AGENDA ITEMS FOR EOIR/AILA LIAISON MEETING[1]
4/3/2008

The Immigration Court Practice Manual (ICPM)

1. AILA is pleased that EOIR has issued an immigration court practice manual, and appreciates the time and effort that went into writing, editing, and publishing the manual. The following are among the issues and concerns raised by AILA members after review of the ICPM:

    A. Although in some instances the ICPM merely standardizes existing practice, given the differences in immigration court procedure nationwide, many of the provisions will be received as "new" and will require changes in preparation and practice by attorneys. Further, we anticipate that DHS and even the immigration courts themselves will need time to adjust to and accommodate these new practices.

    - What steps has EOIR taken to ensure that all stakeholders are familiar with the new procedures?
    - Other than notifying AILA and others via electronic means, what other steps has EOIR taken to notify the public about the new procedures?
    - What training, if any, will EOIR provide to the various immigration courts, including both administrative staff and IJs?

    RESPONSE:
    On February 28, 2008, EOIR issued a press release announcing the publication of the Immigration Court Practice Manual (Practice Manual). On that date, the Practice Manual was prominently posted on the EOIR internet homepage. The press release was distributed to news organizations, immigration law publications, and other stakeholders. In addition, EOIR has mailed hard copies of the Practice Manual to the recognized organizations that have been accredited by the Board of Immigration Appeals, the EOIR Legal Orientation Program providers, and stakeholder organizations. Finally, the press release announcing the publication of the Practice Manual has been posted at all Immigration Courts and placed on counsels' tables.

    Regarding the training of court personnel, OCIJ, in collaboration with an orientation committee of Immigration Judges and Court Administrators, has designed a program to introduce all court personnel—including Immigration Judges, Court Administrators, and all staff—to the Practice Manual. Before the Practice Manual takes effect, all court personnel will have devoted a half day to completing the orientation program and familiarizing themselves with the Practice Manual. Finally, after the Practice Manual takes effect, OCIJ will be conducting on-going training regarding the Practice Manual with court personnel.

[1] Question #9 was not included in the agenda.

B. Given the complexity and length of the manual, we anticipate that all stakeholders will be challenged to be fully conversant with the standards by April 1, 2008, and although again not all changes are dramatic, there are numerous instances where failure to comply might result in prejudice to a Respondent's case. As a result, AILA requests clarification on the implementation and "effective date" of the manual, specifically:

- What standards apply to "pipeline" cases, i.e., cases that were set for merits or completed other substantive procedural steps prior to the publication of the ICPM, but have deadlines or events which will take place after the April 1, 2008 effective date?
- Does EOIR contemplate "transitional" rules or other guidance to the immigration courts and judges to avoid potential prejudice to respondents or counsel who were unaware of the new standards?
- Given the relatively short time period between the ICPM's publication and the likelihood that there will be significant changes in practice required for compliance, AILA would urge that immigration court staff and judges be encouraged to adopt a more lenient standard for a longer transitional period, treating the rules as mere guidelines (without the specified sanctions) for a longer period of time to allow for better understanding and fuller compliance. Will EOIR consider such a directive?
- Alternatively, would EOIR consider a brief delay in the implementation of the rules for such time as AILA and other NGO stakeholders might complete outreach and training? A longer "rollout" phase would allow AILA to help train and inform its members; a process we believe would not only lessen any "pain" associated with this transition, but also help identify areas of the ICPM that might need further development or consideration.

RESPONSE:
On March 11, 2008, in response to requests from members of the private bar for additional time to familiarize themselves with the Practice Manual, EOIR postponed the effective date of the Practice Manual until July 1, 2008.

With regard to "pipeline" cases, on March 11, 2008, the Chief Immigration Judge issued a memorandum to all court personnel addressing the application of the Practice Manual to cases pending on the July 1, 2008, effective date. The memorandum states that "[t]he Practice Manual does not supersede any filing deadlines that were specifically set by an Immigration Judge in a particular case before the Practice Manual went into effect." The memorandum further states that "[t]he Practice Manual does not go into effect until July 1, 2008, and therefore it does not create any deadlines that pre-date July 1."

Finally, although the memorandum does not explicitly provide for a "transitional period," the memorandum states that in processing and adjudicating filings in the coming months, Immigration Judges should be mindful that the public "will need time to become familiar with the Practice Manual. Immigration Judges should be understanding and flexible in applying the provisions of the manual and in setting specific deadlines in cases where necessary."

C. AILA intends to provide training for our membership through web seminars or telephone conferences, as well as through local "brown bag" sessions. We would like to invite EOIR to consider joining in these efforts.

- What provisions, if any, have been made to provide training to either private attorneys, accredited representatives, DHS OCC or other parties on the local level?
- Will EOIR consider participating by providing faculty to participate (similar to the annual EOIR Open Forum), for AILA teleconferences?
- Whom should AILA contact to make arrangements or field inquiries for local training, potential speakers or "point of contact" at a particular court?

RESPONSE:
Representatives of EOIR, including drafters of the Practice Manual, will be participating in the AILA spring conference and annual conference, and EOIR has offered to provide Practice Manual drafters as faculty for AILA teleconferences (contingent upon their availability). In addition, the EOIR Legal Orientation and Pro Bono Program conducts Model Hearing Programs for pro bono representatives. These programs assist pro bono representatives in understanding Immigration Court practice and procedure, and provide an ideal forum for pro bono representatives to ask questions related to the Practice Manual.

D. AILA understands that the ICPM is designed to regularize and standardize practice, but believes that there will inevitably be local interpretations of its provisions. Given that the ICPM is not only a new document, but a new concept, what are suggested best practices for review or clarification of local application of the manual's standards? For example, are all such issues merely appealed to the Board? Or are inquiries best directed to the Court Administrator or the responsible ACIJ?

RESPONSE:
In a March 2008 letter accompanying the release of the Practice Manual, the Chief Immigration Judge stated that "[t]he Practice Manual is intended to be a 'living document,' and the Office of the Chief Immigration Judge will update it in response to changes in law and policy, as well as in response to comments by the parties using it." In addition, Chapter 13.4(a) of the Practice Manual states that "[t]he Executive Office for Immigration Review welcomes and encourages the

public to provide comments on the Practice Manual. In particular, the public is encouraged to identify errors or ambiguities in the text and to propose revisions for future editions."

As noted in the response to question 1(F), below, the Practice Manual is intended to be applied in a uniform manner nationwide. Questions involving local court practices are often most appropriately addressed with the Court Administrator or Assistant Chief Immigration Judge, and AILA members are invited to continue doing so. In addition, comments and suggestions regarding the Practice Manual may be provided to OCIJ at the address provided in Chapter 13.4(a) of the Practice Manual.

E. AILA recognizes that the ICPM represents not only a potentially tremendous resource for pro se Respondents, but unfortunately for those who lack the English skills or sophistication to utilize the manual, a potentially tremendous burden.

- For pro se Respondents, what steps are being taken to ensure they are aware of and can understand the new requirements?
- Will hard copies by made available by immigration court staff for reference and review at court? Has EOIR considered any alternative forms of delivering this information to pro se applicants?
- Is there any possibility that the manual may be made available in languages other than English?
- Will EOIR consider prominently displaying an announcement of the new rules and instructions on how to access materials at each court in languages other than English?
- Will EOIR direct IJs to inform pro se applicants as to the manual and how to access it?

RESPONSE:
EOIR hopes that the Practice Manual will be a resource for pro se respondents. Though EOIR does not plan to publish the Practice Manual in languages other than English, the Practice Manual was written in a manner that was intended to be accessible to the general public. EOIR agrees that, to the extent possible, it is important that pro se respondents are aware of the Practice Manual and its provisions.

In order to ensure that pro se respondents are as well-informed as possible, EOIR has mailed hard copies of the Practice Manual to the recognized organizations that have been accredited by the Board of Immigration Appeals, the EOIR Legal Orientation Program providers, and stakeholder organizations. In addition, EOIR is working with ICE to place copies of the Practice Manual in ICE detention facilities.

EOIR welcomes AILA's input on matters regarding pro se respondents. If AILA members become aware of any ICE detention facilities that lack hard copies of the Practice Manual, please bring this to OCIJ's attention. In addition, following the Practice Manual's implementation, AILA members are encouraged to contact OCIJ with comments addressing how the Practice Manual has affected pro se respondents, and how best to inform pro se respondents of the Practice Manual's existence and requirements. Please see Chapter 13.4(a) of the Practice Manual for information on where to send comments.

F. In the memorandum issued simultaneously with the ICPM, Chief Immigration Judge Neal states that as of April 1, 2008, existing Local Operating Procedures will no longer be used, but the manual is not explicit as to whether local "standing orders" survive the transition. AILA is concerned that allowing IJs to continue to have local standing orders will conflict with the uniformity of the ICPM, particularly if the standing orders are more restrictive than the ICPM.

- Under the ICPM will IJs be allowed to have local "standing orders?"

RESPONSE:
In the March 2008 letter accompanying the release of the Practice Manual, the Chief Immigration Judge stated that, "[b]eginning on [the July 1, 2008, effective date], Local Operating Procedures will no longer be used, and parties will be expected to follow the Practice Manual." The provisions in the Practice Manual are to be applied in a uniform manner nationwide. Therefore, local practices which contradict the Practice Manual's provisions will no longer be permitted, including local practices that were expressed through "standing orders."

G. Many AILA members feel that the 30 day exclusionary rule (ICPM, Chapter 3 (ii) (A), page 33) is unduly burdensome for both parties appearing before the court, and may be unworkable for situations in which there is only a short adjournment between the Master Calendar and Individual Calendar hearing date. This restriction is especially difficult for cases being represented by law school immigration clinics on short semester schedules or for last minute pro bono representation.

- What provisions are made to allow departure from the 30-day rule in the situations described above and other situations where good cause may exist?

- Please confirm that despite the guidance provided in the ICPM regarding time limits, IJs retain independent discretion to accept filings inside or outside the 30 day time limit pursuant to 8 C.F.R. § 1003.10 (b).

RESPONSE:

The deadlines outlined in the Practice Manual apply "unless otherwise specified by the Immigration Judge." Chapter 3.1(b). Therefore, Immigration Judges retain the discretion to set other deadlines in particular cases. In addition, the Practice Manual provides that parties may file motions for extensions of filing deadlines and motions to accept untimely filings. See Chapter 3.1(c)(iv); 3.1(d)(iii). Finally, please note that the Practice Manual's deadlines apply only to cases involving non-detained respondents. For cases involving detained respondents, "filing deadlines are as specified by the Immigration Court." Chapter 3.1(b)(i)(B); 3.1(b)(ii)(B).

OCIJ appreciates the scheduling concerns that are present in cases involving law school clinics and other pro bono representatives. In part to address these concerns, OCIJ recently issued Operating Policies and Procedures Memorandum 08-01: *Guidelines for Facilitating Pro Bono Legal Services*. OPPM 08-01 states the following:

> With respect to individual calendars, judges should be cognizant of the unique scheduling needs of law school clinics operating on an academic calendar and pro bono programs which require sufficient time to recruit and train representatives. Because clinics and pro bono entities often face special staffing and preparation constraints, judges should be flexible and are encouraged to accommodate appropriate requests for a continuance and to advance a hearing date.

H. While AILA understands that deadlines for submission of materials are necessary for the efficient management of EOIR's increasing case load, in many cases—for reasons good or bad—those deadlines will simply not be met. Although the ICPM provides for some limited exceptions to the 30 day rule, AILA urges that the 30 day exclusionary rule be applied liberally, if at all, especially given the fact that in removal proceedings there is no right to government counsel and many respondents are unrepresented (or under-represented), unsophisticated, and may not have even minimal knowledge of the English language.

- Will EOIR consider encouraging both the immigration courts and IJs to take a more liberal approach in their application of these deadlines?

RESPONSE:
As noted in the response to question 1(G), above, the deadlines in the Practice Manual apply "unless otherwise specified by the Immigration Judge." Chapter 3.1(b). Therefore, Immigration Judges have the discretion to set other deadlines, as warranted on a case-by-case basis. OCIJ believes that decisions on departing from the Practice Manual's 30-day filing deadline are best left to the Immigration Judges to make on a case-by-case basis. Therefore, OCIJ does not plan to issue

any guidance to Immigration Judges, beyond the language found in the Practice Manual, on how to set filing deadlines in individual cases.

In addition, the Chief Immigration Judge's March 11, 2008, memorandum to the Immigration Courts states that, in processing and adjudicating filings in the coming months, Immigration Judges should be mindful that the public "will need time to become familiar with the Practice Manual. Immigration Judges should be understanding and flexible in applying the provisions of the manual and in setting specific deadlines in cases where necessary."

I. The ICPM seems to require separate motions for different aspects of what would often now be part of a unified or "omnibus" request (for example, a respondent's motion to change venue, which includes an alternate request for a continuance, or failing that, a request for a telephonic appearance, and a request for an interpreter). Under the ICPM each motion requires a separate cover sheet, the individual motion, (redundant) relevant attachments, a proposed order, and a certificate of service. This will result in much more work for the court and for both parties, and may inevitably lead to confusion where the motion is repetitive or disconnected.

- Would EOIR consider adding language to the motions section of the ICPM that would allow for omnibus or alternative motions, in specific, well-defined circumstances, if necessary?

RESPONSE:
The general standards for all motions are described in Chapter 5 of the Practice Manual. Individualized standards for particular motions are described throughout the Practice Manual. The Practice Manual neither specifically prohibits nor permits the filing of omnibus motions. Rather, Chapter 5.2(b) of the Practice Manual states that a "motion's cover page must accurately describe the motion. Motions must state with particularity the grounds on which the motion is based. In addition, motions must identify the relief or remedy sought by the filing party."

J. The provision of the ICPM that authorizes the court to reject an "improper filing" (Chapter 3 (d) (i) page 37) for mere formatting errors ("failure to comply with the language, signature, and format requirements") appears overly harsh. AILA members are concerned that court personnel or IJs may reject filings for minor errors or deviations from format that do not go to the substance or the materiality of a filing.

- What guidance will EOIR provide to the immigration courts and administrative personnel on the application of such exclusionary sanctions?

- Will the Board entertain interlocutory appeals for sanctions which Respondents arguably consider prejudice their ability to apply for relief or defend themselves in immigration court?

RESPONSE:
Current rejection policies vary by local Immigration Court. Some courts reject documents for failure to comply with formatting requirements in the court's Local Operating Procedures, such as failure to correctly two-hole punch submissions.

OCIJ, in collaboration with Immigration Judges and Court Administrators, is developing procedures to be used by court personnel in handling documents that are improperly filed. While the contents of this policy are still under discussion, the policy will be implemented nationwide, allowing filing parties to benefit from a greater degree of uniformity in the handling of improperly-filed documents than currently exists. Furthermore, as stated in Chapter 3.1(d)(i) of the Practice Manual, any document that is rejected will be accompanied by a specific explanation for the rejection.

All interlocutory appeals are addressed on a case-by-case basis by the Board of Immigration Appeals. It is not possible to predict how any such appeals relating to the Practice Manual will be resolved.

K. AILA is concerned that attorney telephonic appearances at master calendar hearings are allowed only at the IJ's discretion. See Chapter 4, (n), page 72. As will be discussed in greater detail in Agenda Item 2, this affects both the detained and non-detained docket: many detained respondents are sent far away from their normal place of residence, their families, and their attorneys; on the non-detained side, it is not uncommon for a respondent to have been served an NTA in one jurisdiction but have moved or actually maintain a residence in another. Finally, even though EOIR has increased the number of immigration courts nationwide, there remain many respondents whose physical attendance at a brief hearing requires a lengthy drive (and we note that many respondents are unable to secure valid driver's licenses).

- Given the lack of prejudice to DHS in most cases and lack of administrative impact on the courts, will EOIR consider guidance strongly encouraging the use of telephonic master calendar hearings where the alien is remote to the court or circumstances otherwise dictate?

RESPONSE:
The Practice Manual states that "[i]n certain instances, respondents and representatives may appear by telephone at some master calendar hearings, at the Immigration Judge's discretion." Chapter 4.15(n). EOIR does not plan to change this provision, which describes the current practice at most Immigration Courts.

EOIR believes it is appropriate to grant Immigration Judges the discretion to respond on a case-by-case basis to requests for telephonic appearances. However, after this provision goes into effect, if AILA members have specific comments about this provision's local implementation, these comments may be brought to the attention of the local Assistant Chief Immigration Judge.

L. The ICPM would benefit from inclusion of guidelines regarding timeliness of IJ decisions on pre-hearing motions, particularly motions to change venue, motions for leave to appear telephonically, motions to permit witness telephonic testimony, and other similar motions. IJs who do not adjudicate such motions until shortly before (or sometimes the date of) the hearing, prejudice not only the Respondent but also lead to inefficiencies in the court, in that extra court time is needed to handle administrative matters.

- Would EOIR consider adding guidelines to the ICPM that encourage prompt and timely IJ adjudications of motions-- particularly for motions to change venue and motions for telephonic appearances?

RESPONSE:
The Practice Manual states that, for cases involving non-detained aliens, "filings must be submitted at least fifteen (15) days in advance of the [master calendar] hearing if requesting a ruling at or prior to the hearing." Chapter 3.1(b)(i)(A). This deadline, as well as the 30-day filing deadline prior to individual calendar hearings for non-detained aliens, is intended to afford Immigration Judges ample time to review motions and other filings before hearings. EOIR does encourage Immigration Judges to rule on motions promptly; however, even with timely motions, it is not always possible for Immigration Judges to rule in advance of hearings as, in reviewing the motion, the Immigration Judge may identify facts or legal issues that need to be developed further. Therefore, EOIR does not currently plan to issue guidance to the Immigration Judges on this issue.

Telephonic Hearings

2. As ICE steps up enforcement, it is often sending detainees to ICE detention centers far from where they reside. This has created a grave deprivation of due process to such detainees.

   Some IJs at remote detention centers are categorically refusing to allow attorneys to appear telephonically at hearings for their detained clients. This effectively deprives the respondent of his right to counsel of choice. Moreover, while it is clear that there are higher numbers of both private and pro bono immigration lawyers in more populated urban centers, due to the limited availability of counsel in such locations, these remotely detained respondents face significant difficulty finding any representation at all.

A In order to ensure that respondents are accorded due process and have meaningful access to counsel, would EOIR consider promulgating a uniform policy that all IJs should allow attorneys to appear telephonically at bond and master calendar hearings, if the attorneys are not located within a reasonable proximity to the court?

RESPONSE:
The decision whether to grant a motion to appear by telephone is within the discretion of the Immigration Judge and is made on a case-by-case basis. Accordingly, EOIR does not currently plan to issue special guidance to the Immigration Judges regarding this issue. For more information on appearances by telephone, please see Chapter 4.15(n) of the Immigration Court Practice Manual (Telephonic appearances). Also, please see the response to question 1(K), above.

B. Would EOIR consider setting a policy discouraging IJs from categorically denying all requests for telephonic appearances at bond and master calendar hearings, and instead requiring the IJ to make an individualized determination as to each request for a telephonic hearing?

RESPONSE:
EOIR does not currently plan to issue special guidance to the Immigration Judges regarding this issue. If a party does not agree with a ruling by an Immigration Judge on a motion, the party may appeal that decision to the Board of Immigration Appeals. Further, if a party believes that an Immigration Judge has adopted an inappropriate policy regarding the handling of a motion, the party is welcome to raise the issue with the appropriate Assistant Chief Immigration Judge.

Venue & Related Bond Issues

3. Some IJs require not merely "pleading" to the factual allegations of the NTA, but outright concession to the charges of removal and even substantive applications for relief before they will consider a change of venue request (COV). This occurs even in situations where there is no reasonable nexus to the court militating in favor of retaining jurisdiction. AILA notes that there appears to be no case law that requires the respondent to concede the charges in the NTA before the IJ can rule favorably on his or her motion to change venue. Further, the October 9, 2001, OPPM on COV does not require such admissions or concessions.

   The practices outlined above have led to respondents who are released from ICE custody on bond and who have returned to their homes far away from the Court, having to travel sometimes thousands of miles to attend master calendar hearings. In addition, some IJs

delay adjudicating motions to change venue until the day of the master calendar, resulting in respondents having to travel great distances.

A. Would EOIR consider initiating a uniform policy encouraging IJs to grant change of venue requests, in circumstances where the respondent has been released on bond and has returned to a residence in the jurisdiction of another immigration court?

RESPONSE:
The decision whether to grant a motion to change venue is within the discretion of the Immigration Judge and is made on a case-by-case basis in accordance with 8 C.F.R § 1003.20 and the applicable case law. Accordingly, EOIR does not currently plan to issue any special guidance to the Immigration Judges regarding this issue. For more information on motions to change venue, please see Chapter 5.10(c) of the Immigration Court Practice Manual (Motion to change venue). See also Operating Policy and Procedure Memorandum 01-02, *Changes of Venue*. OPPM 01-02 provides guidance to the Immigration Courts regarding the authority of Immigration Judges to change venue and the procedures to be followed in connection with motions to change venue.

4. In detained cases it is often necessary for the respondent to file a COV in order to ensure a substantive merits case is most effectively presented. Frequently, ICE opposes returning the case to the jurisdiction where the underlying charges arose, particularly where ICE has transferred the respondent to a distant detention facility. There is concern that immigration judges regularly defer to the ICE position to deny the COV motion, despite the clear prejudice to the Respondent.

A. Would EOIR consider issuing guidance to the effect that IJs, in deciding whether to grant a COV in a detained case, should not consider as dispositive ICE opposition based on ICE representation of the cost of transportation, convenience or availability of bed space at a particular facility?

RESPONSE:
EOIR does not currently plan to issue special guidance to the Immigration Judges regarding this issue. In considering whether to grant a motion to change venue under 8 C.F.R. § 1003.20, Immigration Judges consider any DHS opposition to the motion on a case-by-case basis. If a party does not agree with a ruling by an Immigration Judge on a motion, the party may appeal that decision to the Board of Immigration Appeals. Further, if a party believes that an Immigration Judge has adopted an inappropriate policy regarding the adjudication of a motion, the party is welcome to raise the issue with the appropriate Assistant Chief Immigration Judge.

B. Would EOIR consider promulgating a policy explicitly notes that the effective "de facto presumption" against a COV does not exist and requiring ICE to

demonstrate why the COV should not be granted, when the respondent is detained far from his normal place of residence, is prima facie eligible for relief and has filed such application with the court?

REPONSE:
EOIR does not currently plan to issue special guidance to the Immigration Judges regarding this issue. The regulation at 8 C.F.R. § 1003.20(b) states that the "Immigration Judge, for good cause, may change venue upon motion by one of the parties . . . only after the other party has been given notice and an opportunity to respond to the motion to change venue." Therefore, the party filing a motion change venue, whether the respondent or DHS, has the burden to show "good cause" why the motion should be granted. *See also Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992). A requirement that, when the respondent files a motion to change venue, DHS must demonstrate why the motion should *not* be granted, would be contrary to the regulation.

5. ICE's policy of transporting detainees from the location of their initial arrest and encounter to remote detention locations (not infrequently with an interim detention location), makes the task of their determining venue and bond issues difficult to the point of being nearly impossible in some cases.

   While ICE will normally draft the NTA soon after encountering an individual, but may not file the NTA with a court until several days or even weeks later because the government "intends" to detain the individual at another location. In the meantime, the court with jurisdiction over the site of the arrest (or location of interim detention—for example, a county jail, en route to an ICE facility in another state), will either refuse to entertain a motion for a bond or alternatively, will schedule a hearing, but (1) decline to proceed if the individual has since been moved out of the court's jurisdiction or the NTA has subsequently been filed with another court; (2) be unable to proceed with a bond hearing because the A file has already been transferred to another ICE office; or (3) not proceed because ICE cannot produce the respondent for testimony via phone or video.

   AILA understands that EOIR cannot control the movement of aliens in custody; however, AILA knows that EOIR shares its concern for the implications that such practices have on due process, fairness, and the ability of detainees to be represented before the court. The regulation at 8 CFR § 1003.19(c) specifies venue for purposes of custody redetermination hearings.

   Would OCIJ consider promulgating a policy that once an attorney has filed an EOIR-28 and motion for bond hearing with the court in the jurisdiction where the respondent was arrested or subsequently detained, that the proper venue for purposes of the bond hearing is that same court and the bond hearing should be held in that same court, even if ICE has transferred the respondent to another jurisdiction?

   RESPONSE:

EOIR does not currently plan to issue special guidance to the Immigration Judges on this issue. The transfer of detainees is entirely within the control and purview of DHS. Accordingly, concerns over the transfer of a detained respondent to another jurisdiction after the respondent's attorney has filed an EOIR-28 and a motion for a bond hearing is best addressed to DHS.

6. Some IJ denials of COV have seemed contrary to established precedent, as set forth in *Matter of Rahman*, 20 I&N Dec. 480 (BIA1992), and work a hardship on the alien by depriving him of available counsel and/or evidence. The BIA discourages interlocutory appeals on COV, but some cases are compelling.

   Will the BIA subject such important and time sensitive interlocutory appeals to expedited briefing and consideration, or merely decide the case on the notice of appeal even if counsel notes he will submit a brief at a later date?

   RESPONSE:
   As stated in the Board's Practice Manual Chapter 4.14 (e), the Board does not normally issue briefing schedules for interlocutory appeals. If an appealing party wishes to file a brief, the brief should accompany the Notice of Appeal or be promptly submitted after the Notice of Appeal is filed. If an opposing party wishes to file a brief, the brief should be filed as soon as possible after the appeal is filed. The Board will not, however, suspend or delay adjudication of an interlocutory appeal in anticipation of, or in response to, the filing of a brief.

   The Board also notes that when an interlocutory appeal is pending before the Board, the Board and the Immigration Court each have joint jurisdiction over the case.

Biometrics & Security Clearances

7. AILA members report on occasion being informed by ICE attorneys that security clearance delays occur because EOIR had improperly designated the case with the wrong code, and, as a result, ICE had not been notified that the client was applying for cancellation and would need security clearances completed. Could EOIR clarify what its role, if any, is in ensuring that biometrics are completed for respondents who are applying for relief before the Court?

   RESPONSE:
   The completion of security and background checks for respondents in Immigration Court proceedings is entirely within the control and purview of DHS. EOIR has no role in ensuring that DHS completes those investigations. Regarding the security clearance delays reported by ICE attorneys, EOIR is unable to provide a response because the question does not include sufficient information. If AILA believes this is an ongoing issue, then specific examples,

including A numbers and the USCIS Service Center Receipt number, if any, should be provided to the appropriate Court Administrator.

Please note that guidance to the Immigration Courts regarding background and security checks for respondents in Immigration Court proceedings is contained in Interim Operating Policy and Procedures Memorandum 05-03, *Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals*.

8. In Interim OPPM 05-03, former Chief Immigration Judge Creppy indicated that voluntary departure and granting of a bond are not forms of relief for which security clearances are mandatory. Nevertheless there is confusion regarding security clearances and their application to voluntary departure and custody reconsideration.

   A. Are security clearances required when an individual is merely seeking bond and/or voluntary departure only?

      RESPONSE:
      The regulation at 8 C.F.R § 1003.47 governs the background and security checks requirement for respondents in Immigration Court proceedings.

      Regarding voluntary departure, 8 C.F.R. § 1003.47(j) provides that the background and security checks requirement does "not apply to the granting of voluntary departure." The regulation at 8 C.F.R. § 1003.47(j) provides, however, that "[i]f DHS seeks a continuance in order to complete pending identity, law enforcement, or security investigations or examinations, the immigration judge may grant additional time in the exercise of discretion, and the 30-day period for the immigration judge to grant voluntary departure . . . shall be extended accordingly."

      Regarding bond, 8 C.F.R. § 1003.47(k) provides that the background and security checks requirement does "not apply to proceedings seeking redetermination of conditions of custody of an alien during the pendency of immigration proceedings under section 236 of the Act." The regulation at 8 C.F.R. § 1003.47(k) provides, however, that "[i]f at the time of the custody hearing DHS seeks a brief continuance in an appropriate case based on unresolved identity, law enforcement, or security investigations or examinations, the immigration judge in the exercise of discretion may grant one or more continuances for a limited period of time which is reasonable under the circumstances."

   B. Are the security clearances mandated by regulation, statute or other guidance, are they discretionary?

      RESPONSE:

Regarding voluntary departure and custody determinations, please see the response to question A, above.

C. If requested, what clearances are required and are any clearances applied only to aliens of a particular nationality?

RESPONSE:
Background and security checks are entirely within the control and purview of DHS. Accordingly, this question is best addressed to DHS.

New Immigration Courts

10. Please provide an update on the status of new immigration courts, especially those recently proposed for Omaha and Charlotte.

A. When are they scheduled to open?

RESPONSE:
The new Immigration Courts are scheduled to open in September 2008.

B. How many IJs will be assigned to each court?

RESPONSE:
Two.

C. Are any other new immigration courts scheduled to open in the near future?

RESPONSE:
No.

EOIR's Role in Reporting to USCIS-Conditional Asylees

11. What, if any, role does EOIR play in communicating to USCIS that a respondent who had been granted conditional asylum (based on CPC) is the beneficiary of a final grant of asylum?

RESPONSE:
Due to both statutory and regulatory prohibitions on granting asylum before required security checks are completed, EOIR works collaboratively with USCIS to ensure that individuals with conditional grants of asylum have cleared their required updated security checks. Following the process established to manage

the former 1,000 annual limitation on the number of final grants of asylum, EOIR periodically provides the USCIS Asylum Program data files containing information for all known EOIR issued CPC conditional grants of asylum. The USCIS Asylum Program uses the EOIR data to schedule required biometrics/fingerprint scheduling notices as needed for the remaining EOIR conditional grants. On a monthly basis USCIS Asylum monitors the clearance of these required security checks and as cases clear the checks, generates final grant notices for EOIR. USCIS provides EOIR with the final grant notices for mailing to both respondents and their attorneys. EOIR also updates the EOIR CASE system to reflect the issuance of the final grant notices.

Asylum Officer Assessments in Removal Hearings

12. AILA was encouraged that the OPPM, 00-01, August 4, 2000, admonished IJs not to admit asylum officer assessments into the record. *Id*, at page 13-14. Additionally, an unpublished BIA decision have held that an asylum assessment referencing DHS credibility findings should not be part of the record absent other factors. Despite this, many IJs continue to admit asylum officer assessments into the record. Would EOIR remind IJs that it is not permissible to do so under the OPPM, 00-01, and/or issue guidance that IJs should instruct ICE OCC not to routinely include such assessments as part of "proposed" exhibits?

RESPONSE:
The relevant portion of OPPM 00-01, *Asylum Request Processing*, states as follows:

> XII. PROCESSING THE AFFIRMATIVE ASYLUM APPLICATION
>
> Only those asylum applications initially filed with the INS will be classified as affirmative applications. All affirmative asylum applications referred to the Immigration Court by the INS must contain all supporting documentation. The Court Administrator will not accept any affirmative asylum applications that do not contain all of the documents referred to in the Uniform Docketing System Manual.
>
> . . .
>
> C. Referring the Asylum Application: If an affirmative asylum application is not granted by the Asylum Office and the alien is not in a legal status, the application, along with any supporting documents, will be referred to the Immigration Court by the INS Asylum Office at the time the charging document is filed. The copy of the application and supporting documents referred to the Court may not contain any annotation or other information of a deliberative nature regarding the

application (other than administrative corrections to the application, as affirmed by the applicant's signature in Part H of the application). Aside from the application and supporting documents, only the ANSIR-generated INS Referral Sheet should be filed with the Court. Under no circumstances should any document containing reference to INS credibility findings be filed with the Court. If this does occur, the Court Administrator should promptly notify the INS prior to filing the application in the ROP.

On June 4, 2007, in its weekly electronic bulletin, OCIJ notified the Immigration Courts of the following:

Reminder Regarding Proceedings for Affirmative Asylum Applications Referred to EOIR by DHS

Pursuant to OPPM 00-01, Asylum Request Processing, the copy of the application and supporting documents referred to the Court may not contain any annotation or other information of a deliberative nature regarding the application (other than administrative corrections to the application). Under no circumstances should any document containing reference to DHS credibility findings be filed with the Court.

Please note that Immigration Judges make determinations regarding whether to admit evidence into the record in accordance with regulation and case law. If a party believes that an Immigration Judge has improperly admitted evidence into the record, that issue is appropriately raised on appeal to the Board of Immigration Appeals.

Administrative Notice of Evidence Outside of the Record on Appeal

13. Under 8 CFR § 1001.1 (d) (3), the Board may take administrative notice of "commonly known facts such as current events or the contents of official documents," but may not "engage in fact finding in the course of deciding an appeal." AILA is concerned that allowing the Board to take administrative notice of such facts, including, but not limited to changes in country conditions, without giving the parties a chance to rebut, respond to, or explain such administratively noticed facts, results in fact finding, and does not satisfy the requirements of due process. The Eighth, Ninth, and Tenth Circuits generally require the Board to notify the parties when it intends to take administrative notice of facts occurring after a hearing, when the facts are not obvious. (Castillo-Villagra v. INS, 972 F. 2d 1017 (9th Cir. 1992); Francois v. INS, 283 F. 3d 926 (8th Cir. 2002); Woldemeskel v. INS, 257 F. 3d 1185 (10th Cir. 2001). The First, Fifth, Seventh and D.C. Circuits do not require such notification, but instead reason that a person who wishes to rebut such administrative actions may properly file a motion to reopen to respond or rebut.

The AG has indicated that either party may file a motion when the Board has taken such administrative notice (see 67 Fed. Reg. 54878, 54892-93, Aug. 24, 2002); however, it appears that time and number limitations would apply to such a motion, precluding a respondent who had already reached the one motion limit from filing such a motion, or alternatively foreclosing the respondent's ability to file an MTR on an alternative basis at a later time. In addition, the respondent could be removed from the United States during the pendency of the motion, unless the Board grants a stay of removal. In such situations, respondents often feel the necessity of filing a petition for review with the Court of Appeals, further adding to the administrative burden and expense on both parties.

For reasons of due process, fairness to both parties, and efficiency, would the Board consider promulgating a policy or rule that when it intends to take administrative notice of facts occurring after a hearing, including, but not limited to changed country conditions, that it notify both parties of its intention, and set a briefing schedule so that each party may respond, prior to issuance of a final order?

RESPONSE:
The Board currently has no plans to promulgate a rule or policy that would notify parties of its intention to take administrative notice of facts and set briefing schedules so that each party may respond. The Board is specifically authorized to take administrative notice of commonly known events such as current events or the contents of official documents, and the regulations clarify that this does not amount to improper fact-finding on appeal. *See* 8 C.F.R. § 1003.1(d)(3)(iv). We are not aware of an influx of cases where the respondent seeks to rebut the use of administrative notice by a motion that it is otherwise time or number barred, but in this situation, the Board may invoke its *sua sponte* authority to reopen to ensure that due process concerns are met in a given case. Regarding the time bar, we encourage parties to file a rebuttal motion as soon as possible to avoid a motion being denied on this basis.

Duress Exception to Asylum Bar for Material Support of a Terrorist

14. DHS recently published regulations to permit a "duress" exception to the asylum bar for materially supporting a terrorist group under INA § 212(a)(3)(B).

    A. Is EOIR working with DHS to create a waiver procedure for the Immigration Court for asylum applicants who may be barred for materially supporting a terrorist group? If so, does EOIR know when such a waiver process will be available?

RESPONSE:
There have been ongoing discussions between EOIR and DHS to develop a process for handling cases before EOIR in which a respondent may be eligible to be considered by DHS for a waiver of the material support bar. To date, this matter is still under consideration.

The Secretary of Homeland Security, following consultation with the Secretary of State and the Attorney General, has exclusive authority over the duress and other material support exemptions for individuals in 240 removal proceedings. EOIR is participating in inter-agency meetings with DHS. Implementing guidance for the DHS material support exemptions is still under internal review and clearance within DHS. We are aware of the Federal Register notices of the Secretary's exercise of his discretionary authority to exempt certain terrorist-related inadmissibility grounds; however, these notices are not regulations.

B. Until such time as there is a waiver, how will EOIR handle pending cases in which material support is an issue? Would EOIR consider administratively closing such cases or holding them in abeyance?

RESPONSE:
In Immigration Court proceedings, this type of situation will continue to be handled on a case-by-case basis.

C. How will the BIA handle pending cases in which material support is an issue? Will the BIA hold such cases in abeyance? Should the affected respondent file a motion to remand?

RESPONSE:
The Board will grant a motion to remand, place a case on hold as provided by the regulations, or administratively close a case where both parties have filed a motion to do so or otherwise agree to close the case. The determination to file a joint motion to administratively close a matter is within the purview of the parties. While the Board understands that a removal order may not be carried out, the Board will proceed to adjudicate the case as long as one of the parties goes forth to request a final decision.

The determination to exercise prosecutorial discretion is a matter within DHS' sole discretion and not a matter that the Board may impose.

D. Will the BIA entertain motions to reopen for respondents who are now eligible for a waiver?

RESPONSE:
See response to C above.

AG's Recommendations—Streamlining & Professionalism

15. Please describe the progress the BIA has made on improving the streamlining rules.

For the past two years the Board of Immigration Appeals (Board) has taken significant steps to adjust its practices in response to the Attorney General's directives. As noted, the Board has reduced the rate of single member affirmances without opinion, from a high of 36 percent in 2003 to 9 percent currently, and is issuing decisions that contain more detail and analysis than before. In addition, the Board has worked hard at fulfilling its mission to give guidance to the immigration judges and the parties in proceedings. In 2007 the Board significantly increased the number of published decisions to 45 precedent decisions.

A. What percentage of BIA decisions are summary decisions?

RESPONSE:
As of October 2007 to the present, an average of 9% of BIA decisions resulted in an affirmance without opinion decision.

B. Does the BIA plan to add additional staff to the BIA?

RESPONSE:
In response to the 2006 directives, the Department published an interim rule expanding the Board to 15 permanent members. Since publication of the interim rule, announcements for Board member positions have been posted and the hiring process is ongoing.

Currently there are five temporary board members appointed to serve on the Board. The Board will continue to monitor and project future caseloads, and adjust resources accordingly, including the number of temporary board members and staff.

16. The AG's recommendations of Measures to Improve the Immigration Courts focused on improving the professionalism of Immigration Judges. While most IJs comport themselves in a professional and appropriate manner, AILA members still report incidents of unprofessional behavior on the part of some IJs. For example, attorneys across the country report IJs who are extremely hostile to respondent's counsel when counsel denies all the allegations and charges on the NTA and who exert pressure on private counsel to admit all allegations and to concede removability. The burden of proof is on DHS to prove the allegations and charges for removal, and IJs create a hostile environment when they try to force respondents to simply admit the allegations/charges. Other attorneys report that some IJs enforce briefing schedules only against defense attorneys, but not ICE attorneys.

Please provide an update on what EOIR has done to implement the AG's recommendations regarding improving IJ professionalism.

RESPONSE:

AILA members and other individuals who wish to report an incident of unprofessional behavior by an Immigration Judge should contact either the Assistant Chief Immigration Judge responsible for that Immigration Court or MaryBeth Keller, who is the Assistant Chief Immigration Judge with primary responsibility for issues of professionalism and conduct. Individuals may report such incidents through a link on the EOIR website under "Immigration Courts Nationwide," or by e-mailing EOIR.IJConduct@usdoj.gov .

To allow EOIR to effectively address the complaint, complaints should provide the most specific information possible. At a minimum, complaints should provide:

1. The name of the Immigration Judge;

2. A statement of what occurred;

3. The time and place(s) of the occurrence(s); and

4. Your name, address, telephone number, and any other contact information you wish to provide.

Since July 2006, OCIJ has, as a matter of routine, received and expeditiously resolved all manner of complaints, varying in nature from minor procedural irregularities to assertions of serious misconduct. The full range of management options have been exercised, including what essentially amounts to "dismissal" of frivolous complaints, procedural corrections, employee counseling and training, reprimands, and suspensions without pay.

EOIR's goal is to provide adequate initial and ongoing training and resources to its adjudicators, so that the level of professionalism remains as high as possible. EOIR currently provides an initial training period of five weeks for new Immigration Judges, and has implemented an intense new mentoring program for new and sitting Immigration Judges.

Institutional Hearing Program

17. Could EOIR furnish AILA (or place on the EOIR website) a list of locations where EOIR is utilizing the Institutional Hearing Program and identify the EOIR office that administers the program, with contact information?

RESPONSE:

The Institutional Hearing Program (IHP) sites, and the administrative control courts responsible for those locations, are included on the "List of Administrative Control Courts," which is available on EOIR's website at www.usdoj.gov/eoir. To reach this list, click on the words "Immigration Courts Nationwide" on the EOIR internet homepage, then click on the words "List of Administrative Control Courts." The IHP sites as well as certain DHS detention sites are listed under the heading "Other Hearing Locations." OCIJ is planning to revise this list so that those hearing locations which are IHP sites can be readily identified. In the meantime, any questions regarding the identification of a specific hearing location on this list may be directed to the appropriate Court Administrator.

Asylum Clock

18. Ongoing dialogue between the Asylum Office of USCIS and EOIR regarding the asylum clock is encouraging but has yet to produce a solution. Separation of the asylum clock from the EAD clock would offer an opportunity to reach resolution. AILA suggests that its participation in dialogue with EOIR and USCIS can aid in reaching resolution. With whom at EOIR can AILA meet to advance this process?

    RESPONSE:
    EOIR is aware of AILA's concerns regarding the asylum clock and we continue to work diligently with USCIS to establish coordinated policies for addressing issues related to the asylum clock. We look forward to sharing with you the results of these discussions, including EOIR's role in tracking the asylum clock. At this time, however, ideas for change are still in development.

    If a party feels that there is a problem with the asylum clock in an individual case and that case is pending before an Immigration Judge, the first step is to try to resolve the issue locally. If the concern arises during a hearing, it should be addressed to the Immigration Judge. If the concern arises after a hearing, it should be addressed to the Court Administrator. If necessary, the question may also be raised with the Assistant Chief Immigration Judge having jurisdiction over the particular court. For cases that are pending before the BIA, asylum clock questions should be directed to the attention of the Office of the General Counsel (OGC), which works with OCIJ to respond appropriately to the clock inquiry. AILA may also continue to raise broader concerns about the asylum clock at the EOIR-AILA liaison meetings or though written correspondence to OCIJ and/or OGC.

IJs Failing to Rule on Motions to Terminate filed by pro se detainees

19. AILA members are reporting that pro se detainees in Eloy, Arizona are submitting motions to terminate removal proceedings, in which they argue that they are not removable for their convictions, as charged in the NTA. DHS rarely responds to these motions, and pursuant to the local rules, the motions are deemed unopposed if DHS does

not respond within ten days. Nevertheless, certain IJs are failing to rule on the motions to terminate. One attorney indicated that he had never seen an IJ rule on a motion to terminate filed by a pro se respondent.

A. Under what circumstances may an IJ decline to rule on a motion?

RESPONSE:
There is no EOIR policy regarding circumstances under which Immigration Judges may decline to rule on a motion. If a party disagrees with a particular determination in case, that party may appeal the issue to the Board of Immigration Appeals. Further, if AILA members believe that certain Immigration Judges in Eloy, Arizona have adopted an inappropriate policy regarding these types of motions, they are welcome to raise the issue in local liaison with the Assistant Chief Immigration Judge for that court.

B. Are pro se detainees' motions treated any differently than attorneys' motions?

RESPONSE:
There are no EOIR special procedures regarding the treatment of motions filed by pro se detainees.