AILA-EOIR LIAISON AGENDA QUESTIONS
March 16, 2005

E-Filing and Fees

1. What is the current state of the E-Filing Initiative? Has EOIR been able to secure funding to move forward with this program? **[*E-filing questions have been asked in several past AILA-EOIR Agenda Questions, including September 30, 2004 (#2) and March 4, 2004 (#8). See http://www.usdoj.gov/eoir/statspub/eoiraila093004.pdf for the most recent question.*]**

   Response

   EOIR's eWorld initiative is a multi-staged project which will strategically position the organization to attain the President's Management Agenda eGov goals. The first phase of eWorld - titled CASE (Case Access System for EOIR), consolidates the legacy case management systems from the Immigration Courts and the Board of Immigration Appeals into a single unified system. CASE is currently in pilot testing with the Board of Immigration Appeals and the Immigration Court in Arlington, Va. Additional Immigration Court pilots are scheduled to commence this fiscal year.

   Although requested, EOIR did not receive funding in FY05 for the eWorld initative. Limited funds from the agency's base budget have been allocated to support this effort. (See question on electronic payment of fees for more info on that aspect of eWorld).

2. The need to continue paying fees due EOIR for certain applications and motions in person or via mail at local USCIS office continues to be a cumbersome and, in some cases, onerous requirement. Given that USCIS has managed to allow E-Filing and payment of fees online, can EOIR explore working with USCIS to allow payment of EOIR-related fees online? **[*Online payment questions were asked in the Agenda Questions from September 30, 2004 (#2) and March 4, 2004 (#9). See http://www.usdoj.gov/eoir/statspub/eoiraila093004.pdf for the most recent question.*]**

   Response

   In addition to the integration of the ANSIR and BIAP databases, EOIR has been working with the Department of Treasury's pay.gov staff to implement electronic payment of fees. EOIR has developed a project plan showing the steps that must be taken to make electronic fee payment a reality. Most recently, test interfaces have been established with pay.gov. EOIR intends to pilot electronic fee payment for matters filed with the Board of Immigration Appeals and may later expand this effort.

Asylum Clock Issues

3. Members continue to have problems with the setting and resetting of the asylum clock for applicants in proceedings. On a case that is remanded or reopened, under what circumstances should the clock be restarted or reset where an asylum application has already been tendered and the clock "stopped" by some intervening event?

Response

If a motion to reopen is granted, and the decision on the asylum application was a grant, deny, or other, the ANSIR system displays the following three clock options: (1) restart the clock from the IJ completion date, (2) restart the clock from the motion to reopen completion date, (3) do not restart the clock. For specific details, see the Office of the Chief Immigration Judge's Operating Policy and Procedures Memorandum (OPPM) 00-01, "Asylum Request Processing," available at http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf. Based on the immigration judge's selection, the clock will then be recalculated or will continue to be stopped. With respect to remands, OCIJ is currently reviewing clock issues and the ANSIR system and will provide further guidance at a later date.

If a practitioner disagrees with the clock setting, the first step is to try to resolve the concern locally with either the court administrator or the immigration judge and thereafter with the Assistant Chief Immigration Judge having jurisdiction over the particular court. However, if at any point the result is unsatisfactory and the case is on appeal to the Board, the request should instead be directed in writing to the Office of General Counsel. See http://www.usdoj.gov/eoir/sibpages/ICadr.htm for contact information, a list of the Immigration Courts, and the link to the list of areas of responsibility and jurisdiction of the Assistant Chief Immigration Judges.

4. Members continue to report confusion by the bar and Respondents as to whether and when the clock has been stopped and on what basis, only finding out weeks or months later when an application for an EAD is denied due to a stopped clock. Will EOIR reconsider requiring Immigration Judges to inform Respondents when their actions have resulted in stopping the clock for asylum purposes? **[*A similar question was asked in the March 7, 2002 Agenda Questions (#2). See http://www.usdoj.gov/eoir/statspub/eoiraila0203.htm . Asylum clock questions were also raised in the March 27, 2003 (#8) and March 30, 2000 (#11) Agenda Questions.*]**

Response

EOIR will not require immigration judges to make formal findings on the

record when the "clock" is stopped. However, if a party wishes to know whether his or her action will stop the clock, the party should inquire at the time of the action. For further guidance on which actions will stop the clock, see the Office of the Chief Immigration Judge's OPPM 03-03, titled "Definitions and Use of Adjournment, Call-up and Case Identification Codes," available at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm. Moreover, the status of the clock can be checked at any time by calling EOIR's Automated Status Query System at 1-800-898-7180. Whenever there is a change to the clock, the 800-number is updated within the next day.

Recent Circuit Court Precedent and Board Decisions

5. *Azarte v. Ashcroft*, 394 F.3d 1278, 2005 U.S. App. LEXIS 882 (9th Cir. Jan. 18, 2005). At the September 30, 2004 AILA-EOIR Liaison meeting, we encouraged the Board to revisit *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), especially in light of IIRIRA's limitations to voluntary departure in the statute, and the Board indicated a willingness to do so in the context of an appropriate case. Please see our attached Memorandum.

Recently, the Ninth Circuit decided in *Azarte* that *Shaar* does not govern cases controlled by or initiated after the effective date of IIRIRA. Further, the court held that in removal cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period is tolled during the period the BIA is considering the motion. **[*Revisiting Shaar was posed in the September 30, 2004 Agenda Questions (#5(c)). See http://www.usdoj.gov/eoir/statspub/eoiraila093004.pdf. Questions regarding voluntary departure and the appeals process were posed in the March 4, 2004 (#23), March 27, 2003 (#19), and March 30, 2000 (#26) Agenda Questions.*]**

a. How will the BIA handle motions to reopen filed by respondents who are covered by the Ninth Circuit's decision in *Azarte*? Is there a process whereby EOIR will notify that DHS that the voluntary departure is tolled?

Response

The Board will consider each motion individually based on its facts and the pertinent laws that apply to the case. Board Members and staff attorneys are routinely provided with relevant and recent updates in caselaw. As each motion filed with the Board must be served on opposing counsel, and as the Board issues filing receipts in each case, the parties should be aware of the motion and the laws that might apply to that motion. The Board will not issue decisions piecemeal.

b. How will the BIA handle motions to stay or toll voluntary departure filed by respondents whose cases were not completed in the Ninth Circuit?

Response

The Board will consider these motions as they arise before us and will apply the developing law on a case by case basis.

c. Will the Board consider an amicus brief on the issue, or in the alternative review the attached memorandum as a preliminary summary of AILA's concerns on the issue?

Response

The Board has asked for supplemental briefing from the parties in cases raising voluntary departure in the last few months and will consider requests for amicus briefing in any case before us. Persons or organizations wishing to make an appearance as an amicus curiae must follow the procedure described in section 2.10 of the Board of Immigration Appeals Practice Manual, available at http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap2.pdf. The Board generally welcomes amicus briefing and will consider contacting AILA to participate in any briefing in this regard. AILA may submit its memorandum on voluntary departure in response to any invitation to participate in the briefing of a case before the Board.

6. *Morales v. Ashcroft*, 384 F.3d 418 (7th Cir. 2004). The Seventh Circuit's decision in *Morales* held that, where an alien departed the U.S. and was arrested and returned without voluntarily departing under threat of deportation or removal proceedings, there was no break in continuous physical presence for purposes of INA 240A(b)(1)(A), non-permanent resident cancellation.

a. Will the Board consider adopting the Seventh Circuit's decision in *Morales*?

Response

The Board will consider these arguments as they arise before us and will apply the developing law on a case by case basis. Currently, the Board is considering several cases to provide guidance on whether there is a "break in continuous presence" and hopes to issue a precedent decision in such a case.

b. How will the BIA handle motions to reopen filed by respondents who are covered by the Seventh Circuit's decision in *Morales*?

Response

The Board will consider each motion individually based on its facts and the pertinent and developing laws that apply to each case. Board Members and staff attorneys are routinely provided with relevant and recent updates in caselaw.

7. *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). The Fourth Circuit held that the application of IIRIRA's language specifying when a returning legal permanent resident is an "arriving alien" seeking admission under INA § 101(a)(13), as well as whether such an individual is subject to removal proceedings and mandatory detention under INA 236(c), was impermissibly retroactive where the alien pled guilty prior to IIRIRA's effective date. Reliance was not required to establish an impermissible retroactive effect and Circuit court granted petition for a writ of habeas corpus challenging detention on such grounds. The language of the decision and reasoning track soundly with the Board's position regarding applications under INA § 212(c).

   a. Will the Board consider amending its interpretation of the definition of an "arriving alien" to exclude returning residents who pled guilty before IIRIRA?

      Response

      The Board will consider the definition of "arriving alien" as the issue arises before us in appropriate cases.

   b. How will the BIA handle motions to reopen filed by respondents who are covered by the Fourth Circuit's decision in *Olatunji*?

      Response

      The Board will consider each motion individually based on its facts and the pertinent and developing laws that apply to each case. Board Members and staff attorneys are routinely provided with relevant and recent updates in caselaw.

8. *Succar v. Ashcroft*, No. 03-2445 (1st Cir. January 5, 2005). In *Succar*, the First Circuit held that 8 C.F.R. § 245.1(c)(8) (prohibiting arriving aliens in removal proceedings from adjusting status) is invalid because it directly conflicts with INA § 245, which explicitly makes parolees eligible for adjustment of status. In the face of such a specific and comprehensive scheme, the Court found that the Attorney General had no authority to adopt a regulation categorically barring a group of individuals from adjusting status. Further, parole documents issued prior to April 1, 1997 (and many issued subsequent to that date) informed parolees that, although they risked being placed in exclusion proceedings, they remained eligible to adjust their status before the district director, notwithstanding the fact that they were before an immigration judge. Applying the regulation serves no purpose and is contrary to principles of

family unification.

a. Will the Board consider adopting the decision in *Succar* given that the underlying regulation on which current precedent is based is clearly inconsistent with the law?

Response

The Board will consider arguments for and against adopting *Succar* in the context of cases as they arise before the Board.

b. How will the Board handle motions to reopen filed by respondents who are covered by the First Circuit's decision in *Succar*?

Response

The Board will consider each motion individually based on its facts and the pertinent and developing laws that apply to each case. Board Members and staff attorneys are routinely provided with relevant and recent updates in caselaw.

c. What is EOIR doing to implement S*uccar* in the Immigration courts in the First Circuit and in BIA appeals which originate in the First Circuit? Has any written guidance been provided to the Immigration Judges, and if so, will EOIR provide a copy of any such instructions?

Response

The Board will apply *Succar* and any other pertinent law to such motions as the facts of each case require. The Board Members have not received written guidance on the application of *Succar.* However, Board Members and staff attorneys are routinely provided with relevant and recent updates in caselaw.

OCIJ has not issued any written guidance to the immigration judges in the First Circuit regarding the *Succar* decision. However, immigration judges are notified of new circuit court caselaw via an electronic bulletin that is updated on a weekly basis. Additionally, all immigration judges are required to keep abreast of all immigration-related legal changes, and they will apply the appropriate statutory, regulatory and circuit law on a case-by-case basis.

d. Are Immigration Judges under the First Circuit's jurisdiction accepting and adjudicating adjustment applications pursuant to *Succar?*

Response

OCIJ has not compiled any statistics and information on these specific types of adjustment applications.

FOIA Requests and Processing Issues

9. In the past few meetings, we have inquired about the delay in processing FOIA requests, particularly where the attorney needs a complete copy of the administrative record in order to file a motion to reopen based on ineffective assistance of counsel, prosecute an appeal, or even determine whether it is appropriate to pursue review in Federal Court.

   Please provide an update regarding the processing times for EOIR FOIA requests, including information of actual handling/approval of requests to expedite processing. **[*A question on expedited processing was posed in the September 30, 2004 Agenda Questions (#13). See http://www.usdoj.gov/eoir/statspub/eoiraila093004.pdf* .]**

   Response

   EOIR endeavors to respond to all expedite questions within 10 days. All expedite requests are subject to substantive review by the Office of General Counsel. Due to limited resources, the current processing times for FOIA requests is about six months. To fully evaluate whether expeditious treatment should be accorded, requesters should state with specificity the basis for requesting expedited treatment and any relevant time frames. See 28 C.F.R. §16.5(d)(1) and (2).

10. Requests for expedites are being rejected, even where the Respondent is in custody on a final order awaiting travel documents. Often, the complete file is needed to file a Motion to Reopen, which would provide an automatic stay. The standards applied appear to be more demanding even tha[n] the Board's position on requesting a Stay of Removal. Please advise as to the specific guidelines by which expedite requests are reviewed. **[*Somewhat similar questions were posed in the Agenda Questions from September 30, 2004 (#13), March 4, 2004 (#15), and March 22, 2001 (page 10 of 12). See http://www.usdoj.gov/eoir/statspub/eoiraila093004.pdf for the most recent question.*]**

    Response

    EOIR is required to respond to FOIA requests in the order in which they were received. See 28 C.F.R. § 16.5(a). We do not utilize a strict first-in-first-out approach, as some files are not available and we do not disadvantage people who are in line behind a case that cannot be satisfied because the information is not available. Instead EOIR uses a multi-track process as well as attempting to process the oldest cases first.

Further, Congress amended the FOIA in 1996 to provide for the expedited processing of FOIA requests. The legislative history of the amendment, however, explains that the categories of cases qualifying for expedited treatment are intended to be narrowly applied, because "given the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do not qualify for its treatment," and "an unduly generous approach would also disadvantage those requesters who do qualify for expedition, because prioritizing all requests would effectively prioritize none." See H.R.Rep. No. 104-795, at 26 (1996).

The Department of Justice has published regulations, found at 28 C.F.R. §16.5(d)(1), that address the expeditious handling of FOIA requests. In accordance with that rule, requests for expedited processing are taken out of order and given expedited treatment only when: (i) normal processing could reasonably pose an imminent threat to the life or physical safety of an individual; (ii) there is an urgent need to inform the public about an actual or alleged federal government activity; (iii) the loss of substantial due process rights are at stake; or (iv) a matter of widespread and exceptional media interest because there exists possible questions about the government's integrity which affect public confidence. In accordance with 28 C.F.R. § 16.5(e), a requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. Because the formality of certification may be waived as a matter of administrative discretion, EOIR does not require a request for expedited treatment to be certified. But specifics as to why the FOIA processing should be expedited are still required. Within ten calendar days of receipt of a request for expedited processing, EOIR decides whether to grant expedited treatment, and notifies the requestor of the decision by mail. If a request for expedited treatment is granted, the request is given priority and processed as soon as practicable. If a request for expedited treatment is denied, an appeal of that decision may be directed to the Department of Justice Office of Information and Privacy. See 63 FR 29591 (1998).

11. AILA has received reports that the Board is proceeding with adjudicating appeals without ensuring or providing counsel access to the entire administrative record, including exhibits (for example, in cases where the counsel of record did not represent the respondents before the immigration court or where a new attorney enters an appearance subsequent to mailing of the transcript of hearing). In at least one case, the Board denied the attorney's request to postpone adjudication of the appeal to allow counsel to obtain the results of an expedited FOIA request, and subsequently denied the Respondent's appeal. Denying appellate counsel access to some or all of

the record of proceedings before the Immigration Judge unquestionably impacts counsel's ability to present the issues on appeal or to preserve relevant issues for federal court review if the appeal is denied. In so doing, it also infringes on the respondent's right to counsel and the right to a full and fair hearing, including an opportunity to be heard in a meaningful manner.

a. Please clarify the BIA's position on ensuring that counsel has access to the entire record of proceedings on appeal. **[*Ability of an attorney to review the file was addressed in the Agenda Questions dated March 22, 2001 (page 10 of 12) and November 8, 2000 (#21(d) and (e)). See http://www.usdoj.gov/eoir/statspub/eoirailaMarch01.htm for the most recent question.*]**

Response

Counsel should to the extent possible obtain copies of documents from the alien or his or her previous attorney. Petitioners desiring to review the ROPs at the Immigration Courts should contact the court administrator to verify the availability of the specific ROPs and the local court's procedures for reviewing the files. Upon the filing of an appeal, ROPs are sent to the Board within a matter of days to begin processing the appeal. While the ROPs are at the Board, counsel may inspect the entire record of proceedings by prior arrangement with the Clerk's Office. As of June 2004, records of proceedings remain at the Board for 120 days following the issuance of the Board decision. After 120 days the records are returned to the custody of the Immigration Courts, after which they are retired to a Federal Record Center.

As a separate matter, the attorney of record may obtain from the Clerk's Office a copy of a few pages from the record. "As a general rule, parties who want a copy of the record of proceedings must file a FOIA request. . . . However, when the record is small or only a portion of the record is needed, parties may contact the Clerk's Office for assistance in obtaining a copy." Board Practice Manual 13.2(a)(i), available at http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm. Parties should contact the Clerk's Office in writing.

The hearing tapes are kept at the Immigration Courts after a transcript is prepared for appellate purposes. Practitioners desiring to listen to or copy the tapes should check with the court administrator for the location of the tapes and for the local policy on copying tapes.

b. Please address whether such a request to obtain a complete copy of the record or an expedited FOIA may serve to toll or extend the briefing schedule.

Response

While the Board will provide to the extent practicable copies of small portions of the record of proceedings to an attorney who has newly entered an appearance, the Board does not favor extensions based on substitution of counsel. See Board Practice Manual 2.3(i)(i).

OCIJ Action on Complaints Filed Against Immigration Judges

12. Members note that when they follow OCIJ's procedures for filing a formal complaint against an Immigration Judge, there is no follow up or indication as to any action taken on a complaint. State Judicial and Bar Associations routinely provide complainants with both acknowledgement of receipt of a complaint, as well as information regarding action taken (dismissal, referral for investigation, or disciplinary action taken).

[*Questions on disciplinary action were asked several times in the past. These earlier agenda questions include:*
September 25, 2003)(Q.#5) http://www.usdoj.gov/eoir/statspub/eoiraila0903.pdf**,**
September 26, 2002 (Qs.#14-15)
http://www.usdoj.gov/eoir/statspub/eoiraila0209.htm **,** ***March 7, 2002 (Q.#4)***
http://www.usdoj.gov/eoir/statspub/eoiraila0203.htm **,** *and*
March 30, 2000 (Q.#27) http://www.usdoj.gov/eoir/statspub/qaeoiraila.htm **.]**

a. Under what circumstances will OCIJ or any other relevant authority provide acknowledgement of receipt of a complaint?

b. Under what circumstances will OCIJ or any other relevant authority provide any information regarding the whether a complaint is dismissed, referred for investigation or made a decision to take action on the issue?

c. In the event no action is taken or the action taken is not viewed as satisfactory by the complainant, what is the next level or steps to be taken by the complainant?

While we understand that, in some limited circumstances, the nature of the action taken may be a confidential matter, we urge OCIJ to adopt measures to acknowledge receipt and consideration of complaints, and provide general information regarding whether action has been taken or further review declined so that complainants can be assured that the matter has been both taken seriously, as well as to allow the complainants to know that there has either been a satisfactory resolution, or the matter needs to be taken further.

Response

OCIJ will provide acknowledgment of receipt of a written complaint against

an immigration judge. Complaints are addressed individually, and any action taken will be appropriate to that particular situation. Any action taken by either OCIJ or the Office of Professional Responsibility (OPR), however, may be considered confidential. In addition, OCIJ does not disclose any disciplinary action taken against an employee. However, OPR may disclose disciplinary action taken against a Department employee in limited circumstances and only when such a disclosure would not violate the employee's privacy interests.

Regulations at 28 C.F.R. Subpart G-2 §0.39a addresses the functions of the Office of Professional Responsibility (OPR) and 28 C.F.R. §0.39d discusses the relationship of OPR to other departmental units. Further information concerning OPR may be found at http://www.usdoj.gov/opr/. Regulations at 28 C.F.R. Subpart E-4 §0.29c address reporting allegations of employee misconduct to the Office of Inspector General (OIG). Further information concerning OIG may be found at http://www.usdoj.gov/oig/. Please note that 28 C.F.R. §0.39d(a) specifies that primary responsibility for assuring the maintenance of the highest standards of professional responsibility by Department employees shall continue to rest with the heads of the offices, division, bureaus and boards of the Department.

Rape and the Sexual Purpose or Pleasure Doctrine

13. Practitioners report that Immigration Judges and even Board members continue to mischaracterize rape as an act of sexual pleasure for the perpetrator, as opposed to a purely violent act engaged in to humiliate, intimidate or otherwise harm the victim, relying on such a characterization to avoid a finding of prior persecution. *See, e.g., Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2004); *See Eliminating Immigration Judges' Discretion to Mischaracterize Rape as an Act of Sexual Purpose or Pleasure in Asylum Proceedings*, 5 BENDER'S IMMIGR. BULL. 669 (August 1, 2000). EOIR's cavalier treatment of rape continues to date—for example, a recent Board Member dismissed a credible account of a brutal gang rape by a group of soldiers of a young political activist with the statement that "[s]he was in the wrong place at the wrong time."

Such archaic attitudes have no place in any part of American jurisprudence, much less the agency charged with evaluating asylum applications and petitions filed by victims of abuse. Please advise as to what guidance EOIR can provide either through training to Immigration Judges and/or efforts to clarify its position through relevant precedent decisions by the Board.

Response

At present, OCIJ does not have plans to conduct additional immigration judge

training on this particular issue. OCIJ recognizes the sensitive nature of these types of claims. If the respondent or the respondent's attorney believes that an immigration judge has conducted him or herself improperly or has engaged in misconduct, a complaint can be filed with OCIJ or OPR (see response to Question 12 above and response to Question 5 of AILA-EOIR Agenda, September 25, 2003, available at http://www.usdoj.gov/eoir/statspub/eoiraila0903.pdf). If a respondent or the respondent's attorney believes that an immigration judge has incorrectly applied the law, such matters should properly be addressed on appeal before the Board.

The Board has reviewed the decision referenced in the question, although it is not clear how this statement is the equivalent of saying that rape is an act of sexual pleasure for the perpetrator. The question, in the context of an asylum claim, is whether there exists a nexus between the rape, which the Board recognizes to be a horrible act, and one of the five enumerated grounds for asylum eligibility. With regard to training, the Board endeavors to provide ongoing training for the Board Members, the attorney staff, and the Board's support staff on important issues, including the particular sensitivities involving asylum, withholding or deferral applicants.

Representation and Referral of Juveniles in Proceedings

14. According to ABA guidelines, juveniles in removal proceedings should be represented by counsel, and EOIR has stated that pro bono representation is to be encouraged. *See* OPPM 04-07, Guidelines for cases involving unaccompanied minors (http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-07.pdf). While some community-based organizations (CBOs) regularly represent juveniles, not all juvenile respondents are able to immediately secure representation through such agencies. In the interest of helping the juveniles, cases are continued for counsel, with the unintended effect of prolonged detention.

Will EOIR consider advising Immigration Judges to encourage contact with any and all sources for pro bono representation of juveniles (e.g., the local AILA chapters' Pro Bono Coordinator), to secure representatives for juveniles with relief where representation by a CBO—even one with funding for such representation—is not readily available?

Response

Immigration judges are required to follow procedures and guidance as set forth in the OPPMs issued by the OCIJ. As stated in OPPM 04-07, the OCIJ has instructed that immigration judges should encourage the use of pro bono resources whenever a child respondent needs a legal representative. Further, pursuant to 8 C.F.R. § 1003.61(a), the OCIJ maintains the List of Free Legal Service

Providers which is distributed to all aliens in immigration proceedings. The EOIR point of contact for pro bono efforts concerning juveniles in removal proceedings is Steven Lang, Pro Bono Coordinator. Assistant Chief Immigration Judge Phillip Williams is the OCIJ point of contact concerning juveniles in removal proceedings.

Since April of 2000, the EOIR Pro Bono Program has been involved in efforts to facilitate and promote pro bono representation for juveniles (both detained and non-detained) before the Immigration Court and Board of Immigration Appeals. The Pro Bono Coordinator looks forward to assisting in the establishment of the recently-launched National Center for Refugee and Immigrant Children, and in carrying out its mission.

EOIR Interim Rule on Background and Security Investigations

15. We applaud the Justice Department and EOIR for taking the initiative to grapple with the problems surrounding the intersection of background and security investigations and grants of relief before the Court. We note, however, that there are no directives within the proposed regulations that require DHS to act within a certain time frame to perform the background and security investigations. We also note that the Immigration Judges are prevented from granting relief until the background and security investigations are completed by DHS, and that DHS may request an unlimited number of continuances in order to complete the investigations.

a. The Interim Rule appears to cross agency lines. Was it developed as a result of collaboration with or input from the DHS? If so, why wasn't the Rule published jointly?

Response

The Interim rule was developed in consultation with Department of Homeland Security (DHS). Because the rule was intended to address primarily EOIR processes and DHS may develop a rule pertaining to processes within its exclusive purview, it was determined that the rule would remain exclusive to EOIR. As a general rule both DHS and DOJ may exchange draft documents for comment and review where processes within each separate Department may overlap. EOIR is working collaboratively with DHS in order to ensure that implementation of the rule proceeds smoothly.

b. Has DHS informed EOIR as to any estimated processing times are for performing background and security investigations? If so, what are those estimates or guidelines?

Response

DHS has not stated the anticipated length of time for performing background investigations. This is a question more appropriately handled by DHS.

c. Has EOIR considered whether the implementation of the Interim Rule may lead to *increased* backlogs within EOIR? What will EOIR do to ease any increased backlogs caused by the implementation of the Interim Rule?

Response

EOIR does not anticipate a backlog of appellate cases. See 8 C.F.R. §§ 1003.1(d)(6)(ii)(A) or (B). However, the implementation of the rule may lead to delays at the Immigration Courts, especially in the initial implementation period. However, the rule is clear that relief cannot be granted until the required checks are completed. See 8 C.F.R. 1003.1(d)(6)(i) and 1003.47(g).

d. Has EOIR considered what affect increased backlogs within EOIR may have the Agency's ability to comply with its own Case Completion Guidelines?

Response

EOIR does not anticipate any effect on its ability to comply with the Board Reform Rule or EOIR's Case Completion Goals for cases pending before the Board. See 8 C.F.R. § 1003.1(e)(8)(i). However, as noted above, the implementation of the rule may lead to delays before the Immigration Courts. At this time, it cannot be determined what impact the rule will have on case completion goals.

e. What does EOIR plan to do in order to balance the interim rule with the Case Completion Guidelines? For example, will Immigration Judges be granted waivers for cases that they are not able to complete because DHS has not completed the background and security investigations in a timely fashion?

Response

All immigration judges must comply with the regulation. Case completion goals, which are internal, aspirational measures, will continue to be implemented in harmony with the statute and regulations. OCIJ has issued an interim OPPM, 05-03: "Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals (Interim)," which provides guidance on the background and security investigations rule, and is available at http://www.usdoj.gov/eoir/efoia/ocij/oppm05/05-03.pdf. We note that all OPPMs are available on the EOIR website under the Statistics and Publications link. See http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm. With regard to appeals pending before the Board, the Board may remand a case where background checks have not been completed or place a case on

hold where checks are no longer current. The regulation makes allowances for cases that must be placed on hold to allow for updated checks. See 8 C.F.R. § 1003.1(e)(8)(i).

f. What, if any, recourse will individual immigration judges have if DHS does not take reasonable steps to perform the background and security investigations in a timely fashion, thus effectively preventing a case from being completed? Would EOIR consider implementing a system whereby the DHS is given a presumptively reasonable amount of time to complete the background investigations, and if it is not able to do so, the Department must request a waiver from the Immigration Judge?

Response

None. As noted above, the rule is clear that relief cannot be granted unless the required checks are completed. Please note that the rule at 8 C.F.R. §§ 1003.47(e), (f) and (g) and the discussion in the rule supplementary language at 70 FR 4743, 4744 and 4747 (Monday, January 31, 2005) discusses the national security concerns that gave rise to this rule. The rule specifically discusses the nature of the authority of the immigration judge with regard to DHS investigations and states that where "[o]n occasion, immigration judges have attempted to 'order' DHS to complete investigations by a specific date, an authority that was never delegated by the Attorney General when the functions of the former Immigration and Naturalization Service were a part of the Department of Justice, and an authority that the Attorney General does not now delegate to immigration judges." Additionally the rule also discusses the "immigration judge's authority to administratively close cases solely because the respondent is subject to investigation or indices checks" [and] specifically does not authorize the immigration judge to close administratively such cases. See supplementary language at 70 FR 4747.

g. The Interim Rule provides for sanctions against Respondents who do not set up or attend fingerprinting appointments. Would EOIR consider requiring the Immigration Judges to amend hearing notices at the Master Calendar hearings that set forth Respondents' responsibilities and potential penalties? The Immigration Judges should also include such information in the routine advisals provided. Please comment.

Response

As required by the rule, instructions and advisals will be provided to respondents regarding the requirement to provide biometrics and the consequences for failures to comply. See 8 C.F.R. § 1003.47(d) and the discussion in the supplementary language to the rule at 70 FR 4743, 4746 (Monday, January 31, 2005). These instructions and advisals, OCIJ OPPM

05-03 "Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals (Interim)," DHS "Post-Order Instructions for Individuals Granted Relief or Protection from Removal by Immigration Court," and DHS "Instructions for Submitting Certain Applications in Immigration Court and for Providing Biometric and Biographic Information to U.S. Citizenship and Immigration Services," were issued by EOIR and DHS, effective April 1, 2005. The availability of interpreters is guided by OPPM 04-08, "Contract Interpreter Services," available at http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-08.pdf.

h. Has EOIR considered whether the Interim Rule requiring the Board to remand cases presently pending directly to the Immigration Judge will cause additional backlogs in the Immigration Courts? How will the Justice Department deal with such additional backlogs?

Response

As noted above, EOIR cannot determine at this time what impact the rule will have on case completion guidelines.

i. The Interim Rules provide for a complicated scheme for cases that are pending before the Board. From AILA's review, the benefits of the proposed rule are limited at best, if not actually counterproductive. Would EOIR consider retaining the existing system it now has for appeals before the Board, i.e., in the absence of new information, requiring a decision based on the evidence contained in the record on appeal?

Response

As indicated in the supplementary information to the Interim Rule, the Attorney General has determined that national security requires that the Board shall not grant covered forms of relief without first ensuring that DHS has completed the appropriate identity, law enforcement, or security investigations or examinations. EOIR, however, notes that the Interim Rule does indicate that the Board may rely upon the results of checks completed after April 1, 2005, where DHS has not reported either of the following: (1) prior checks have expired and must be updated or (2) new information bearing on the merits of the application of relief has been uncovered. See 8 C.F.R. § 1003.1(d)(6)(ii).

j. If negative information from a security or background investigation develops during the pendency of the appeal, nothing prevents DHS from filing a motion to remand the proceedings to the Immigration Judge. Similarly, where negative information from a security or background investigation becomes apparent after the Board's decision, DHS can file a motion to reopen with the Board. There is

clearly no prejudice to the government as DHS, unlike the alien, does not have any limits on how many motions it may file. Please comment.

Response

In motions to reopen removal proceedings, DHS does not appear to be subject to the number and time limitations for motions to reopen as set forth in 8 C.F.R. § 1003.2(c)(2), except in exclusion or deportation proceedings as provided in paragraph (3) of that section. However, the Board still has discretion to deny a motion to reopen even if the moving party has made a prima facie case for reopening. As to how the Board will address motions in the context of a background investigation, the Board will address that issue as it arises.

AWO and Appeals Review Procedures

16. Citing the extraordinary caseload faced by the Board and requirements for individual Board Members to adjudicate appeals and motions, AILA Members relate that they are concerned that the sheer volume and time restrictions prevent adequate review of the entire record by the decision maker, and cause respondents and certain circuit courts of appeal to lack confidence in the actual procedures used by the Board to review and adjudicate cases.

Will the Board explain the procedures employed to review and adjudicate matters before it, including the steps and levels of review, as well as the general levels of education, training and professional background of the staff members conducting the review? **[*Procedural questions were posed in the March 27, 2003 (#15) and March 30, 2000 (#5) Agenda Questions. See http://www.usdoj.gov/eoir/statspub/eoiraila0303.pdf for the most recent question.*]**

Response

The Board reviews records of proceedings in accordance with the regulations, and files go through different levels of review by paralegals, staff attorneys, and Board Members, but the deliberative process is an internal Board matter.

The thoroughness of review has not changed since the Board Reform rule was instituted in 2002. The only difference is that most cases are now reviewed by a single Board Member instead of a panel of three Board Members. While affirmances without opinion form a subset of the single Board Member decisions, they consist of approximately one third of all decisions issued by the Board. Regardless of the length of the Board's order, staff attorneys and Board Members remain responsible for a full assessment of all materials included in the record.