of the respondent's representative in eliciting testimony on direct or redirect examination to clarify inconsistencies brought out during the hearing.[18] Establishing that the witness is experiencing a memory lapse, refreshing their memory, and explaining why a memory lapse has occurred may help differentiate between a memory problem and an inconsistency.

Thus, if the practitioner has refreshed a witness's recollection, or even before, they should ask the witness why the witness had a memory lapse during the hearing, especially if it is due to trauma or some other plausible explanation. The practitioner may also use a medical or mental health expert to contextualize the memory issues in light of the witness's diagnosis or trauma history.

What Are Some Alternatives to Refreshing Recollection When Dealing with Witnesses Who Have Trouble Remembering?

Before resorting to refreshing the witness's recollection, practitioners should consider other options to get the witness's testimony back on track. The practitioner could try to rephrase the question or ask other easier questions that may help the witness remember. For example, if a witness testifies that they cannot remember the exact date that an event occurred, the practitioner could ask during what month the incident occurred, or if it was before or after certain other known time markers such as a birthday or a holiday. The practitioner could also use an exhibit already accepted into the record to assist a witness with memory problems. The practitioner should show the witness the exhibit, such as a map, and have the witness testify from that exhibit to develop the testimony, rather than resorting to the refreshing recollection technique.

It may also be possible to use a leading question to refresh recollection rather than going through the refreshing recollection procedure. While generally leading questions are not permitted during direct examination, Federal Rule of Evidence 611(c) allows leading questions on direct "as necessary to develop the witness's testimony."[19] The Advisory Committee's commentary on this rule specifically recognizes that a leading question can be used with a "witness whose recollection is exhausted."[20] Depending on the circumstances, it may be less damaging to refresh a witness's recollection through the use of a few gently leading questions, if the witness can then testify in detail, rather than resorting to the refreshing technique. Other factors to consider in deciding which technique to use may include how likely it is that the witness's memory can be refreshed with a document, whether there is a reason apparent in the record for why the witness is having memory issues, and how crucial the testimony sought to be refreshed is to the case.

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[17] *Matter of Y-I-M-*, 27 I&N Dec. at 728.

[18] *Id.*

[19] *See also, e.g.*, STEVEN LUBET, MODERN TRIAL ADVOCACY, at 41 (3d Ed. 2010) ("While it is most common to rekindle a witness's memory through the use of a document . . . a photograph, an object, or even a leading question may also be used.").

[20] Fed. R. Evid. 611(c), Advisory Committee Notes, 1972 Proposed Rules, Note to Subdivision (a).

What Is the General Process for Refreshing Recollection During Witness Examination?

The predicate for refreshing a witness's recollection is that the practitioner conducting the examination must first establish that the witness needs their memory refreshed—that is, that the witness cannot remember something that they once knew. The witness must testify to a memory loss such that refreshing is needed. If the witness's response to a question is "I don't remember," this sets the stage for refreshing recollection. However, if a witness's answer is "I don't know," a follow up question of "Did you ever know [X]?," and then, "Are you having trouble remembering [X] today?", can set the stage for refreshing recollection. Alternatively, a question of "Do you not know, or do you not remember?" can help the witness provide a response that would allow counsel to refresh their recollection. The practitioner could also ask a question such as, "Are you having trouble remembering?" or, "Do you recall anything else?"[21]

The practitioner should not ask a question starting with the phrase "Do you remember" or "Do you recall" unless the practitioner is hoping for a "no" answer and to initiate the refreshing process. Sometimes practitioners use these phrases in questioning when they do not really intend to ask about a witness's memory. These phrases can cause a witness to hesitate or falter when they otherwise would generally have had no problem answering the question. Also, depending on how the witness has been prepared, they may think that if the practitioner asks a question starting with "Do you remember," that the practitioner wants a "No" answer in order to initiate refreshing and fix a problem. Practitioners should save these memory questions for (1) establishing memory loss if refreshing is truly needed, and (2) helping the witness explain the cause of their memory loss, *e.g.*, due to trauma, confusion caused by the delay between the event and the testimony, or some other reasonable explanation.

Once lack of memory is established, the practitioner can go through the refreshing recollection process using a writing or other item. The process consists of the following steps:

- Ask the witness if there is anything that would help them remember. This question can also be phrased as "Would reviewing [X] help you remember?" The advantage of the latter question is that it provides the solution rather than asking a witness, who is already having trouble remembering, to come up with a specific item that will refresh their memory.
- Ask the IJ to mark the writing or other item used to refresh as an exhibit (for identification purposes) if it is not already an exhibit
- Show the item to the opposing counsel, ask for permission to approach the witness to show them the item—referring to the item by exhibit name so that the record is clear—and then give the item to the witness
- Instruct the witness to read the writing silently (if the item is a writing) and look up when they are done. The practitioner should be specific when directing the witness what to look at or

[21] The procedure for refreshing recollection described here can be found in a variety of evidence and trial treatises. *See, e.g.*, THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS Ch. 5.13 (9th Ed. 2013).

what part of a document to review. Instead of, for example, instructing the witness to review their statement, the practitioner should direct the witness to page 2, paragraph 23 of the statement, the second sentence beginning with the phrase "I had nowhere to go"

- Ask the witness if they now remember. If the answer is yes, retrieve the item (or ask the witness to put it face down, if the practitioner thinks there will be a need for more refreshing during the same examination)[22]
- Ask the question again. The witness testifies about what they now remember, having looked at the refreshing item. The witness must testify from the basis of their current recollection; if the item used to refresh recollection was a document, they cannot read from that document.[23]

These steps are summarized in the Appendix at the end of this resource.

What Can a Practitioner Use to Refresh a Witness's Recollection?

Virtually anything can be used to refresh recollection during testimony.[24] As the Second Circuit put it in a 1946 case, "Anything may in fact revive a memory: a song, a scent, a photograph, and allusion, even a past statement known to be false."[25] The reason for the wide latitude in what can be used to refresh a witness's recollection is that the witness's testimony is the evidence, not the thing given to the witness to trigger their memory. A witness's testimony elicited after refreshing recollection "may be proper, even though the document used to refresh the witness['s] memory is inadmissible."[26]

Often, documents are used to refresh recollection as they allow the witness to read or review previous statements or other relevant written materials. The writing need not have been written or prepared by the witness, as long as it would help the witness refresh their recollection and the court allows it.[27]

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[22] If the witness cannot remember despite attempts to refresh their memory, the hearsay exception of past recollection recorded may apply. *See* Fed. R. Evid. 803(5). Given that in immigration court hearsay is generally permitted, this rule may be less relevant in immigration proceedings.

[23] *See, e.g., Rush v. Illinois Cent. R. Co.*, 399 F.3d 705, 718 (6th Cir. 2005) (noting that it was improper for witness who had used writing to refresh memory to then read aloud from that writing, rather than testify from present recollection); *United States v. Scott*, 701 F.2d 1340, 1346 (11th Cir. 1983) (noting that witnesses were instructed "not to testify as to any statement contained in [writings used to refresh] for which they did not have an independent recollection").

[24] *See* MAUET, *supra* note 21, ch. 5.13; *see, e.g., Farewell v. State* 822 A.2d 513, 534 (Md. Ct. Spec. App. 2003) (noting that "almost anything" can be used to refresh a witness's memory); *People v. Connolly*, 751 N.E.2d 1219, 1232 (Ill. Ct. App. 2001) ("[A] police report can be used to refresh a witness's recollection, and the manner and mode in which recollection is refreshed are matters within the sound discretion of the trial court.").

[25] *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946).

[26] *Scott*, 701 F.2d at 1346.

[27] *See, e.g., Rush*, 399 F.3d at 716 ("The propriety of permitting a witness to refresh his memory from a writing prepared by another largely lies within the sound discretion of the trial court.").

Examples of items courts have permitted for refreshing recollection include:

- A list of household goods[28]
- An X-ray plate[29]
- A police report prepared by another individual, not the witness[30]
- A tape recording of a conversation or telephone call[31]

What Are the Rules for Refreshing Recollection in Immigration Court?

The Federal Rules of Evidence, including Rule 612, are not binding in immigration court,[32] and the Immigration Court Practice Manual, which is the primary guide to immigration court procedure, does not address refreshing recollection.[33] However, the refreshing recollection technique is permissible in immigration court just as it is in federal and state jurisdictions. Arguably, techniques like refreshing recollection, which are designed to help witnesses provide complete testimony, are required as a matter of due process and fundamental fairness, principles that govern immigration court proceedings.[34] Indeed, the BIA and courts that have reviewed decisions where refreshing recollection occurred in immigration court have recognized its appropriateness.[35]

Because there are no specific immigration court rules of evidence addressing refreshing recollection, it is important to investigate the practices and preferences of the particular IJ. For example, some practitioners have reported that certain IJs will only allow a witness's memory to be refreshed by using documents that have been previously submitted and accepted into evidence at the start of the merits hearing.[36] This stands in contrast to the general refreshing recollection rules, in which any item can be used to refresh memory, even if it is not in the record or even admissible. Indeed, at least one

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[28] *Guiffre v. Carapezza*, 11 N.E.2d 433 (Mass. 1937).
[29] *Hinkelman v. Pasteelnick*, 130 A. 441(N.J 1925).
[30] *United States v. Marrero*, 651 F.3d 453, 471-72 (6th Cir. 2011).
[31] *United States v. Kusek*, 844 F.2d 942, 949 (2d Cir. 1988), *Bianchi v. State*, 759 S.E.2d 536, 537-38 (Ga. Ct. App. 2014).
[32] *See Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011) ("It is well settled that the Federal Rules of Evidence are not binding in immigration proceedings and that Immigration Judges have broad discretion to admit and consider relevant and probative evidence."). A full discussion of the rules of evidence in immigration court is beyond the scope of this practice pointer. For more information on immigration court evidence rules, see CLINIC, *Practice Advisory: Rules of Evidence in Immigration Court Proceedings* (Mar. 13, 2020), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings.
[33] The Immigration Court Practice Manual can be found on the Executive Office for Immigration Review website, https://www.justice.gov/eoir/office-chief-immigration-judge-0 (updated Feb. 21, 2020).
[34] *See, e.g., Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015).
[35] See cases discussed above under the question titled "What Are the Downsides to Using the Refreshing Recollection Technique in Immigration Court"?
[36] *Cf. Davis v. Lynch*, 802 F.3d 168, 172 (1st Cir. 2015) (IJ had refused to allow counsel to refresh recollection using a passport stating that "[a]ny document that was going to be used during the proceedings should have been submitted to the Court").

unpublished BIA decision has recognized that inadmissible evidence is permissible for refreshing recollection.[37]

Whether or not the refreshing item is in evidence, the practitioner must show it to opposing counsel, DHS OCC, when using the refreshing recollection technique. If the item is not already in the record (and DHS OCC does not already have it), the best practice is to have copies of the document available for the IJ and DHS OCC at the hearing. Even more importantly, the practitioner should keep in mind that, if the IJ permits refreshing recollection with an item not in evidence, the IJ may allow DHS OCC to introduce the item into evidence.[38] DHS OCC may also use the item to cross examine the witness. As always, practitioners should exercise caution and assess the contents of any document before deciding to use it in immigration court, even if the intended use is merely for refreshing recollection.

What Can Legal Counsel Do If an IJ Does Not Allow Refreshing Recollection?

Practitioners should know and attempt to follow the general rules for refreshing recollection. If the IJ attempts to prohibit refreshing, practitioners should make their objection clear to preserve the issue for appeal. They can cite the immigration court evidentiary standard of fundamental fairness as well as the respondent's statutory right to present evidence.[39] It may be necessary that the practitioner state for the record a summary of the testimony that would have been offered after refreshing recollection. This is called an "offer of proof."[40] An offer of proof refers to a statement "on the record [of] what you would prove if you were allowed to present evidence . . . of what you *would* testify to if allowed to testify."[41] The practitioner should describe the testimony that would have been elicited through refreshing recollection to preserve the record and show on appeal that the IJ's adverse ruling prejudiced the respondent—that is, that had the IJ allowed the refreshing it would have made a difference.[42]

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[37] Xiomara Olivas de Triana, 2006 WL 2183570 (BIA June 21, 2006) (unpublished) ("We note that even under the Federal Rules of Evidence, which are not controlling in administrative proceedings, inadmissible evidence may be used to refresh the memory of a witness.").

[38] *See* Fed. R. Evid. 612(b) (discussing the adverse party's options when the other party refreshes a witness's recollection with a writing and directing that the "adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony").

[39] *See Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015) (noting that in immigration court the "test for admitting evidence is whether it is probative and its admission is fundamentally fair"); INA § 240(b)(4)(B).

[40] *Cf.* Fed. R. Evid. 103(a)(2) (discussing offer of proof).

[41] *Matter of A-S-*, 21 I&N Dec. 1106, 1134 (BIA 1998) (Board Member Rosenberg, dissenting) (describing offer of proof and suggesting that if IJ will not allow certain testimony or evidence, representative file a brief "arguing what the law requires and why your evidence or your explanation should be considered").

[42] *Cf. Davis*, 802 F.3d at 178 (no prejudice where IJ had refused to allow counsel to refresh recollection on visit dates by using passport, since IJ had determined that respondent should have readily known the dates if they had actually occurred, so refreshing would likely not have changed the IJ's credibility determination).

What Are Some Tips for Refreshing a Witness's Recollection in Immigration Court?

Even though the rules of evidence are relaxed in immigration court, practitioners should know how to use the technique of refreshing recollection when conducting direct examination and consider the pros and cons of using it in a given situation. Tips for dealing effectively with memory issues include the following:

- **Know the IJ and plan accordingly**. Practitioners should try to learn about the IJ's preferences ahead of the hearing. For example, does the IJ believe that practitioners can only refresh with documents already in the record? Is the IJ strongly opposed to any leading questions on direct examination, even for refreshing recollection?
- **Prepare the witness**. Witness preparation is crucial for successful immigration court trials. Effective witness preparation may eliminate the need for refreshing on the stand, but even where it does not, it can ensure that the refreshing process works smoothly. It is important to discuss and review with witnesses documents or items that might be used to refresh their memory and talk about how refreshing recollection would work at the hearing. It is also important to make sure that all witnesses are familiar with the documentary evidence and important details in them before they take the witness stand. The importance of reviewing all the documents with the witness before the hearing cannot be overstated!
- **Know the different methods for dealing with memory lapse and strategically use the technique that is most beneficial to the client in terms of credibility and effectiveness**. In some instances, the problem can be fixed easily with a leading question. In other cases, however, the practitioner may need to follow the full process for refreshing recollection.
- **Know the general procedure for refreshing recollection**. Practitioners should be prepared to set up the refreshing by rephrasing a question to elicit a statement that the witness cannot remember. If the witness responds that they do not know the answer rather than that they cannot recall, then the practitioner cannot use a document to refresh their recollection.
- If the IJ is not inclined to allow refreshing, practitioners should **be prepared to argue that refreshing should be allowed and ensure the issue is preserved for appeal**.
- **Plan ahead for language, literacy, and interpretation issues.** Practitioners must think about the specific needs of the client or other witness. If the client or witness is unable to read in English but reads in another language, it may be wise to have a fully translated document for the witness to read from if necessary (and to consider submitting this translated document by the filing deadline if the particular IJ requires that refreshing items be part of the record). Or, if the witness does not read in any language, practitioners should establish that fact on the record and then ask to be allowed to read the relevant part of the document out loud to the witness through the interpreter rather than asking the witness to read it silently to themselves.
- **Have refreshing documents ready to go.** Practitioners should keep a separate folder for each witness that includes the documents they may need during the examination. The documents should be labeled and ready to hand to the witness if necessary. The documents

should be "clean" copies without any notes, since the practitioner may be showing them to the DHS OCC attorney and/or the IJ.

- Minimize distractions. If the witness may need the document more than once, the practitioner can ask them to simply turn the document face down, rather than retrieving it from the witness. This way the practitioner avoids having to continually approach the witness to re-present the document.
- Speak into the microphone. In order to make a record in immigration court, the practitioner must speak into the microphone. The practitioner will have to step away from the microphone at counsel table in order to approach the witness to deliver and receive the refreshing item, but they should be sure to return to a microphone before asking questions or making any arguments. One way of doing this is to turn one of the microphones from counsel table toward the witness stand when the practitioner leaves the table to approach the witness. Then the practitioner can point the witness on the record to the portion of the document the witness should review to refresh their recollection. Once the practitioner returns to counsel table after collecting the refreshing item from the witness, they can turn the microphone back and continue the examination from counsel table.
- Tailor the strategy to the case. Practitioners should remember that whatever they show the witness to refresh their memory also has to be shown to the DHS OCC attorney. After seeing this document or item, the DHS OCC attorney may ask that it be admitted into the record as evidence if it is not already in evidence. Practitioners should be sure that there is no problematic or prejudicial information in the document or item that could undermine the witness's testimony or credibility.
- Head off credibility problems by explaining and contextualizing the memory lapse. Practitioners should directly address the reasons for the lapse in memory while the witness remains on the stand.[43] Where applicable, practitioners can provide context to the court about the loss of memory such as having a mental health expert testify that the client's memory loss is due to previous trauma or psychological issues. Practitioners should be prepared to make an argument that the witness's lapse in memory should not preclude a favorable credibility finding. Practitioners may want to highlight BIA cases where the BIA credited testimony of DHS officers despite their memory lapse and need to refresh recollection with documents.[44]

[43] *See Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998) (adverse credibility finding upheld where, *inter alia*, "the respondent has not provided a convincing explanation for the discrepancies and omissions").

[44] *See, e.g., Matter of B-R-*, 4 I&N Dec. 760 (BIA 1952) (upholding deportability finding based on officers' testimony despite the fact that they had used writings to refresh their recollection); Xiomara Olivas de Triana, 2006 WL 2183570 (BIA June 21, 2006) (unpublished) (upholding IJ finding that DHS officers' testimony was credible despite concession that they lacked any recollection of events without reviewing government files).

APPENDIX

Refreshing Recollection: 8 Steps[45]

1. Establish lack of memory (*e.g.*, "Are you having trouble remembering?").
2. Ask if reviewing a specific document or item would help the witness remember, *e.g.*, "Would reviewing the declaration you submitted in this case help you remember?"
   [Ask the IJ to mark the item as an exhibit for identification purposes, if not already in the record. Best practice – plan ahead and use documents already in the record; IJ may require this.]
3. Show the item to opposing counsel referring to exhibit name, *e.g.*, "I am showing opposing counsel Exhibit 1, Tab C, Ms. Jones's declaration."
4. Ask for permission to approach the witness to show them the item, referring to it by name, *e.g.*, "May I approach the witness to show her the declaration, Exhibit 1, Tab C?"
5. Give the item to the witness and instruct them to review it silently and turn over the document when finished. Be specific, *e.g.*, "Please silently review your declaration, specifically page 3, paragraph 22, the second sentence beginning with the phrase 'I had nowhere to go' and turn over the document when you are done."
6. Ask the witness if they now remember, *e.g.*, "Do you remember now"?
7. If yes, retrieve the item (or leave the item with the witness, face down, if you think you will need to use it again).
8. Ask the question again.

[45] CLINIC wishes to thank attorney Tom Swett for suggesting the content in this appendix.

What If You Are Not Permitted to Refresh Recollection?
Steps for Preserving the Record for Appeal

1. Argue the right to use refreshing pursuant to the principles in Federal Rule of Evidence 612 and note unpublished BIA cases that have recognized the use of the technique in immigration court. Example: Bernardino Montano, Jr., AXXX XX8 809, 2018 WL 4692837 (BIA Aug. 29, 2018) (unpublished) (included in this Appendix).
2. Argue refreshing must be allowed pursuant to respondent's right to present evidence, INA § 240(b)(4)(B), and fundamental fairness. *See Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015) (noting that in immigration court the "test for admitting evidence is whether it is probative and its admission is fundamentally fair"); *cf. Matter of Y-I-M-*, 27 I&N Dec. 724, 728 (BIA 2019) ("Because the alien carries the burden of proof for relief under section 208(b)(1)(B) of the Act, it is incumbent upon him to directly raise and clarify information that is obviously inconsistent.").
3. Make an offer of proof: "If permitted to refresh Ms. Jones's recollection, she would have provided credible testimony as follows: _____."
4. Offer an explanation, grounded in the record, as to why the witness is having a memory problem and why it should not be used as a basis for discounting their remaining credible testimony.

2018 WL 4692837 (BIA)

** THIS IS AN UNPUBLISHED DECISION - NOT INTENDED FOR CITATION AS PRECEDENT **

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: BERNARDINO MONTANO, JR.

File: AXXX-XX8-809 - Pearsall, TX
August 29, 2018

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Shan D. Potts, Esquire

ON BEHALF OF DHS:

Bao Q. Nguyen
Assistant Chief Counsel

APPLICATION: Special rule cancellation of removal; cancellation of removal for certain nonpermanent residents

***1** The respondent is a native and citizen of El Salvador. The Department of Homeland Security (DHS) appeals the Immigration Judge's March 2, 2018, decision granting the respondent's application for cancellation of removal for certain nonpermanent residents under section 240A(b)(1) of the Immigration and Nationality Act, and special rule cancellation of removal pursuant to section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA). *See* 8 U.S.C. § 1229b(b)(1); *see also* Pub. L. No. 105-100, 111 Stat. 2193, 2096, amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997). The appeal will be dismissed.

We review the Immigration Judge's factual findings for clear error, including findings as to the credibility of testimony. We review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*. *See* 8 C.F.R. § 1003.1(d)(3).

On appeal, the DHS argues that the Immigration Judge erred by granting NACARA relief because the respondent did not demonstrate that he is a person of good moral character. *See* 8 C.F.R. § 1240.66(b)(3) (good moral character for 7 years before the application date). The DHS argues that the respondent is unable to establish that he has the requisite good moral character because, during his removal proceedings, he presented false testimony when he did not disclose his full criminal history on direct examination (DHS Br. at 6-9). *See* section 101(f)(6) of the Act; *see also Matter of Gomez-Beltran*, 26 I&N Dec. 765, 766 (BIA

2016) (failure to disclose full criminal history constituted false testimony). The Immigration Judge found, however, that the respondent presented credible testimony (IJ at 8). As noted, we review this finding for clear error. *See* 8 C.F.R. § 1003.1(d)(3).

While we recognize the DHS's concern over the respondent's initially limited disclosure of his criminal history, the Immigration Judge did not clearly err in crediting the respondent's testimony given the totality of the circumstances. We uphold the Immigration Judge's credibility determination for the reasons that she provided including the fact that the respondent testified several times that he was unable to remember the details of his arrests. Further, the respondent's testimony concerning his criminal history was influenced by the fact that he was charged with the same violations numerous times, and some of the charges arose from the same arrest (IJ at 8; Tr. at 48-49, 51, 53). In addition, when the DHS's counsel and the respondent's attorney refreshed the respondent's recollection, he was able to testify regarding the charges (IJ at 8; Tr. at 48-49, 51, 53). For these reasons, we find no clear error in the Immigration Judge's credibility determination and we uphold the Immigration Judge's conclusion that section 101(f)(6) of the Act does not preclude a finding of good moral character in this case.

***2** The DHS also argues on appeal that the Immigration Judge erred by finding that the respondent demonstrated the requisite good moral character (DHS Br. at 9-11). Despite this argument, the Immigration Judge properly weighed the factors relevant to a finding of good moral character as a matter of discretion. Although the respondent has a history of arrests and convictions, the Immigration Judge recognized countervailing positive factors, including remorse, counseling and abstinence from alcohol, a history of financial support for his family and, most significantly, his care for his seriously ill daughter, who has undergone 16 surgeries. (IJ at 2-3, 6, 10; Tr. at 31, 42-43, 53-54, 64-67; Exh. 5 at 266). We uphold the Immigration Judge for the reasons he provided in this regard.

Finally, we also uphold the Immigration Judge's conclusion that the respondent merits relief as a matter of overall discretion (IJ at 11; DHS Br. at 11-12). *See Matter of Blas*, 15 I&N Dec. 626 (BIA 1974); *Matter of Aral*, 13 I&N Dec. 494 (BIA 1970); *Matter of A-M-*, 25 I&N Dec. 66, 76-77 (BIA 2009) (discretionary factors considered should be relevant to the application at issue). As the Immigration Judge found, the adverse factors in the respondent's case, including his criminal history, are outweighed by his equities including his more than 20 years of residence beginning at the age of 9, family ties, including his United States citizen wife and three children whom he supports, and his youngest daughter's serious medical issues that require around-the-clock care (IJ at 7, 10, 11, 15; Tr. at 3, 7, 28-33, 36, 56; Exh. 5; Exh. 6 at 1-4; Exh. 7 at 3-6). Before he was detained, the respondent cared for his youngest daughter in the morning when his wife went to work and then he worked in the evening (IJ at 11; Tr. at 40-41). When he was detained, his wife quit her job to care for her and their other two children, which has caused economic hardship (IJ at 11; Tr. at 41).

If the respondent is removed, his family could not go to El Salvador with him because his youngest daughter would not be able to receive adequate medical care in that country (IJ at 15; Tr. at 41-42). Contributing to the care of his daughter who has a serious medical condition constitutes an "outstanding equit [y]" and weighs heavily in the balance. *See Matter of Aral*, 13 I&N Dec. at 496. Given the evidence presented, we uphold the Immigration Judge's conclusion that the equities outweigh the negative factors in the respondent's case. For these reasons, we uphold the Immigration Judge's grant of NACARA relief to the respondent.

Accordingly, the following order will be entered. [1]

ORDER: The appeal is dismissed.

Anne J. Greer
FOR THE BOARD

Footnotes

1 Because we uphold the Immigration Judge's grant of NACARA relief, we need not address the DHS's appeal of the Immigration Judge's grant of cancellation of removal under section 240A(b)(1) of the Act.

2018 WL 4692837 (BIA)

The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 730 organizations in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC's BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP's primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program's initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeal, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice advisory on strategies and considerations in light of the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client's release from immigration detention, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Presumed Dangerous: Bond, Representation, and Detention in the Baltimore Immigration Court."

These resources and others are available on the DVP webpage.