AILA-EOIR LIAISON MEETING AGENDA QUESTIONS AND ANSWERS
October 21, 2008

A. IMMIGRATION COURT ISSUES

General Immigration Court Issues

(1) An electronic filing system has been discussed in past AILA-EOIR liaison meetings. This system would greatly enhance the private bar's access to information, eliminating much of the work involved in contacting trial attorneys, getting copies of the NTA and I-213, etc.

A. How close is an electronic filing system to being implemented?
B. Would the system be similar to the federal court PACER docketing system?

RESPONSE: Over the years, EOIR has discussed our desire to implement electronic filing for the immigration courts and Board of Immigration Appeals (BIA). We agree that all parties will experience efficiencies with electronic filing. However, right now, EOIR does not have any immediate plans to design, develop and implement a comprehensive electronic filing system. EOIR is currently in the middle of implementing its Digital Audio Recording (DAR) system throughout the nation. The DAR system is revolutionizing the antiquated audio tape recording system that has existed at EOIR. The implementation of DAR is not trivial; EOIR expects that it will take until 2010 to complete the implementation and the total cost of the implementation is projected to be over $20m.

Currently, EOIR does not have the funding to undertake the implementation of a comprehensive, nation-wide electronic filing system. However, EOIR will continue to analyze, plan and implement technical improvements to the current immigration hearing processes that will bring EOIR closer to realizing our goal of electronic filing in the immigration courts and the BIA.

(2) The Immigration Court Practice Manual provides that individual judges may allow limited appearances. See EOIR Manual, Section 2.3(d), at page 20 ("unless the Immigration Judge specifically allows a limited appearance"). Also, we are aware that EOIR recently issued OPPM 08-04 on telephonic hearing requests. http://www.usdoj.gov/eoir/efoia/ocij/oppm08/08-04.pdf

There is a great shortage of and need for pro bono attorneys as well as counsel from nonprofit agencies and private counsel for detained respondents and particularly in response to major worksite enforcement operations by ICE. Recognizing this need, EOIR has invested efforts to encourage pro bono representation for detained noncitizens, such as the "Attorney of the Day" pro bono programs and funding for nonprofit organizations through the Legal Orientation Program. AILA commends EOIR for its efforts in this regard. However, some IJs in different areas of the country continue to deny requests by counsel for limited appearances. While some counsel may be able to represent respondents to the completion of proceedings, the majority of them are only able to represent respondents during the early stages of

proceedings (i.e., bond and master hearings). Therefore, requiring all attorneys to represent respondents to the completion of proceedings would impose an undue burden on them and would discourage representation.

A. Will EOIR consider issuing an OPPM to provide additional guidance to the IJs to encourage them to allow for limited appearance by counsel?

RESPONSE: EOIR agrees that it is important to encourage pro bono representation of detained respondents. To that end, in addition to the initiatives mentioned above, EOIR has issued Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services, which "provides guidance on how immigration courts and court administrators can encourage and facilitate pro bono legal services for respondents."

With regard to limited appearances, Chapter 2.3(d) of the Immigration Court Practice Manual states:

> Once an attorney has made an appearance, that attorney has an obligation to continue representation until such time as the alien terminates representation or a motion to withdraw or substitute as counsel has been granted by the Immigration Court. The filing of a Notice of Entry of Appearance as Attorney or Representative before the Immigration Court (Form EOIR-28) on behalf of an alien constitutes entrance of appearance for all proceedings, including removal and bond, unless the Immigration Judge specifically allows a limited appearance.

EOIR appreciates AILA's concerns on this issue and will consider issuing guidance addressing limited appearances. EOIR welcomes AILA's feedback on precise scenarios in which AILA feels limited appearances should be allowed.

(3) After a Court of Appeals issues an order remanding a matter to the BIA, the BIA routinely requests the attorney to file a new Form EOIR-27 with the BIA in order to be recognized as the attorney of record before the BIA if she wishes to continue representation. If the attorney does not file the EOIR-27 she is no longer deemed the attorney of record. If the attorney files a new EOIR-27, she is deemed the attorney of record before the BIA. We understand that notice also gets sent to the Respondent regarding his request to designate an attorney of record. We agree this is proper procedure to insure notice and the proper manner in which to define the scope of representation made by attorneys at each level of review.

However, when the BIA decides to remand a matter back to the Immigration Court, the Immigration Court upon receiving the remand order, does not recognize the attorney listed on the BIA EOIR-27 as the attorney of record before the Immigration Court. The attorney representing the alien before the BIA gets a copy of the BIA decision but will not obtain a notice of hearing for remanded proceedings. It is requested that the Immigration Courts recognize the Form EOIR-27 to at the very least give attorneys the opportunity to identify to the Immigration Court whether or not their services will continue before the Immigration Court, and request the submission of a new EOIR-28 with the Immigration Court within a specified period of time. The Respondent can also be served with the notice of hearing and attorney

designation, as is done before the BIA when a matter is remanded by the Court of Appeals. Application of this procedural safeguard will allow attorneys to become aware of remanded court hearings before the Immigration court along with the Respondent. If the attorney responds by filing a Form EOIR-28 with the Immigration Court, or refuses to do so, the scope of representation will be properly defined. The lack of a specified procedure, as is exercised before the BIA, has resulted in numerous in absentia orders when matters are remanded back to the Immigration Courts from higher courts. See Chete-Juarez v. Ashcroft, 376 F.3d 944 (9th Cir. 2004).

A. Can the Immigration Court implement a procedure to allow attorneys noted as attorneys of record before the BIA the opportunity to submit a new notice of representation, EOIR-28, to properly designate whether their representation of Respondent will continue? This safeguard will allow the Courts to have a proper understanding of the attorney's scope of representation and will also allow aliens who may have not submitted proper address changes to have an opportunity to be contacted by their current or former attorneys and be told of their new hearing dates.

RESPONSE: EOIR appreciates the concern being raised here. Under the current process, however, the attorney who represents a respondent before the BIA is notified about a remand when the attorney receives a copy of the BIA's decision remanding the case. The attorney then has the opportunity to file a Form EOIR-28 with the Immigration Court. EOIR notes that upon issuance of the decision, the BIA generally returns the Record of Proceedings (ROP) to the Immigration Court within a week.

(4) AILA members have reported that some respondents are being served with Notices to Appear that do not have the initial court date listed or an assigned immigration judge. This has created difficult situations for practitioners. For example, the instructions on the NTA state that the respondent must file address changes with the court, but if he/she attempts to do so the clerk will reject the filing because the court does not have a file. This also creates a Catch-22 for asylum seekers trying to meet the one year filing deadline who can't file in open court absent a court date but whose application would be rejected by the Service Center because the system shows he/she is in removal proceedings.

A. Can EOIR implement a procedure where it will accept filings after NTAs have been issued and hold them until the NTA has been filed with a local immigration court and an A-file created in the immigration court?

B. Can EOIR clerks, at a minimum, be instructed to date-stamp filings (even if they cannot accept them) so that the practitioner can later prove that s/he did everything possible to comply with deadlines?

RESPONSE: The Immigration Court accepts filings from parties once a Notice to Appear has been filed, unless the filing contains certain defects. Form EOIR-33/IC and requests for bond redeterminations are accepted even if no NTA has been filed. For filings sent by mail or courier that are rejected by the court, the filings are returned to the sender with a Rejected Filing Notice, which lists the

date the filing was received by the court. For documents filed in person, EOIR will consider AILA's request regarding providing proof of attempted filing.

Equal Treatment Issues in Immigration Court

(5) Attorneys for respondents report different treatment by IJs compared to ICE assistant chief counsels. For example, ICE assistant chief counsels are routinely given more time to respond if they miss a court ordered filing deadline, with typically no consequence to the government. Often ICE assistant chief counsels come to court without the A-files on the docket for the day and request continuances to find the file, resulting in repeated continuances on behalf of the DHS. In cases involving alleged criminal convictions upon which removal proceedings are based, ICE is supposed to obtain the criminal records before filing the Notice to Appear with the local immigration court. On the other hand, if a respondent's attorney misses a deadline, the IJ will typically order the client removed or rule against the alien on the matter before the IJ.

A. Has the issue of perceived bias in favor of ICE been addressed through training or other means, particularly in light of recent federal courts of appeals decisions regarding denials of continuances for respondents?

B. If training has not been implemented on this issue, can this disparity be addressed with the IJs?

RESPONSE: Immigration Judges are trained on the importance of being impartial. If a party disagrees with an Immigration Judge's ruling on a motion to continue or other issue, the party may appeal the decision to the BIA of Immigration Appeals. In addition, if a party has an immediate concern about an Immigration Judge's conduct, and the concern is inappropriate for an appeal, it can be raised with the Assistant Chief Immigration Judge responsible for the Immigration Court or with the ACIJ for Conduct and Professionalism. See Chapter 1.3(c) of the Immigration Court Practice Manual.

(6) Stipulations by ICE counsel: Attorneys have reported that stipulations made by ICE counsel have been retracted by ICE in a later stage of removal proceedings, such as filing a notice of appeal to challenge an IJ's decision that was based on ICE's stipulation during the individual hearing.

A. If counsel for respondent is bound by its stipulation before an IJ, shouldn't ICE be bound when it stipulates to a fact or a legal issue?

RESPONSE: EOIR does not give advisory opinions regarding issues such as the legal effect of a stipulation.

B. Attorneys have noticed a trend by the BIA to reverse and/or remand cases involving ICE stipulations in sex offense cases where ICE later changes its position. Is this trend particular to these types of offenses?

RESPONSE: The BIA issues decisions on a case-by-case basis. The BIA is unaware of a trend to reverse and/or remand cases involving ICE stipulations in sex offense cases where ICE later changes its position.

(7) Many new immigration judges were previously employed as assistant chief counsel, chief counsel or in some similar capacity with ICE. These judges are often serving in the same court where they were previously a member of the ICE legal staff. Upon appointment to the bench, the appointee may be hearing cases that were once the administrative responsibility of the appointee, or which are being presented by ICE counsel who were colleagues of, supervised by, or trained by, the appointee, or are matters in which ICE locally or nationally has special interest, either in the specific matter, or from a policy and enforcement perspective. At minimum these circumstances create the appearance of a conflict of interest.

A. Please advise as to what steps are being taken to ensure that the immigration judges both appear to be and are impartial adjudicators?

RESPONSE: Please see the response to response to question 5, above.

B. Please discuss the standard when an immigration judge should consider recusal due to former involvement in the case or issue and how are immigration judges trained about this issue? How is this issue monitored?

RESPONSE: The legal standards for recusal are found in 8 C.F.R. § 1240.1(b) and Matter of Exame, 18 I&N Dec. 303 (BIA 1982). These standards, as well as procedural issues related to recusal, are addressed in Operating Policies and Procedures Memorandum 05-02: Procedures for Issuing Recusal Orders In Immigration Proceedings.

If a party believes that an Immigration Judge should have recused himself or herself in a particular case, the party may appeal the decision to the BIA of Immigration Appeals. Alternatively, if the party has a concern regarding the Immigration Judge's conduct, and the concern is not appropriately addressed in an appeal, this can be raised with the Assistant Chief Immigration Judge responsible for the Immigration Court or with the ACIJ for Conduct and Professionalism. See Chapter 1.3(c) of the Immigration Court Practice Manual.

C. What is the ultimate goal of the Department in regard to this issue? The Ethics Manual states that the Model Code of Judicial Conduct is not binding but is the aspirational goal, yet the June 2007 proposed rules for Judicial Conduct for Immigration Judges sets out a much different standard than the Model Code when it comes to determining when recusal is necessary or should be considered.

RESPONSE: Operating Policies and Procedures Memorandum 05-02 states that "a judge should recuse himself or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge's impartiality might reasonably be questioned." EOIR strives to ensure that all its hearings are conducted fairly.

Immigration Court Practice Manual Issues

(8) AILA recognizes the intention of the Immigration Court Practice Manual ("ICPM") and EOIR's effort to provide uniform guidance to counsel and respondents alike. Unfortunately, the ICPM has become an accessible document to attorneys, but not to all respondents. To date, the ICPM is accessible to attorneys who are aware of the EOIR website link to the ICPM. The ICPM is not yet available in Immigration Court lobby areas nor is reference to a website link to the ICPM made in any court documents, i.e., notice of hearing, pre-trial orders, etc. According to FY 2007 EOIR Statistics, more than half of all removal cases are pro se. Based on the fact that the ICPM, as implemented, and as made available today, needs to be made more accessible to non-represented respondents, AILA offers the following suggestions:

i. That notice of the ICPM and its access via website must be included on the Notice of Hearing in bold lettering.

Notice of the ICPM is not provided in writing at this time. Non-detained Respondents, especially those unable to afford an attorney, may be able to access a copy of the ICPM if properly instructed of where to locate a copy of the ICPM which they may download. This may be accomplished by placing the website and ICPM link on the Notice of Hearing. This will also advise novice attorneys with sufficient notice of the existence of the ICPM.

RESPONSE: EOIR agrees that parties in Immigration Court proceedings should be made aware of the Immigration Court Practice Manual. EOIR will therefore examine whether references to the Practice Manual can be placed on court documents such as Notices of Hearings.

ii. That a hard copy of ICPM be made available in each court's area.

A hard copy of the ICPM must be made available at the public lobby area of each courthouse servicing non-detained respondents. The EOIR's ICPM assumes that every respondent, many times a recent arrival to the United States from a third world country or members of indigenous social groups, have immediate access to the Internet and capability/knowledge or assistance to access the Internet. That is simply not the case for many respondents, particularly those who live in rural and remote areas. Having a hard copy of the actual manual available at the court lobby area would allow non-represented respondents the opportunity to review court procedures and the court's expectations of readiness at subsequent hearings.

RESPONSE: EOIR agrees that it is important that pro se respondents have access to the Immigration Court Practice Manual. EOIR has therefore made the Practice Manual available for review, upon request, at the front window of each Immigration Court.

iii. That a videotape explanation of the highlights of the ICPM be played at the Immigration Court lobby in English and Spanish, and where possible, additional languages.

AILA suggests that the Court apply the methodology used by USCIS for NACARA interviews, wherein a videotape is played in a general waiting room in both English and Spanish, explaining an applicant's rights to NACARA eligibility and relief. AILA suggests that the EOIR produce an instructional video which highlights pertinent portions of the ICPM and advises respondents about how and where a copy of the ICPM may be obtained or personally reviewed. The videotape may be played on a television located in the general court lobby area throughout the day and controlled by the court clerk's office.

RESPONSE: EOIR thanks AILA for this suggestion. Such a videotape is not feasible at this time, but EOIR will revisit this idea in the future. Please note that the Immigration Court Practice Manual is often discussed at the "self-help" workshops for detained pro se respondents carried out by non-profit organizations under EOIR's Legal Orientation Program. EOIR invites AILA to contribute other suggestions regarding how to inform pro se respondents of the Immigration Court Practice Manual.

iv. That the EOIR amend the ICPM with a special memorandum to instruct IJ's with instructions to implement the ICPM in a more liberal manner, when applied to respondents with mental incapacities or deficiencies.

AILA requests that the EOIR take notice of the ICPM's failure to address the fact that some respondents, especially those in detained facilities, suffer from mental incapacities or deficiencies that impede them from understanding and comprehending the ICPM. The ICPM is written in a manner that a represented respondent or a non-detained respondent fluent in English or with the assistance of a competent translator may fully comprehend. Respondents with colorable claims for immigration relief may be precluded from being granted relief by their failure to comply with the ICPM.

AILA notes that on August 8, 2007, the EOIR issued a memorandum instructing IJs regarding the adjudication of cases involving unaccompanied minors. AILA suggests that a similar memorandum be issued for pro se respondents with mental illness and/or deficiencies and that it address the application of the ICPM to such respondents.

RESPONSE: EOIR appreciates that certain respondents may be mentally or psychologically impaired in a way that impacts their ability to comply with the Practice Manual. Immigration Judges should be mindful of such special considerations. Note that the Practice Manual does not limit the discretion of the Immigration Judge to depart from the Practice Manual's provisions in cases involving respondents with mental incapacities or deficiencies.

v. That the EOIR request that ICE Detention Facilities maintain more than one copy of the ICPM at each facility, that the copies are made available at all legal libraries or reading rooms, and that ICE communicates its compliance for each facility on an annual basis to the immigration court assigned to hearing the case of the detained respondents.

RESPONSE: EOIR is happy to request that additional copies of the Immigration Court Practice Manual be made available by the Department of Homeland Security, but AILA should also pursue this in its national liaison with DHS. Further, as discussed in the response to question 1(E) of the April 3, 2008, EOIR/AILA Liaison Meeting Agenda, EOIR is working with DHS, Immigration and Customs Enforcement, to place copies of the Practice Manual in ICE detention facilities. AILA members should notify EOIR if they become aware of specific ICE detention facilities that lack a hard copy of the Practice Manual.

(9) Some immigration courts have continued the practice of standing orders that are not consistent with the ICPM. For example, in Chicago, one judge still requires duplicate copies of all filings. Another judge in Atlanta requires written pleadings according to a prior standing order which is not available to the public. The OPPM 08-03, dated June 16, 2008 and the News Release of the same date make clear that the purpose of the ICPM is to establish uniform procedures and requirements, and that local operating procedures will no longer be used.

A. What is the rule for standing orders that are in effect for cases prior to July 1, 2008?

B. What is the rule for standing orders after July 1, 2008?

RESPONSE: As stated in the response to question 1(F) of the April 3, 2008, EOIR/AILA Liaison Meeting Agenda, the provisions in the Immigration Court Practice Manual are to be applied in a uniform manner nationwide. Therefore, local practices which contradict the Practice Manual's provisions are no longer permitted, including local practices expressed through "standing orders." If an Immigration Judge is continuing to use standing orders, this should be brought to the attention of the appropriate Assistant Chief Immigration Judge.

U, T and VAWA Issues

(10) The adjudication of U and T visa applications and VAWA I-360 self-petitions has historically been slow. Recently the adjudication of U visa applications have started to trickle out of CIS with the October 2007 implementation of the long-awaited regulations, but VAWA I-360 self-petitions and T visa applications still have USCIS processing times of over one year. Some IJ's refuse to continue cases when legitimate U, T, or VAWA cases are pending before the USCIS. This practice unfairly prejudices the applicants, who are not in control of the adjudication time and who should be afforded every opportunity to have their cases continued to allow the adjudication of their applications and to have relief granted by the immigration courts. As U, T, or VAWA applicants, these individuals have been or are very important to criminal proceedings and may be needed in the future to testify, making it very important for them to stay in the US.

A. Can guidance be issued to the IJs to continue cases where there is a U or T application or VAWA self-petition pending before the USCIS?

RESPONSE: EOIR does not plan to issue guidance to the Immigration Judges covering motions for continuances to permit the adjudication of U and T visa petitions and VAWA I-360 self-petitions. Immigration Judges make decisions

on motions for continuances on a case-by-case basis under the law and regulations. If a party feels that a case involving a U or T visa petition or a VAWA I-360 self-petition should be continued, the party may file a motion for a continuance. If the party disagrees with the Immigration Judge's ruling on the motion, the party may appeal to the BIA of Immigration Appeals.

B. BIA ISSUES

Remand Issues

(11) How does the BIA process cases that have been remanded from a circuit court of appeals?

Attorneys have reported the following:

- Remands on detained cases are taking six months or longer to be set for briefing by the BIA;
- BIA clerks inform attorneys that the BIA does not have the case pending and reject attempts by attorneys to file new Form EOIR-27;
- Attorneys have sent in copies of the PACER docket sheets and the order from the circuit court of appeals and it takes months for the BIA to act on the case;
- Motions to set expedited briefing schedules on remanded cases have not been adjudicated; and
- Some cases are set for additional briefing on remand while others are remanded without a briefing schedule to the IJ.

A. In light of the above, is there any set process for the handling of remands by the BIA? What can attorneys expect? What steps should attorneys take to get the BIA to process the case?

RESPONSE: The BIA primarily receives copies of remand orders from the federal courts from the Office of Immigration Litigation (OIL). It also receives copies of remand orders from aliens or their attorneys or the Department of Homeland Security (DHS). As the BIA is not a party to proceedings before a federal court, it does not directly receive remand orders from those courts. The BIA cannot begin processing a case as a federal court remand until it receives notification that a case has been remanded by a federal court, along with a copy of the court's order which sets forth the court's basis for the remand and in some instances a copy of the joint motion filed.

If you are representing an alien before a federal court and the court orders the record remanded to the BIA, and you are retained to represent the alien before the BIA, submit a copy of the Court's order, and the underlying motion if the Court granted a party's motion to remand, along with an updated address form (Form EOIR-33) from the alien as well as a Notice of Appearance as Attorney before the BIA (Form EOIR-27). This will ensure that the BIA gets prompt notification of the Court's remand order.

If you are representing an alien before a federal court and the court orders the record remanded to the BIA, but the alien has not retained you to represent the alien before the BIA, encourage the alien to submit a copy of the Court's order

(and the underlying motion if the Court granted a party's motion to remand) along with an updated address form (Form EOIR-33) to ensure that the BIA is aware of both the Court's order and the alien's current address.

Submit a written request to set a briefing schedule if there are issues that you want to have briefed for the BIA's consideration when adjudicating the case.

B. Can the BIA Practice Manual be amended to include steps to take for cases that have been ordered remanded by a federal circuit court of appeals?

RESPONSE: The BIA Practice Manual will be revised to provide more information regarding federal court remands to the BIA.

(12) AILA has received numerous reports from its members regarding inconsistencies on the part of BIA clerks in terms of accepting or rejecting for filing documents with de minimus clerical errors. For example, the BIA clerk has rejected a document for filing solely on technical grounds (i.e., wrong zip code by one digit on a certificate of service); however, the clerk has accepted documents in other cases with the identical error. In other cases, the BIA clerk has returned defective filings and asked the attorney of record to resubmit them with corrections (i.e., missing Form EOIR-27 or unsigned portions of filings). In still other instances, the BIA clerk has corrected defective service by ICE counsel by sending a copy of the ICE filing to the correct attorney of record. This creates a problem of inconsistency and unfairness since whether minor defective filings are accepted or the respondent is given an opportunity to resubmit corrected filings depends entirely upon which BIA clerk reviews documents and in rare instances which party submits defective filings. While AILA understands that BIA rules should be complied with at all times, inconsistent practice by the BIA clerk creates a problem of unfairness and results in prejudice on respondents in some cases even when their attorneys who represent them *pro bono* accept their mistakes, albeit inadvertent, in the context of Matter of Lozada.

A recent report by an AILA member, who represented two brothers *pro bono*, both in defensive asylum proceedings before the same IJ in NYC and before the BIA, well illustrates this problem. That member reported that the BIA denied a motion for a 21-day extension to file one of the brother's brief because motion was not signed (the other brother's motion was signed and accepted). As corrective measures, he (1) filed a motion to reconsider, (2) a subsequent motion to reconsider pursuant to Matter of Lozada (both motions complied with all of the filing requirements) against himself through another attorney, and (3) filed a brief along with the motions. Thereafter, the attorney made numerous phone inquiries with BIA clerks for an update on the status of the motions to no avail. Less than two months later, he received a decision denying the motion to reconsider under Matter of Lozada. He has referred his client to another attorney for an appeal to the U.S. Court of Appeals for the Second Circuit and, according to AILA members who practice before that Court, based on the Second Circuit precedent, it is likely that the Second Circuit would reverse the BIA. In light of this real case example, AILA would like the BIA's responses to the following questions:

A. Would the BIA be willing to implement a new policy or guidance regarding *de minimus* clerical errors filing errors?

RESPONSE: The BIA is not inclined at this time to establish a new policy regarding these clerical errors. The Clerk's office offers the parties that commit filing errors the opportunity to correct such filings. Further, the parties have at their disposal the opportunity to file a motion to reconsider which the BIA adjudicates on a case-by-case basis.

B. Would the BIA be willing to reopen this case *sua sponte* and similar cases in the future?

RESPONSE: The BIA will consider any motion to be filed on a case-by-case basis.

BIA Practice Manual Issues

(13) The BIA Practice Manual (BIAPM) indicates the correct manner in which documents must be filed with the BIA. Chapter 9 indicates that the BIA has jurisdiction to review the decisions on visa petitions adjudicated by the USCIS District Director or USCIS Service Center Director having jurisdiction over the petition. The appeal of a denied visa petition must be filed with the USCIS using Form EOIR-29. If the petitioning party is denied a family based visa petition and is represented by counsel, a Form G-28 signed by the petitioner must be submitted to USCIS along with Form EOIR-29. The Notice of Appeal and the file thereafter is transferred to the BIA.

In practice, the BIA sends notice to the petitioning relative that if they wanted to continue being represented by an attorney, then Form EOIR-27 must be submitted. The BIA, however, is sending these notices specifically requesting that the attorney submit a Form EOIR-27 and that the form be signed by the petitioning party. Chapter 2, Section 2.3(c)(i) of the manual indicates that practitioners must use the most current form which can be found on the EOIR website. However, in the same section, Section 2.3(c)(i), the BIA manual indicates that when representing a United States citizen or lawful resident, the Notice of Appearance should be signed by the represented party as well.

A review of the most current Form EOIR-27 clearly does not indicate a "signature box or designated space" for the signature of a United States citizen or lawful resident alien petitioner in the case of an appeal of a denied visa petition that is transferred from a USCIS District Director or Service Center. There is no place for the U.S. citizen or lawful permanent resident to sign Form EOIR-27, and the BIA has dismissed such transferred appeals where Form EOIR-27 has not been signed by the petitioner. However, the very same Form EOIR-27 only requires that the practitioner sign under the penalty of perjury that he is an authorized representative. The BIA is literally asking practitioners to create a signature box or alter an existing form in order to comply with its rule. However, practitioners are not authorized nor should they be compelled to alter documents in order to clarify inadequacies in the Form EOIR-27. It should be noted that the former version of the Form EOIR-27 required a signature; however, the current form does not have such a space.

A. Can the BIA clarify the BIA Practice Manual or revise and publish Form EOIR-27 with a proper signature box for represented parties?

RESPONSE: The problem with the EOIR-27 in visa petition cases is not actually caused by the lack of a signature necessarily, but by the lack of evidence anywhere in the appeal packet (including the Form EOIR-29, the Form EOIR-27, or any submissions filed with these forms) to indicate that the attorney is representing the petitioner and not the beneficiary who has no standing to appeal. A case that might result in a dismissal includes a Notice of Appeal that is not signed by the petitioner but rather by the attorney. Further, the Form EOIR-27, only bears the beneficiary's name and does not indicate that counsel represents the petitioner, as required by 8 C.F.R. § 1003.3(a)(2) and §1003.3(a)(3). Only the party affected by a decision is entitled to appeal to the BIA. Matter of Sano, 19 I&N Dec. 299 (BIA 1985); Matter of DaBaase, 16 I&N Dec. 720 (BIA 1979); Matter of Kurys, 11 I&N Dec. 315 (BIA 1965). If it is not apparent from the record that the appeal was initiated by the petitioner or an authorized representative, the appeal will not be considered as properly filed. 8 C.F.R. § 1292.4. The BIA Practice Manual will be reviewed to clarify the signature requirement.

B. Can the BIA issue a standing order or a special motion to reopen to allow such petitioners the opportunity to have their appeals accepted by the BIA if they have been previously denied due to the lack of their signature on Form EOIR-27 which does not contain the signature box?

RESPONSE: The BIA is currently not inclined to issue a standing order or a special motion to reopen in these cases. The parties have at their disposal the opportunity to file a motion to reconsider if it is their belief that the BIA erred in not accepting the Form EOIR -27.