AILA-EOIR LIAISON MEETING AGENDA QUESTIONS
4/11/2007

1. AG's Directives

AILA members are very interested in the AG's Directives and applaud some of the changes that have already been made, such as the ACIJs who are posted to the Court which they supervise. What other progress has EOIR and the BIA made on implementing the Attorney General's Directives?

RESPONSE

Board:
With regard to the Attorney General's directive that EOIR make adjustments to the Board's streamlining reforms, EOIR has drafted a proposed rule that would accomplish three things. First, the rule would adjust the criteria for issuing an affirmance without opinion to allow Board members greater discretion to issue a full written decision in a case, as opposed to an AWO, in those cases where a fuller discussion or clarification of the legal issues would be beneficial. The Board is already making an effort in this regard. Since the Board reform rule was published, the Board has decreased the rate of AWOs. In fiscal year 2003, approximately 36% of the Board's decisions were AWOs. By fiscal year 2006, only 15% of the total decisions were AWOs, and that number is down to 10% so far in FY 2007.

Second, the proposed rule would expand the circumstances under which a case may be referred to a three-Board-member panel by allowing individual Board members to refer more cases for written opinions in a small class of particularly complex cases. Finally, the proposed rule would facilitate the publication of more Board decisions as precedents by allowing a majority of Board members on a panel, as opposed to the entire en banc Board, to authorize the publication of precedent decisions. Indeed, now that implementation of the Board reform rule is completed, the Board has been able to concentrate more resources on publishing opinions. In 2006, the Board published 26 decisions, with 10 so far in 2007.

With regard to the Attorney General's directive to increase the size of the Board, on December 7, 2006, the Department published an interim rule with request for comments expanding the size of the Board from 11 to 15 Board Members. The increase in size will permit the Board to issue more detailed orders, to issue more three-Board-member orders, and to issue more precedent decisions. The rule also expands

the pool of persons eligible to serve as temporary Board members to include not only Immigration Judges but also EOIR attorneys with at least 10 years of experience in the field of immigration law.

The new Board members have not been appointed yet. There are currently nine Board members, with three Immigration Judges serving as temporary Board members.

Regarding the directive to improve transcription services, last year EOIR began to crack down on poor quality transcripts and assessed monetary damages on a transcription company, prompting improvement in the company's performance. An additional transcription company has been contracted to allow more cases to go out for transcription at once. Further improvements in the system are planned as a new digital audio recording system is to be piloted in the fall, which will significantly improve the full range of activities associated with transcripts, including the ability to transmit the transcripts electronically.

Finally, as concerns improved training, Board members will participate in periodic training programs and sessions with federal judges, which will provide greater feedback to the Board. At the next training conference, Board members and attorneys will focus on substantive legal issues and professionalism, and circuit specific reference materials. For the Board's legal staff, there is a revamped training committee headed by a Senior Legal Advisor who is examining various training opportunities including writing workshops, a revised attorney manual, a new legal monthly newsletter focusing on judicial, legislative, and regulatory developments in immigration law, and more opportunities for joint training with the immigration judges.

OCIJ:
In response to the directive for improved training, the training program for new immigration judges has been extended. The next training conference for all immigration judges will focus on substantive legal issues and professionalism. Some additional steps currently underway include: circuit-specific reference material and other information is being distributed electronically to all immigration judges throughout the year; the Board and OCIJ are distributing a monthly update and analysis on immigration law developments; and the development of a peer observation program, which will provide immigration judges with an opportunity to observe colleagues conducting proceedings.

In response to the directive to develop a plan to standardize complaint intake procedures, EOIR has created the new position of Assistant Chief Immigration Judge for Conduct and Professionalism. Currently, EOIR's General Counsel, MaryBeth

Keller, is serving in this position in an "acting" capacity. The ACIJ for Conduct and Professionalism is responsible for reviewing and monitoring all complaints against immigration judges, regularly consulting with the Office of Professional Responsibility (OPR) and the Office of the Inspector General (OIG) about whether matters should be referred to those offices, tracking all complaints and working with the Chief Immigration Judge, OPR, and OIG to ensure that investigations of complaints are concluded as efficiently as possible and that disciplinary action, if appropriate, is imposed in an expeditious manner. Complaints involving Immigration Judge Professional Conduct can be raised with the ACIJ charged with court oversight of the local Immigration Courts or the ACIJ for Conduct and Professionalism who will also be the EOIR POC on these issues. Shortly information will be posted on the EOIR website where AILA, or anyone, will be able to make comments into a mailbox. This should be up and running within 6 months.

In response to the directive to evaluate newly appointed immigration judges during their trial period of employment, at regular intervals, newly appointed judges will be assessed to determine their suitability for retention. If at any time during their trial period of employment new appointees are not performing adequately, remedial action will be taken or employment will be terminated. If a new appointee's performance has been suitable, a final certificate of suitability will be issued at the end of the appointee's probationary period.

In response to the directive that newly appointed immigration judges pass a written immigration law exam, the exam has been incorporated into the training for new immigration judges. In order to successfully complete the training, new immigration judges are required to pass not only this exam but also mock-hearing and oral-decision exercises. The exam requirement pertains only to immigration judges appointed after December 31, 2006.

EOIR Pro Bono Committee:
The EOIR Committee on Pro Bono is currently developing and further researching many of the ideas presented at the first Open Meeting of the Committee, which was held this past November. For example, EOIR is considering additional guidance to immigration judges and court administrators on facilitating pro bono best practices, and is designing a Legal Orientation Program geared for non-detained respondents. Additional comments and ideas are presently being solicited from immigration judges and court administrators throughout the country.

Since January, 2007, the number of EOIR staff assigned to the Legal Orientation and Pro Bono Program has doubled. This has allowed for an increase in the number of 'mock trial' pro bono training programs (known as Model Hearing Programs) being planned. A Model Hearing Program was recently held in Hartford, Connecticut, and additional programs are currently being scheduled in five cities: Pittsburgh, Pennsylvania; San Juan, Puerto Rico; Harlingen, Texas; Los Angeles, California; and Boston, Massachusetts. Model Hearings are held in immigration courts and presented by volunteer immigration judges. Attendance is limited in size, and all participants are committed to handling immigration court cases through local pro bono groups and non-profit agencies.

Discussions are also underway with the United States Court of Appeals for the Ninth Circuit regarding creation of a pro bono project in a major city within the court's jurisdiction. The purpose of the project is to pilot the provision of pro bono counsel for all individuals pursuing asylum, withholding of removal and protection under the Convention Against Torture at the selected immigration court, as well as for any appeals that are taken thereafter to the Board of Immigration Appeals. On March 21, 2007, the Coordinator of the Legal Orientation and Pro Bono Program, the Acting Chairman of the BIA, and the Chief Immigration Judge discussed this project with judges of the Ninth Circuit in San Francisco.

See also October 18, 2006 AILA Agenda Questions and Answers, Question 1.

2. The Clock—Work Authorization

A. Where an individual Respondent does not request an expedited asylum hearing but accepts the first date given to him by the judge at the master calendar hearing, does the clock stop? Apparently this has been the case in some courts. If the first date given by the court is accepted, the clock should not stop, and that this is not an alien-caused delay. The respondent has not caused a "delay" simply by accepting the "ordinary" merits hearing date. Would EOIR consider sending instructions to immigration judges around the country that where the alien accepts the "normal" hearing date that is offered by the court the clock should not stop and that this is not an alien cause delay of proceeding?

RESPONSE

There does not appear to be a delay here and, therefore, the clock should not be stopped. If AILA would like to identify which Immigration Courts are stopping the

clock in this situation, OCIJ will look into the matter. EOIR does not plan, however, to send any special instructions to Immigration Judges on this issue.

B. Please clarify who controls the clock. If there is an issue with the clock should the Respondent go back to the judge or should the Respondent or his attorney contact the court administrator to correct the problem. If it cannot be corrected locally is there someone in Falls Church who can be contacted on clock issues?

RESPONSE
If a practitioner disagrees with the clock setting, the first step is to try to resolve the issue locally with either the Immigration Judge or the Court Administrator and thereafter with the Assistant Chief Immigration Judge having jurisdiction over the particular court. It is important to follow this process so that problems can be quickly identified and corrected locally as soon as possible. However, if at any point the result is unsatisfactory and the case is on appeal to the Board, the request should instead be directed to the Office of the General Counsel. Additional information about asylum clock inquiries can be found in the responses to questions 3 & 4 of the AILA-EOIR liaison agenda questions dated March 16, 2005, and questions 1, 2, and 3 of the AILA-EOIR liaison agenda questions dated October 17, 2005. These agendas questions are available at March 16, 2005 AILA Agenda Questions and Answers, Questions 3 & 4 and October 17, 2005 AILA Agenda Questions and Answers, Questions 1, 2 & 3**,** respectively.

3. Courtroom Conditions

Members have complained about the conditions under which their detained clients appear in court before the Immigration Court. Often respondents appear before the Court with only a few hours of sleep, because they were brought from distant prisons to the facility where the hearing is being held. Clients are also unable to bathe or eat before the hearing. In addition, they are frequently cold, because of the low temperatures in the courtrooms and in the holding cells where they are being held. Many detainees continue to be shackled at the arms and legs when they appear before the Court. They also must always appear in the ubiquitous prison jumpsuit. As a result of these conditions, detained clients suffer psychologically and physically, which in turn affects their ability to present their applications before the court in an appropriate manner. Given that a hungry, tired, dirty, cold, and psychologically depressed respondent is not an effective or coherent witness because of the detention and courtroom conditions, would EOIR consider developing fair standards for how detainees are to be treated in the courtroom?

RESPONSE

The conditions and security in DHS detention facilities as well as the treatment of detainees in DHS's custody are entirely under the control of DHS. Thus, any issues regarding such matters should be raised with DHS. Certainly, if any issues regarding a respondent's physical condition are raised in an individual case, the Immigration Judge can make a determination as to that respondent's ability to go forward with the case that day. Additionally, any issues regarding courtroom conditions should be raised with the Court Administrator.

4. Stipulated Removal Orders

As Attorneys, we hear from unrepresented respondents who signed stipulated removal orders (SROs) under INA section 240(d) without understanding what they signed and what the consequences of their stipulated removal order would be. The Immigration Judge signs the stipulated orders, without the respondent ever appearing in Court, and without the Immigration Judge being able to assess whether the Respondent is aware of potential eligibility for relief, and the consequences of the removal order. In order to assure that the Respondent understands what he is signing, what he may potentially be giving up, and what the consequences of the order will be, we suggest:

A. That the Court develop a model stipulated removal request, which would include blanks that would be filled in by the respondent.

B. That such model request information would permit the Court to assess the possibility of acquired or derived citizenship for the respondent, specifically whether either of the respondent's parents is a U.S. citizen, whether the respondent is a lawful permanent resident, when she became a lawful permanent resident, etc.

C. That such model request information would permit the Court to assess the case for potential eligibility for Cancellation of Removal and Adjustment of Status, including an assessment of any legal status held by the respondent's wife, parents, and children; whether (for a respondent without LPR status) any visa petition has ever been filed on petitioner's behalf; the length of residence in the United States; and the date of any legal status that the respondent might have or have had.

D. That such model would specifically inform the respondent of his right to seek "voluntary departure" from the United States in lieu of a removal order.

While we recognize that it would be impossible for any paper record to duplicate the careful screening that Immigration Judges provide to pro se detainees, we believe that such information would permit the Immigration Judge to screen for individuals who might not be making a knowing waiver of rights, or who might be beyond the court's jurisdiction due to acquired or derived citizenship. Although we suspect that some regulatory changes would be appropriate, we do not believe that the foregoing would require the use of any rule-making authority, and would assuage the concerns of many immigration judges (and others) about the fairness of stipulated removal proceedings.

RESPONSE
EOIR currently is working with DHS to create a uniform nationwide process for stipulated removals. EOIR will consider discussing AILA's *written* suggestions with DHS as this process moves forward.

5. EOIR List of Free Legal Service Providers

EOIR distributes a list of free legal service providers pursuant to 8 C.F.R. 1003.61, et seq. A private attorney may ask to have his or her name placed on the list if they make a specified declaration:

An attorney, as defined in § 1001.1(f) of this chapter, who seeks to have his or her name appear on the list of free legal services providers maintained by the Chief Immigration Judge must declare in his or her application that he or she provides free legal services to indigent aliens and that he or she is willing to represent indigent aliens in immigration proceedings pro bono. An attorney under this section **may not receive any direct or indirect remuneration** from indigent aliens for representation in immigration proceedings, although the attorney may be regularly compensated by the firm or organization with which he or she is associated.

8 C.F.R. 1003.62(d).

Across the nation there are private attorneys on the free legal advice list who do not accept many pro bono cases, and who charge money for services. Their listing seems to be a form of advertising.

Most state bars require attorneys to do some pro bono work, and most of us perform pro bono work even when not required. If this regulation were read loosely, nearly any attorney could appear on the list, but we do not believe that this regulation is designed to provide for free advertising for any private attorney who so desires. We believe that the last sentence is intended to make clear that a private attorney should be placed on the list only where they have a particular practice of accepting pro bono cases (as opposed to accepting cases only occasionally). Moreover, there is some harm to immigrants seeking legal help, who waste their time seeking free legal help from people who will not help them.

A. Would EOIR consider guidance to the local immigration courts that would help to address this problem?

RESPONSE
EOIR shares AILA's concerns that the Free Legal Services Provider List not be used as a form of free advertising for anyone who is not a true pro bono attorney. EOIR would welcome input from AILA on ways to improve the effectiveness and accuracy of the Free Legal Services Provider List.

B. Would EOIR consider developing a standardized declaration for pro bono attorneys. which would require a statement not only that they take pro bono cases, but that they have a practice of never accepting payment from indigent aliens in removal proceedings?

RESPONSE
This is an excellent suggestion and EOIR through the Office of the Chief Immigration Judge and Steve Lang, the EOIR Pro Bono Coordinator, are open to working with AILA on creating such a declaration. Additionally, EOIR will take under consideration drafting a change in the current regulations that govern the Free Legal Service Provider List. It is the goal of EOIR to have better referrals for the indigent immigrant population. In order to meet this goal the scope of the problem needs to be defined. Any information about specific incidents or general trends in the abuse of this list would be appreciated by EOIR.

C. Is there a practice whereby IJs or other practitioners may bring it to the attention of local or national EOIR that an individual on the free legal services list isn't a true pro bono attorney? Or alternately, does EOIR ever audit its free legal services list to ensure not only its technical accuracy, but its substantive accuracy?

RESPONSE
If an Immigration Judge, a practitioner, or a respondent is concerned that an attorney on the list does not provide pro bono services, the Court Administrator should be contacted. The Court Administrator will gather information about the complaint and, if appropriate, will forward it to OCIJ for further investigation. While EOIR currently does confirm that each attorney on the list is a member of the bar in good standing, we are reviewing our audit practices and procedures for future revision to ensure accuracy.

6. Los Angeles EOIR—Good Conduct Certificates

Most of the Los Angeles area Immigration Judges require respondents to file a current California Department of Justice (CDOJ) background check with relief applications. This requirement is in addition to the mandatory DHS biometric checks. If the California Department of Justice background check is not filed, the Immigration Judge will deny the respondent's application for relief.

The California Department of Justice recently changed their delivery policy. They are no longer sending the background check results to the requesting attorney, but rather to the respondent's home. Many of the results are lost in the mail or misplaced Additionally, in detained cases, it is impossible for respondents to receive these checks due to their incarceration. Attorneys practicing before the Los Angeles EOIR have informed EOIR of this change; however, the Immigration Judges continue to require the California background check results.

This requirement has become extremely prejudicial to the respondents and respondent's attorneys. Attorneys are facing ineffective assistance of counsel complaints due to the failure to file these checks that are no longer under their control.

AILA is not aware of any other EOIR Immigration Courts requiring respondents to submit such background check results. Given the fact that extensive DHS background checks are now required and it has become much more difficult to obtain the California background checks, this requirement is redundant and overly burdensome. Would EOIR consider instructing Los Angeles EOIR to discontinue this practice?

RESPONSE

The Office of the Chief Immigration Judge has been advised that the Los Angeles Immigration Court does not require a California Department of Justice (CDOJ) check, but recommends that one be done if the respondent has any kind of criminal record and/or encounter with State of California law enforcement authorities. This is because the California check often contains more up to date information. For example, the California check sometimes will have the disposition for an arrest listed that is not specified in the DHS check, thus providing a more complete picture at the time of the merits hearing. In addition, OCIJ is not aware of any claim being denied for failure to do or complete a CDOJ check; at times, Immigration Judges may continue the case for completion of this check if the DHS check disclosed an arrest/court case without a disposition. If a DHS check disclosed a California criminal record without a disposition, the best way to clear the record is by either doing another DHS check to see if there is a disposition reported or asking for a CDOJ check to see if it gives more

detailed information.

See also September 30, 2004 AILA Agenda Questions and Answers, Question 1.

7. Continuances for Children Applying for SIJS Visas

The Special Immigrant Juvenile Visa process for detained minors has unique requirements requiring a state court to determine whether a child is eligible for long-term state foster care as a result of abuse, abandonment and neglect. INA §101(a)(27)(J)(i). As a precondition to entering state court, children in the custody of immigration authorities are required to request consent from the Attorney General. INA §101(a)(27)(iii)(I). As no regulations have been promulgated by the agency, only memoranda have defined the parameters of the consent procedures. Effectively, the child must make a written request to John Pogash [or his replacement], the Juvenile Coordinator, asking for consent to proceed in state court with a dependency petition. The process of obtaining consent from Mr. Pogash [or his replacement] creates a substantial delay. The Juvenile Coordinator typically requires that the child almost create a *prima facie* case for the SIJS visa in the consent request. This requires that the child obtain identification document proving identity and age, corroborating evidence of the abuse, death or parents, or evidence of neglect/abandonment. Often, the Juvenile Coordinator will investigate the validity of the claim at this early stage in the case. The constitutionality of this process has been condemned by several district courts.

This procedural quagmire is relevant to EOIR, because detained children in proceedings often need to request continuances for their case in order to obtain the necessary consent to enter state court. Further, if consent is denied or granted, the child will then either seek a district court injunction or will enter the state dependency process – both of which are lengthy legal processes.

A. Is a detained child who is potentially eligible for the Special Immigrant Juvenile Status legally permitted to seek a continuance in Immigration Court to pursue that statutory remedy? The ramifications of not allowing a child to seek a continuance could render the statutory right to [apply for] the visa a nullity.

RESPONSE

The regulation at 8 C.F.R. § 1003.29 provides that an Immigration Judge may grant a motion for a continuance for good cause shown. In making this determination, the Immigration Judge considers the arguments raised in the motion and any supporting documentation. Of course, the adjudication of a motion for a continuance is within the discretion of the Immigration Judge on a case-by-case basis.

B. Many immigration judges working with detained children appear unaware of the process for obtaining the visa, which include the [sic] procedural delays that are not attributable to the respondents. Would EOIR consider setting up a special training program for IJs working with detained children?

RESPONSE
All Immigration Judges are trained and qualified to handle cases involving juveniles. In certain Immigration Courts in which there is a large volume of these cases, OCIJ has set up special juvenile dockets. The Immigration Courts that have juvenile dockets are: Atlanta, Chicago, Cleveland, El Paso, Harlingen, Houston, Los Angeles, Miami, New York, Phoenix, San Antonio, San Diego, San Francisco, and Seattle.

OCIJ notes that the revised Operating Policies and Procedures Memorandum (OPPM) 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children was issued on May 22, 2007. This revised OPPM replaces OPPM 04-07 that was previously issued on September 16, 2004.

8. Philadelphia EOIR

When there is a long term absence of an IJ, the docket problems grow significantly. In Philadelphia, for instance, an entire month's worth of master and merits hearings had to be continued. In York, detained aliens await bond hearings due to under staffing that has only recently been alleviated after nearly a year of interim solutions. Other jurisdictions suffer from the same problems. In particular, Judge Ferlise has been off the bench, but is still deciding motions. This has resulted in situations where IJ Ferlise denies permission to admit evidence beyond the time set by the local rule, but the IJ who actually hears the case then admits the evidence. AILA's concern is not limited to Judge Ferlise. Although we have specific questions regarding his situation, AILA believes that a dialogue on this can be a basis for development of policy in this area.

A. What is EOIR doing to assure prompt hearings, especially of detained aliens, when there is a breakdown in court staffing?

RESPONSE
The Headquarters Immigration Court (HQIC) is the primary means for addressing shortfalls in the availability of hearing times for detained cases nationwide as well as in person details, when needed.

York had only one Immigration Judge for ten months in 2006. On November 2, 2006, Judge Andrew Arthur entered on duty and since that time the court has been fully

staffed. Regrettably, it took longer than expected to bring a new judge on board at York. During the period the court had only one judge, the HQIC provided additional hearing coverage by video teleconference.

There is one Immigration Judge in the Philadelphia Immigration Court out of four who currently is not hearing immigration cases. He has the authority of an Immigration Judge under the Immigration and Nationality Act and Title 8, Code of Federal Regulations, and can rule upon motions and other matters. We have had three judges plus at least one HQIC judge for the entire period that that judge has not been hearing cases. Additionally, we have had some in person details through December 2006.

Case receipts in the Philadelphia Immigration Court, which does not hear detained cases, declined from Fiscal Year 2005 to Fiscal Year 2006. Despite the decline in cases in Philadelphia, there have continued to be at least four judges hearing cases in Philadelphia, which is the largest number of judges ever assigned to that court. For the second calendar quarter of 2007, most cases that were previously on the calendar of the judge not hearing cases are being or will be set on the calendar of one of the HQIC judges.

B. What are the various forms of suspension that an IJ can undergo? How was Judge Levinsky's status handled during the investigation into his misconduct and eventual termination?

RESPONSE

Suspensions of all lengths are considered formal disciplinary measures, meaning that they are recorded in an employee's Official Personnel File (OPF). There are not varying "forms" of suspension. However, suspensions of 14 days or less are not appealable to the MSPB, though they may be grievable, and suspensions of 15 days or more are appealable to the MSPB. Immigration Judges have been assigned to duties off the bench in various circumstances, such as to attend additional training or to attend to tasks other than deciding cases. These assignments of work, which can result in a judge not hearing cases for a period of time, are not suspensions.

EOIR does not discuss the details of any specific employee's status. However, depending on the nature of an investigation and the allegations raised, an Immigration Judge may be assigned duties off the bench or other projects if warranted. It is appropriate for most judges to remain on the bench during the resolution of most complaints.

C. What is IJ Ferlise's current status within EOIR? Members are not asking for detailed personnel information, just transparency as to the process that is being undertaken. AILA members are concerned that although IJ Ferlise has been removed from hearing cases, he is still deciding motions that affect the outcome of cases.

RESPONSE
EOIR does not discuss the details of a specific employee's status. However, for further information, please see the third paragraph in the response to question 8A.

9. IJ Decisions provided with Transcripts

Some members have noticed that when they get a copy of the entire EOIR record file during their pursuit of a petition for review, that the IJs marked up the decision before it was sent to the BIA. The attorney does not get the corrected copy when she gets the written decision and the transcript. The attorney, therefore, is unable to prepare her memorandum of law on the decision that is actually in the EOIR record file. What can EOIR do to ensure that the attorneys for both respondent and the DHS get the corrected copy before they file their respective memoranda of law?

RESPONSE
When the Clerk's Office receives the transcribed oral decision of the Immigration Judge and the transcript of the hearing from the transcription company, the Board serves a copy of these documents on the parties and on the Immigration Judge to allow him or her to make any minor corrections, sign the decision, and return it to the Board. In the past, the Clerk's Office served the transcript on the Immigration Judge first, and then waited for a couple of weeks for return of the signed decision before serving the parties and setting the briefing schedule. It was the Board's experience that many Immigration Judges did not, and still do not, return a signed copy to the Board, especially when they are satisfied that the transcribed decision is accurate. The Board therefore changed its practice to ameliorate the delays in processing cases, particularly out of concern for detained aliens, and because any changes in the Immigration Judge's decision are minor.

In the rare instance where an Immigration Judge goes beyond correcting minor transcription errors or grammatical errors and edits the content of the oral decision substantially, it is the Board's policy to remand the case to the Immigration Judge to issue a new decision and to serve it on the parties. The remand order notes that the redacted decision returned to the Board by the Immigration Judge was not the decision the parties were given an opportunity to appeal, and reminds the Immigration Judge that review of the oral decision is limited to minor editing of the order.

The Board reviews Immigration Judge decisions for over-redaction, but has not encountered many problems or heard any complaints that the substance of an Immigration Judge's decision has been altered. Pursuant to the Attorney General's Directives, EOIR expects to shortly start piloting Digital Audio Recording (DAR) and expects that DAR will improve the quality of transcripts. EOIR welcomes any suggestions and the BIA will continue to be vigilant for over-redacted decisions.

10. Written Descriptions of Court Procedures in Immigration Courts

Many pro se respondents are very confused about the workings of the Immigration Court and have no advance preparation before they enter the court room for a master calendar. Would EOIR consider having written simple descriptions of what happens in immigration court in the Court waiting rooms? No legal advice would be included. Instead, these descriptions would include a description of the participants—the IJ, the DHS attorney, the translator, and the clerk, and would also contain information regarding the importance of appearing at hearings, and the telephone number for the Court (not included on an NTA) if there is any unforeseen and unavoidable problem with appearing. This could be done in several different languages and would help inform the participants.

RESPONSE

This is an excellent suggestion. A very simple written description of Immigration Court proceedings, such as those suggested by AILA, might be an appropriate companion to the Immigration Court Practice Manual, which OCIJ is currently drafting in response to the Attorney General's directive # 13. In addition, the Practice Manual itself is intended to help address this issue by providing guidance to pro se respondents. The Practice Manual will include comprehensive explanations of master calendar hearings and individual calendar hearings. Further, it will be written in a manner intended to be accessible to non-attorneys.

Additionally, the EOIR Office of Public Affairs and the Legal Orientation Program (LOP) already have developed similar self-help materials, which include actual scripts and courtroom procedures. The LOP & Pro Bono Program is also in the process of translating several of these materials into the most needed languages.

11. Overcrowded Court Dockets

The dockets in many immigration courts are overcrowded. For example, in New York City it is not unusual for an IJ to have more than 50 cases on a Master Calendar. One suggestion to ease the crowded court docket would be for the Immigration Judge to remand cases to the Asylum Unit when a

non-detained respondent is applying defensively for asylum before the Court and there is no one year issue. This would remove the case from the calendar and allow the respondent to proceed before the specially trained Asylum Unit officers. If the Asylum Unit declines to grant the application, the respondent would return to the Immigration Court, and renew his application. Neither the respondent nor DHS would be prejudiced by this process, and it may work to ease the crowded court docket. AILA recognizes that both ICE and USCIS must cooperate in order for such a change to occur, and that it may not be appropriate for all immigration courts. Would EOIR consider raising this possibility in its liaison meetings with ICE and USCIS?

RESPONSE

Yes, EOIR will consider raising this issue at its liaison meeting with DHS.

12. Copies of ROP from EOIR

Some AILA members have reported that their local Immigration Court, pursuant to a directive from the Chief Immigration Judge, has stopped providing them with copies of documents from the Record of Proceeding unless they first file a FOIA request with the Office of the General Counsel for EOIR in Falls Church. This has caused concern, as often the only way to get a copy of the Notice to Appear, additional charges of removability, or other documents when the respondent is in proceedings before the Court is by reviewing the ROP. DHS is not usually very cooperative about supplying documents from its file, and frequently the relevant documents are missing from the DHS file. Both private bar and DHS attorneys rely on their ability to review the ROP and make copies of relevant documents in order to be prepared at the hearings before the Immigration Judge. Losing that ability may mean that litigants will be less prepared when appearing before the Court, which will affect the efficiency of the Court.

A. Has the Chief Immigration Judge issued such a directive? If so, what does the directive state?

B. If such a directive has been issued, does it apply to all parties—respondents, attorneys, and DHS attorneys?

C. If such a directive has been issued, would EOIR consider making an exception for such essential documents, such as the Notice to Appear, I-261s, IJ decisions on motions, etc? Alternatively, would EOIR consider allowing copies of the ROP to be made but with a limit of the number of pages?

RESPONSE

The Office of the Chief Immigration Judge is not aware of such directive, and there has been no change in policy. Court staff have been advised to accommodate a party's

request for a limited or reasonable number of copies of documents from the Record of Proceedings. If an individual needs a voluminous number of copies or a complete copy of a Record of Proceedings, however, the individual should file a FOIA request with the Office of General Counsel, Executive Office for immigration Review, FOIA Unit, Suite 2600, 5107 Leesburg Pike, Falls Church, VA 22041. Additional information about accessing the Record of Proceedings can be found in the response to question number 5 in the AILA-EOIR liaison agenda questions dated October 17, 2005, available at October 17, 2005 AILA Agenda Questions and Answers.

13. Non-Receipt of BIA Decisions

The issue of Respondents or Respondent's attorney not receiving BIA decisions continue. The Federal Courts are requiring proof of non-receipt in motions and appeals. This is impossible to establish when respondents and their attorneys have received nothing from the BIA. Does the BIA have a database or a system in place to establish proof of mailing or delivery? Can Respondents or Respondent's Attorney request proof of mailing or delivery from the BIA? Can the BIA make these records available to verify names or mailing addresses?

RESPONSE

The Board sends out decisions by regular mail and thus does not have individual receipts to show proof of delivery. However, the Board's procedures are well established and carefully followed to ensure decisions are mailed out the very day they are date stamped. The decisions go out to the last known address in the record, and addresses are verified by the Board's staff at several stages in the processing of cases.

Where the Board receives a properly filed and properly supported motion indicating that the Board made a mistake in mailing the decision, or asserts with supporting evidence that a decision delivered to the last know address of record was not received, the Board gives careful consideration to reissuing the decision on a case by case basis. Please note, however, that where mail is returned to the Board as undeliverable, the Board checks the addresses carefully to make sure the Board's mailing went to the correct address. If the Board finds error with respect to the address, we will reissue the decision or correspondence sua sponte, without any need for the parties to file an affirmative motion with the Board.

See also October 17, 2005 AILA Agenda Questions and Answers, Question 18.

14. Attorney's Addresses on BIA's Correspondence

Attorneys have noted that if their address on the EOIR-27 is more than three lines long, their addresses are nonetheless truncated to three lines on BIA correspondence. For example:

EOIR 27:
Nina Sanchez
University of Colorado School of Law
1004 Rocky Mountain Road
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If the attorney's address is truncated, many attorneys do not receive the mail or it creates substantial delays in receiving the mail. For example, many universities require the department listing as campuses house thousands of employees and the campus mail division needs this information to adequately sort the mail.

Is there any reason for deleting relevant portions of the attorney's address? What can the BIA do to remedy this problem?

RESPONSE
The Board's computer system reflects the full address of the parties, but current printing limitations allows only three lines to be displayed on filing and mailing receipts. The Board is aware of the problem and is working with the technology staff to fix it.

See also September 30, 2004 AILA Agenda Questions and Answers, Question 3 (A) - (C).

15. BIA filings

AILA members have reported experiencing problems with clerical errors and apparent policy decisions when they submit filings to the BIA. For example:

The BIA has erroneously returned motions and memoranda for motions to reopen for failure to pay a

filing fee in a Lozada motion to reopen for asylum. A Lozada motion to reopen for asylum is an asylum request, and, therefore, does not require the payment of a filing fee. See 8 CFR Section 1003.24 (b)

The BIA also refuses to accept motions (and other filings as well) and returns them to the sender when there is no certificate of service attached to the filing. This has happened in situations where there actually was a certificate of service attached to the filing and the BIA clerk overlooked the certificate.

There also have been reports of the BIA rejecting filings, particularly motions to reopen when an EOIR-27 is not filed with the motion. For years, the Clerk's Office would consider such a filing complete, and timely if filed within the deadline, but views it as pro se until such time the attorney filed an EOIR-27. This refusal to accept a filing because of a procedural defect can cause an appeal, motion or memorandum of law to be filed late, which has disastrous and final results for respondents.

The BIA seems to have a policy of not rendering a decision on a motion to remand for new relief until the briefing is completed. This creates unnecessary work and delays for the parties as well as for the BIA when a remand is warranted (i.e. to adjust status).

Finally, there are times when the motion is an urgent matter, such as a motion to remand for DV adjustment, for example. Motions to expedite a remand go unanswered and applicants lose their rights.

A. Would the BIA consider establishing a motions panel or panels that handle matters that need to be fast tracked?

RESPONSE
While the Board does not have a motions panel, the Board does have a screening panel which quickly reviews all cases and promptly addresses those which present fairly straightforward issues. Other cases which require more extensive deliberation are assigned to the merits panels. Motions to expedite are evaluated and directed as quickly as possible, but because of the volume of motions and cases, it is not always possible to respond to the parties with status on these motions. However, your question and concern have been received, and refresher training will be offered on how to handle motions to expedite.

B. Would the BIA consider dispensing with the policy of awaiting full briefing before ruling on a motion to remand?

RESPONSE
The Board has a policy of not adjudicating cases piece-meal. It is important to have a fully developed record in order to properly evaluate all claims and requests. EOIR

wants to avoid having cases bounce back and forth between the courts and the Board, when aspects of a case were left hanging, without being reviewed or addressed.

C. Would the BIA consider changing its policy to allow acceptance of a motion, appeal or memorandum of law, even if it is missing, for example, a procedural requirement, such as a certificate of service, and then later require the attorney/respondent to cure the procedural defect within a certain time? Another alternative would be to be date stamp the filing as having been received, and to return the filing to the attorney/respondent for correction of the procedural defect within a certain time. Then, if the attorney/respondent corrected the defect, and returned the filing to the BIA within the set time, the filing date would be the original date the filing was received at the BIA.

RESPONSE

Rejection of an appeal or motion as improperly filed is not merely a matter of Board policy, but rather a matter of regulation. 8 C.F.R. § 1003.2(g)(1) and 1003.3(a). *See also*, Board of Immigration Appeals Practice Manual, Chapter 2.1 (Representation); Chapter 3.2 (Service); Chapter 3.4 (Filing Fees).

Please note that all filings received at the Board are date-stamped, and if rejected, the parties receive an opportunity to cure the filing defect and resubmit the rejected appeal or motion within 15 days. The Board looks favorably upon filings that are resubmitted within the time allotted and will generally take those cases.

In the past, the Clerk's Office sometimes accepted a motion filed by an attorney without a Notice of Entry of Appearance (Form EOIR-27). The Clerk's Office treated the motion as pro se, and sent out a notice to the attorney and the alien indicating that a Form EOIR-27 was required. However, when the Board made these exceptions, it proved difficult and confusing for all involved for several reasons. First, it created confusion over who should receive service of documents from the Board, over who could have access to the information in record of proceedings, and over who would be allowed to submit filings to the Board. It is crucial that the Board know with whom it is dealing. All of the scenarios listed above are covered by clear rules about representation. The Board learned through various motions that in cases where filings were made with by attorneys who did not submit an EOIR-27, the aliens believed they had engaged the services of a representative and were surprised to hear they were treated as pro se by the Board, or certain attorneys or representatives filed documents on behalf of aliens, from whom they extracted fees, but avoided the responsibility of representing them through the appellate process.

Again, please note that the appeal or motion is not dismissed. It is date-stamped and rejected, with an opportunity to cure the defect. If the initial filing was timely, and if the filing is perfected and resubmitted within 15 days, the Board generally accepts the filing.

Appellate briefs do not have a 15-day period where any filing defects may be perfected, however, the parties are advised that they may resubmit the brief with a motion to accept late-filed-brief. Furthermore, the Board notes that the Clerk's Office does not generally reject the filings of *pro se* detained aliens and the Board will frequently serve the filings on DHS.

Finally, if a filing is erroneously rejected by the Board because of a clerical error, it should be resubmitted with an explanation.

The Board would like to take this opportunity to raise another issue with AILA regarding the Notice of Appeal from Decision of a District Director (Form EOIR-29) and the Notice of Entry of Appearance as Attorney (Form EOIR-27) in the context of appeals filed visa petition cases. Only the petitioner has standing to appeal. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); Board of Immigration Appeals Practice Manual, Chapter 9.3(c). Please be sure that it is the petitioner's name that appears on the Forms EOIR-27 and 29, as the appealing party, and not just the beneficiary's. Otherwise, the appeal may be dismissed, since the beneficiary does not have standing to appeal. As the appeal is not filed with the Board directly, the Board cannot reject the appeal and give the petitioner the opportunity to resubmit the appeal. The Board does issue filing receipts when we receive the appeal and the record of proceedings explaining this and giving the parties time to respond if necessary, but many attorneys do not respond.

D. Would the BIA instruct its clerks that there is no fee for a motion to reopen for purposes of filing an application for which there is no underlying fee, such as an asylum application?

RESPONSE

About two months ago, the Board noticed the confusion among some newer staff regarding the issue of whether a filing fee was required in *Lozada* claims, where the underlying application was for asylum. This has been addressed by training and should not happen in the future. If it does happen, please resubmit the filing to the Board with an explanation.

See also October 17, 2005 AILA Agenda Questions and Answers, Questions 18 - 21.

16. BIA-Courier Error

Recently some AILA members have reported that motions and briefs that they have filed with the BIA have not been timely delivered because of courier error and delay. In one case, FEDEX attempted to deliver the brief but the reserved parking space for the FEDEX truck at the BIA building was occupied and there was nowhere to park. As a result, the driver left and made delivery at another time. In another instance, delivery was delayed because of a snowstorm in one of the cities that FEDEX uses as a hub. In yet another example, an IJ provided the appellant with a Notice of Appeal that listed the BIA's old address. Members have also reported that despite advance mailing of briefs/motions, FEDEX, on some occasions, takes more than 5 days to deliver an item. Although the BIA's precedent decision in *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006) does not excuse the late filing of a brief due to error by an overnight courier service, will the BIA consider adopting the "mailbox rule" or excuse a late filed appeal or motion for "unique circumstances"? This would not only promote fairness and protect respondents' rights; it would also be consistent with the decisions of at least three circuit courts which have held that a late filed appeal can be excused in "unique circumstances." *See Atiqullah v. INS*, 39 F.3d 896, 898 (8th Cir. 1994); *Anssari-Gharachedaghy v. INS*, 246 F.3d 512, 514-15 (6th Cir. 2000); *Berhe v. Gonzales*, 464 F.3d 74, 88 (1st Cir. 2006). Moreover, it would be consistent with the decisions in the Second and Ninth Circuits specifically holding that failure of an overnight delivery service to deliver an appeal on time could be a unique circumstance. *See Sun v. U.S. DOJ*, 421 F.3d 105 (2nd Cir. 2005) and *Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005).

RESPONSE

The Board considers jurisdictional issues in the context of cases before us, but there are no currently existing plans to change the regulations to adopt a mailbox rule. The Board will, however, consider motions to determine whether unique circumstances exist that would warrant taking a late-filed appeal on certification.

Please note that there is no reserved parking space for FedEx trucks at the building where EOIR Headquarters and the Board are located. The building has a large loading dock area with ample parking, where couriers arrive several times throughout the day. Further, there is extensive overflow parking around the loading dock entrance, and there are two short term parking lots immediately adjacent to the building.

See also October 18, 2006 AILA Agenda Questions and Answers, Question 9.

17. Amicus Briefs

What procedures must an attorney or organization follow in order to both submit an amicus brief with regard to a particular issue before the BIA and ensure that it is considered by the BIA? Would the BIA consider soliciting amicus briefs on certain issues such as the two drug possession/aggravated felony issue as it did for the Soriano 212(c) cases after 1996? The private bar and other legal associations have a great deal of experience to offer. Not only could they save the BIA valuable time, but they could help the BIA formulate stronger and better decisions.

RESPONSE

The Board welcomes and is grateful for the thoughtful and insightful briefs filed by amicus curiae in many matters before the Board. Individuals or organizations wishing to file an amicus curiae brief must file a written request with the Board. The request should specify the name and alien registration number of the case in which they wish to appear as amicus and articulate why they should be allowed to appear. The request should be served on all parties in the proceedings. Board of Immigration Appeals Practice Manual, Chapter 2.10 and 4.6(i). Individuals interested in providing amicus oral arguments should follow the same process as that followed for amicus briefs.

In the past, the Board has solicited amicus briefs from parties in cases presenting issues of importance that would benefit from further development of the issues, especially where aliens may be unrepresented. The Board has reached out to organizations who might have an interest in briefing a case. Where AILA is concerned, the Board has contacted AILF for briefs and will continue to do so in the future.

EOIR through the EOIR Pro Bono Coordinator, Steve Lang, has an existing pro bono project for cases pending at the Board. It is suggested that AILA members interested in providing pro bono services for cases pending appeal at the BIA contact Steve Lang the EOIR Pro Bono Coordinator to learn more about the existing BIA Pro Bono Project. Additional information about the BIA Pro Bono Project may also be found at: http://www.usdoj.gov/eoir/probono/MajorInitiatives.htm#BIAProBono

See also March 16, 2005 AILA Agenda Questions and Answers, Question 5c.