AILA-EOIR LIAISON AGENDA QUESTIONS
For October 17, 2005

Asylum Clock

1. At the last liaison meeting held on March 16, 2005, OCIJ stated that it was reviewing the clock stopping provisions as they relate to asylum cases that are remanded or reopened and would provide guidance at a later date. Has this issue been resolved and if so, how? If OCIJ has not yet addressed the issue, when does it anticipate resolving this issue?

RESPONSE:

Since the March 16, 2005, liaison meeting, the Office of the Chief Immigration Judge (OCIJ) has reviewed the issue of the clock and remands. When the Board of Immigration Appeals (Board) remands an asylum case to an immigration judge, the immigration judge does not restart or reset the asylum clock. OCIJ has considered the propriety of restarting or resetting the asylum clock and concluded that the clock would not restart upon remand. In reaching that conclusion, OCIJ relied on section 208(d)(5)(A)(iii) of the Immigration and Nationality Act. That section provides that in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed. When an immigration judge enters an order, the immigration judge stops the clock. Thus, if the immigration judge denied an asylum application on day 160, the clock would remain on day 160 while the case was on appeal and during any further proceedings.

2. At the AILA Annual Conference in Salt Lake City, EOIR commented that the new biometrics regulation would result in stopping the clock in expedited asylum cases between an initial master calendar and the next. Given the time in receipting in applications before the court and obtaining biometrics appointments, such a policy could result in a delay of three to four months. Please comment on the exact policy and mechanism that EOIR anticipates an asylum seeker in proceedings to follow in order to comply with the biometrics requirements, and their impact on the clock.

RESPONSE:

When adjourning a hearing and scheduling the next, immigration judges consider the reason for the delay and properly attribute the delay to the respondent or the Department of Homeland Security (DHS). As explained in the supplement to the background check regulation, a respondent seeking relief is responsible for taking the initiative to provide biometrics or other biographical information in a timely manner. *See* 70 Fed Reg. 4743, 4745 (Jan. 31, 2005). Therefore, when an immigration judge adjourns a case to allow the respondent time to complete the necessary paperwork or other requirements for the background investigations and security checks, the delay is attributed to the alien. Conversely, if DHS needs time to complete the background investigations and security checks, the delay is properly attributed to the government.

Because the Executive Office for Immigration Review (EOIR) has no role in the provision of biometrics or the processing of background checks, an immigration judge does not know whether a respondent has complied with the regulation. Therefore, an immigration judge generally learns that a respondent has complied during the next scheduled hearing. However, a respondent may file a motion to inform the immigration judge that he or she has provided the requisite biometrics. A motion reflecting the alien's compliance with the regulation would allow an immigration judge to attribute the future delay to DHS in advance of the next hearing.

3. Despite the recent instruction regarding procedures for restarting or correcting the asylum clock, many members report that the issues are not being resolved even when following the steps noted in prior liaison minutes. Court administrators and immigration judges alike are telling respondents that they have no power over the issue and inquiries to both OCIJ and the Board remain unanswered after up to two months. Will EOIR review its procedures or revise its liaison instructions for resolving such cases?

RESPONSE:

EOIR agrees that asylum clock questions generally should not require two months for review. Any specific information that AILA can provide about cases illustrating delay may assist EOIR in identifying the source of any delay. In the event a court administrator or immigration judge has declined to respond to an asylum clock inquiry, if AILA provides the A number, OCIJ is willing to look into the matter. Please contact the Assistant Chief Immigration Judge (ACIJ) with control over the relevant geographic location. A list of the ACIJ's and their respective territory is available at http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm.

When a case is pending before the immigration courts, court administrators and immigration judges should review inquiries about the accuracy of the asylum clock and address errors without undue delay. OCIJ recently reminded court administrators and immigration judges about the importance of addressing asylum clock issues. In particular, court administrators were reminded that they had the responsibility for reviewing and addressing such inquiries in consultation with the immigration judges.

When a case is pending at the Board, asylum clock questions should be directed to the attention of the Office of General Counsel (OGC), who works with OCIJ to respond appropriately to the clock inquiry. Practitioners interested in additional information about the asylum clock and asylum clock inquiries may consult question 3 of the AILA-EOIR liaison agenda questions dated March 16, 2005, available at http://www.usdoj.gov/eoir/statspub/eoiraila031605.pdf.

Succar Adjustments in Proceedings

4. At the last liaison meeting held on March 16, 2005, OCIJ stated that it has not compiled any statistics or information on adjustment of status applications in the First Circuit, pursuant to Succar v. Ashcroft, 394 F.3d 8 (1st Cir. 2005). Is this information currently available?

RESPONSE:

Although EOIR's computer system is capable of tracking a wide variety of data, EOIR cannot track the number of parolees who have applied for adjustment of status since the First Circuit's decision in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). Similarly, EOIR will not be able to track the number of parolees who apply for adjustment of status in light of *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005) and *Bona v. Gonzales*, __ F.3d __, 2005 WL 2401874 (9th Cir. 2005). In addition, OCIJ has not compiled any informal statistics.

Discovery and FOIA Processing

5. FOIA processing by all agencies, including EOIR, is taking several months. It is often essential for an attorney to review a client's DHS file to fully understand his/her immigration history, or alternatively to review the EOIR file in order to determine eligibility for relief, an appeal, or a motion to reopen. Unfortunately, making a FOIA request appears to be the only form of discovery available to individuals in immigration proceedings, despite regulations providing for limited discovery.

a. Does OCIJ provide any guidance to its courts or the immigration judges concerning availability of files, FOIA, and discovery in proceedings?

RESPONSE:

In light of the practical need for representatives to review their clients' files in advance of scheduled hearings, OCIJ has provided guidance to court employees and immigration judges about providing access to files.

In particular, immigration judges and court staff have been instructed that, once a representative files an EOIR-28, the representative may review the record of proceedings in the court. The representative should contact the court administrator to arrange a time to review the record of proceedings. In addition to affording a representative the opportunity to review the record of proceedings, court staff also are advised to accommodate requests for a limited or reasonable number of copies of documents within the record of proceedings. If a representative or any other individual needs a more voluminous number of copies or a complete copy of a lengthy record, he or she should follow the standard FOIA procedures – filing a FOIA request with the Office of General Counsel, 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 11(a) in the AILA-EOIR liaison agenda questions dated March 16, 2005, available at http://www.usdoj.gov/eoir/statspub/eoiraila031605.pdf.

In the preface to your question, you state that processing of FOIA requests by all agencies, including EOIR, is taking several months. OGC is working diligently to ensure that all FOIA requests are handled expeditiously. OGC is in the process of hiring an additional employee, has expanded our contract support, and has been offering overtime to employees to address FOIA requests in a timely fashion.

b. Will OCIJ consider advising the immigration judges to be more accommodating in ruling on motions for discovery or, in the alternative, a continuance, where there is evidence that other attempts to obtain the file have been unsuccessful to date?

RESPONSE:

The Director of EOIR and the Chief Immigration Judge are without authority to direct the result in the adjudication of an individual motion. Immigration judges adjudicate motions for discovery and motions to continue on a case-by-case basis. As always, however, when adjudicating such motions, immigration judges consider the arguments raised in the motion. Thus, when adjudicating a motion to continue, an immigration judge would consider whether a delay in obtaining needed documents constitutes "good cause" sufficient to support the motion. *See* 8 C.F.R. § 1003.29. If a party believes that an immigration judge abused his or her discretion in denying a motion, the party may file an appeal with the Board. **In regard to motions for production of documents and other forms of discovery, practitioners are encouraged to tailor the language of the motion in light of the regulatory language. See generally, 8 C.F.R. §1003.35.**

Bond Appeals

6. Will the Board elaborate on current adjudication procedures for bond appeals? Given the limited information in the statute and regulations (and based on experience), it appears that the immigration judge is not required to issue a written memorandum until after an appeal is filed, and more importantly, that there is no specific time limit to producing the record. When AILA members attempt to track the process of a bond appeal, Board clerks do not appear to have a tickler system to ensure that the immigration judge completes the bond decision in a timely manner. Further, the several weeks delay between hearing a bond matter and writing a memorandum (where there is no record transcript or tape of the bond proceedings), would seem to hamper the immigration judge's ability to accurately recall the information presented. Finally, as we have previously noted, bond appeals are often mooted out because the Board issues a decision on the merits appeal first. AILA is concerned that the Board's current procedures regarding bond appeals may effectively strip aliens of their right to appeal a bond decision.

a. Could these procedures could be examined in any way to ensure more speedy and accurate resolution of bond appeals?

RESPONSE:

Yes, the Board is continuously examining its operations to improve processing times while enhancing accuracy and fairness. In an effort to respond to general questions presented in the introduction to this question, EOIR provides the following overview of the processing of bond appeals. Like all cases involving detained aliens, bond appeals are high priorities of the Board. Just as the detained alien's bond appeal receives priority attention, so does the alien's merits appeal. Where the Board is striving to adjudicate merits appeals quickly and provide the alien and government with a final administrative decision, at times the bond appeal may become moot. In light of the importance of finality for both parties, the Board would hesitate to slow the adjudication of the merits appeal simply to ensure that a bond appeal is adjudicated before the merits appeal.

In an effort to respond to your more specific questions about the processing of bond appeals, EOIR provides the following overview. Pursuant to Board policy, a bond appeal is entered into the computer system within 24 hours and most are entered on the same business day they are received. Once the appeal is entered, the Board immediately requests the record of proceedings from the immigration court. **Each case has a separate bond record of proceedings entirely distinct from the record of proceedings for the merits appeal of the case, and both the bond appeal and the merits appeal proceed to review along separate tracks.** When the immigration judge is notified that an appeal has been filed, the immigration judge prepares a bond memorandum within five business days. Immigration judges are instructed to request an extension of that period in the event five business days is insufficient. *See* OPPM 96-4, *Processing of Motions and Appeals*, at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm. EOIR is unaware of the need for immigration judges to request extensions. Thus, the 5-day period appears to be sufficient. Once the memorandum is prepared, the immigration judge serves the memorandum on the parties and sends the record of bond proceedings to the Board. If the record of proceedings is not received in a timely fashion, the Board's Clerk's Office has a tickler system to send reminders to the immigration court.

b. What is the current volume of bond appeals and average processing time?

RESPONSE:

In fiscal year 2005, the Board received 546 bond appeals and completed 758 bond appeals. The Board has slashed in half the average processing time for bond appeals over the last few years. In fiscal years 2002 and 2003, the average processing time for a bond appeal was 222 days. That figure has continually decreased over the last two years to less than half and for fiscal year 2005 was 105 days. Indeed, more than 60% of bond appeals are adjudicated in less than 60 days, and more than 75% of bond appeals are adjudicated in less than 90 days. Notably, of the 43 bond appeals filed by DHS in fiscal year 2005 in which DHS invoked the automatic stay provision found in 8 C.F.R. § 1003.19(i)(2), 67% were completed in less than 90 days from the date the appeal was received. Particularly with respect to that class of cases, the Board and OCIJ

have been discussing possible processing improvements that would reduce even further the number of days required to adjudicate those bond appeals.

c. Does the Board maintain any statistics on regarding the outcome of bond appeals (i.e., number or percentage of reversals, remands, or sustained appeals)?

RESPONSE:

Yes, the Board can track basic statistical information. That raw statistical data, however, provides an incomplete picture. For instance, although the computer codes reveal that approximately 42% of the immigration judges' bond decisions were affirmed in fiscal year 2005, that statistic does not reveal whether the appeal was filed by the alien or government. In fiscal year 2005, approximately 10% of bond appeals resulted in a remand, approximately 7% were sustained, and approximately 16% were dismissed as moot. However, these numbers should be viewed with caution as they fail to reveal essential information. Without referring to the record of proceedings, the Board does not know the precise nature of the Board's decision disposing of a bond appeal.

d. Does the Board have access to any statistics regarding the number of appeals dismissed as moot (where contemporaneous final decisions on the merits are issued)?

RESPONSE:

The Board can provide some statistics. Please note, however, that the following statistics do not account for contemporaneously issued bond and merits decisions. These statistics solely address the number of bond appeals dismissed as moot. In fiscal year 2005, approximately 16% of the appeals were dismissed as moot. Without the file the Board cannot tell why any bond appeal may have been dismissed as moot. An appeal may be moot for many reasons other than an intervening Board order in the removal proceeding. For example, a bond appeal is dismissed as moot if the alien is released, the alien is removed, or the alien has requested a subsequent bond redetermination. In addition, if the respondent fails to file a notice of appeal within 30 days from the date of the immigration judge's decision, the removal order becomes final and the bond appeal is moot.

e. Would the Board reconsider its policy of adjudicating bond motions simply as expedited detained motions and consider creating a separate docket for those given the significant impact of detention on a respondent?

RESPONSE:

The Board understands the significance of an individual's detention and handles all cases involving detained aliens on an expedited basis. Because the Board prioritizes all detained cases, detained cases are distinguishable from non-detained cases while they are processed and

adjudicated. Bond appeals are marked as such and the Board strives to adjudicate those cases – like others – expeditiously and fairly. Indeed, bond appeals are handled initially by a team of employees and attorneys well versed in issues unique to bond cases.

f. Will the Board revisit the regulations which sever the bond hearing from the case in chief, or alternatively consider requiring the immigration judge to make a record of the proceedings (i.e., a tape recorded transcript)?

RESPONSE:

EOIR is not contemplating a revision of the regulations that sever bond and removal proceedings. *See* 8 C.F.R. §§ 1003.19, 1236.1. Because bond and removal proceedings are different in nature, procedure, and result, EOIR continues to support the current regulatory regime that treats them separately. The existing regulations appropriately reflect the distinction between bond and merits proceedings.

To enable parties to secure hearings before immigration judges as promptly as possible, bond proceedings are less formal than the removal proceedings. *See Matter of Chirinos*, 16 I&N Dec. 276 (BIA 1977). The structure of bond proceedings allow for immigration judges to conduct bond redetermination hearings without undue delay or cumbersome formality. If the regulations required that the immigration judge record bond proceedings, the transcription process would delay the adjudication of appeals by multiple weeks. Parties are free to present arguments to the Board based on the hearings before the immigration judge and may highlight factors affecting either perceived danger to persons or property or perceived flight risk. The absence of a transcript does not preclude the full presentation of those issues to the Board.

Although the informal nature of bond proceedings works to the advantage of parties who may have an interest in securing a prompt hearing before an immigration judge, informal removal proceedings would disadvantage parties. Removal proceedings require a higher level of formality. The evidentiary burdens in bond and removal proceedings differ and the evidence presented in the less formal bond proceeding should not taint the adjudication of charges of removability or eligibility for relief. *See Matter of Adenji*, 22 I&N Dec. 1102 (BIA 1999).

<u>Video Conferencing in Removal Hearings</u>

7. Will OCIJ update us and provide the current status on use of video conferencing in removal hearings?

a. How many courts use video conferencing to complete removal hearings?

RESPONSE:

Approximately 27 courts have used video conferencing to conduct hearings and complete

cases.

b. What is the total volume of hearings now being conducted by videoconferencing?

RESPONSE:

As of September 26, 2005, approximately 698 hearings to be conducted via video conference were pending. To provide a context, OCIJ currently has approximately 194,472 total matters pending.

c. Has EOIR taken any steps to standardize the use of video equipment (e.g., camera placement; desk placement; etc…)?

RESPONSE:

OCIJ has attempted to standardize the use of video conferencing equipment throughout the immigration courts. For example, all locations equipped with such technology have a video monitor and camera that permit picture-in-picture displays. Some courts are equipped with newer technology. OCIJ has been and will continue to seek out the most advanced technology for all the locations where video conferencing is used to conduct hearings.

8. We would like to confirm that OCIJ has had a chance to review the recent report on video conferencing produced by the Chicago Appleseed Fund for Justice and the Legal Assistance Foundation of Metropolitan Chicago, Videoconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court, issued August 2005 (available at: http://www.lafchicago.org/complete%20report.pdf).

a. Does OCIJ have any comments with regard to the findings and evaluation in that report?

RESPONSE:

OCIJ reviewed and responded to the report. A copy of the response is attached for your review.

b. Has OCIJ taken or anticipate taking any action with regards to the program after reviewing the report?

RESPONSE:

The attached response to the report addresses the issue of any future actions that OCIJ plans.

9. OCIJ has previously committed to making in-person merits hearings available. However, certain judges have announced blanket policies refusing any in-person hearings. Has OCIJ's policy changed or is this simply a local issue? If this is purely a matter of an immigration judge inappropriately refusing to follow OCIJ guidance, what action should be taken to remedy the matter?

RESPONSE:

OCIJ is not aware of any courts or judges with blanket policies and welcomes any specific information about announcements of blanket policies. AILA raised a similar question in the AILA-EOIR liaison agenda questions dated September 30, 2004. OCIJ's response is available on EOIR's website, at http://www.usdoj.gov/eoir/ailaarchive.htm. As reflected in that response, OCIJ did not commit to providing in person hearings in every case. OCIJ indicated that policies and procedures applicable to all cases should be published in Local Operating Procedures. If a party believes that a court has adopted a blanket policy interfering with an individual's right to be heard, the party is welcome to raise the issue with the appropriate ACIJ. A list of the ACIJs and their geographical areas of responsibility are available on EOIR's website, at http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm.

In addition, parties who believe an immigration judge has erred in conducting a certain type of proceeding may appeal the judge's decision to the Board. Although immigration judges have broad discretion to control the conduct of proceeding, a party may appeal if he or she believes that the immigration judge has abused his or her discretion in a particular case to the party's detriment. The party also may appeal if the party believes that an immigration judge misapplied the statutes and regulations specific to hearings conducted via telephone or video conferencing. *See* section 240(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c).

Impact of REAL ID Identification Requirements

10. Many non-citizens (documented and undocumented alike) who must enter federal buildings to attend their removal hearings do not possess valid photo identification as required under REAL ID. In some cases, ICE or CBP has confiscated and continues to hold their documents during the pendency of the removal proceedings; for others, the procedural posture of the case prevents them from obtaining identification.

a. Has a plan been formulated to deal with entry of undocumented non-citizens into affected federal buildings once the REAL ID requirements go into effect?

RESPONSE:

In general, EOIR does not control the entry procedures in federal buildings. Immigration courts are housed in a variety of facilities such as federal buildings, commercially leased space,

and federal/state/county detention facilities. Federal Protective Services, within DHS, controls the entry requirements and other security policies and procedures in federal buildings. The Marshals Service, within the Department of Justice, handles security policies and procedures for federal courthouses.

Visitor entry into any federal building has for some time required presentation of photo identification. Visitors also must submit to screening procedures which generally consist of passing through a walk-through magnetometer, and/or screening by hand-held metal detector, as well as having all hand-carried items (e.g., purses, briefcases, packages, etc.) either searched by hand or screened through x-ray equipment.

Even before the REAL ID Act, when a respondent lacked the requisite identification to enter a federal building, the immigration courts adhered to procedures to facilitate the respondent's entry. For instance, EOIR staff provides building security staff with a list of the names, A numbers, and addresses for each respondent expected on a particular day. Security staff then matches that information with the respondent's notice of hearing and allows unescorted entry following the standard magnetometer and/or x-ray screening. If a respondent arrives without a copy of his or her hearing notice, the respondent may enter along with his or her attorney following the standard magnetometer and/or x-ray screening. Building security may call the court in the event a respondent appears without identification or a hearing notice. If the court confirms that the respondent has a hearing or other need to enter, the respondent will be escorted into the building. If the court cannot confirm that an individual lacking both identification and a hearing notice has business at the court, the individual is not allowed to enter.

b. Has OCIJ considered seeking an exemption from the REAL ID requirement?

RESPONSE:

OCIJ has not considered seeking an exemption from the REAL ID requirement. OCIJ has not received any reports that respondents are having difficulties entering immigration court facilities in light of the REAL ID Act.

c. Has OCIJ considered the possibility that the REAL ID requirements may cause additional delays for entry into high traffic federal buildings in cities such as New York, Los Angeles, and Miami, and will the agency issue any instructions to its immigration judges regarding in absentia orders for non-citizens who show up late to a hearing because of such delays?

RESPONSE:

As previously mentioned, OCIJ has not received reports suggesting that respondents are encountering problems entering court facilities based on the REAL ID Act. In the absence of reported problems, guidance seems to be unneeded at this time. In addition, the decision to issue

an in absentia order or to rescind such an order rests with the immigration judge who must consider the individualized facts and issues arising in each case. A party unable to attend a hearing based on the REAL ID Act is welcome to raise such an issue before the immigration judge via a motion to rescind.

Just as travelers at airports need to plan ahead for possible security-related delays, visitors to the immigration courts must anticipate possible delays while passing through security. However, if entry problems arise in particular locations, please contact the appropriate ACIJ having control over the affected location. A list of the ACIJ's and their geographic areas of responsibility is available at http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm. OCIJ then will consider what options exist to address the problem. As addressed above, because the authority to establish and enforce entry and security procedures in federal buildings does not rest with OCIJ, OCIJ may not be able to abandon an existing procedure and adopt a new one. However, because the courts in Miami and Los Angeles are located in commercially leased spaces, the court administrators there have more ability to determine entry policies and procedures. Contract guards enforce those policies and procedures. In the absence of reported problems, the system seems to be operating successfully.

Security and Background Checks

11. Under 8 CFR § 1003.47(b)(3) of the Interim Rule relating to Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals, an immigration judge or the Board cannot grant an application for relief unless the security clearances have been completed. Unfortunately, the filing instructions provided indicate that the Texas Service Center (TSC) will only accept Forms I-589, I-485, EOIR-40, EOIR-42A, EOIR-42B, and I-881. Certain applications for relief may be adjudicated on forms not listed (e.g., Form I-191 for § 212(c) relief, or an unaccompanied Form I-601 for certain waivers), while others do not require the filing of any application at all (e.g., a waiver under § 237(a)(1)(h)). Some immigration judges are requiring applicants to file form I-191 for the § 212(c) application with the TSC even though the instructions do not include the I-191 form, and TSC does not accept the I-191 applications.

*a. Please clarify exactly what forms must be filed with TSC and why the instruction forms only include Forms I-589, I-485, EOIR-40, EOIR-42A, EOIR-42B, and I-*881?

RESPONSE:

Biometric checks and procedures are entirely within the control and purview of DHS. DHS, rather than EOIR, provides respondents with instructions about the requisite biometric and biographical information. *See* 8 C.F.R. § 1003.47(d). Accordingly, the instruction form referred to, namely "Instructions For Submitting Certain Applications In Immigration Court And For Providing Biometric And Biographical Information to U.S. Citizenship and Immigration Services," is a form that DHS drafts and issues. Thus, DHS most appropriately can field this

question. However, EOIR has been advised that DHS is revising the above-mentioned form to list additional applications for filing with TSC.

b. If the I-191 and I-601 forms are to be filed with the TSC, could the instruction form be modified to reflect this?

RESPONSE:

EOIR understands that DHS is amending the instructions to reflect that the I-191 and I-601 are to be filed at TSC. Again, however, because DHS is responsible for the form captioned "Instructions For Submitting Certain Applications In Immigration Court And For Providing Biometric And Biographical Information to U.S. Citizenship and Immigration Services," AILA is advised to direct the question to DHS.

c. Would EOIR consider asking USCIS to allow all forms, including the I-191 and the I-601 waiver to be filed at TSC?

RESPONSE:

As previously noted, EOIR believes that DHS is amending the form to reflect that the I-191 and I-601 are to be filed at TSC. To ensure an accurate description of DHS operational plans, AILA is advised to raise the issue with DHS directly.

d. *Would EOIR consider printing the informational form in Spanish and other common languages for pro se applicants who may not understand the complicated instructions in English?*

RESPONSE:

EOIR is not responsible for creating or printing the form titled "Instructions For Submitting Certain Applications In Immigration Court And For Providing Biometric And Biographical Information to U.S. Citizenship and Immigration Services." Questions about the form are best fielded by DHS.

12. Certain forms cover multiple persons (e.g., asylum applications). Must multiple applications be filed to receive the appropriate receipt and biometrics appointments?

RESPONSE:

As noted above, biometric checks and procedures are entirely within the control and purview of DHS. To ensure accuracy, the question should be posed to DHS.

13. Respondents who indicated their intent to file an application for relief at a master calendar prior to April 1, 2005, have not been informed of the new filing procedures for applications prior to hearing. As a result, for example, a person who has a filing deadline for the "fee'd in" application and supporting documents of fifteen days before the hearing would be caught unaware of the inability to fee the application in locally and be caught out of time. Respondents are assuming that the TSC filings constitute proper service on both the immigration court and DHS, only to find out at the hearing that such filing is neither. Further, individuals report being told that they have to file ALL their exhibits with TSC and find the applications lost or rejected.

a. Will EOIR consider revamping the forms to clarify the procedure and need to continue filing exhibits/forms with the immigration court and DHS Chief Counsel's office?

RESPONSE:

EOIR understands that DHS soon will issue a fact sheet and a list of frequently asked questions and the corresponding answers. Such documents may increase clarity. Filing documents with DHS is distinct from filing documents at the immigration courts. If an EOIR employee has provided erroneous advice with respect to the proper filing of documents, EOIR encourages AILA to provide specific information so that EOIR may look into the matter. Similarly, if AILA provides DHS with specific information about the source of erroneous advice, DHS may be able to address the issue.

b. Will EOIR consider notifying respondents who obtained settings for merits hearings prior to April 1, 2005 of the new procedures, to avoid further confusion and delays?

RESPONSE:

EOIR understands that DHS soon will issue guidance about the type of case described above, known as "pipeline cases." DHS is responsible for providing instructions to respondents.

14. There continue to be reports from around the country of immigration judges denying or pretermitting applications where a respondent has not completed fingerprinting or not updated fingerprints in pre-April 1, 2005 cases. While the majority of these cases appear to have been remanded for consideration of the applications, the policy is not uniform. Has the Board and/or OCIJ considered providing additional guidance or directing the immigration judges that, unless there is ample notice in the record of the consequences of failure to obtain fingerprints (as well as an explanation that fingerprint results expire and may require a new fingerprinting), a removal order or other sanction is inappropriate?

RESPONSE:

The regulations clearly set forth the circumstances in which an immigration judge may

deem an application for relief abandoned due to a respondent's failure to provide biometrics. *See* 8 C.F.R. §§ 1003.47(c), 1003.47(d). Because the regulation appears to be sufficiently clear, OCIJ does not plan to issue additional guidance at this time. *See* OPPM 05-03, *Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals (Interim)*, at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm. In the event a respondent believes that an immigration judge has pretermitted or denied an application in error, the party may seek recourse via an appeal to the Board.

New Immigration Courts and Immigration Judge Positions

15. Several members note that there is little understanding of how OCIJ selects and recruits new immigration judges, the required qualifications, and recruitment and selection processes. Will OCIJ explain those procedures and the evaluation process?

RESPONSE:

Unless the Attorney General elects to make a direct appointment, a vacancy announcement is prepared by the Human Resources (HR) staff, Administration Division, EOIR. The announcement is given to the Office of Attorney Recruitment and Management (OARM), Justice Management Division, Department of Justice (DOJ). OARM sends out the announcement to various sources (DOJ postings, Internet sites, bar associations, law journals, etc.). Applicants must have an LL.B. or a J.D. degree and be duly licensed and authorized to practice law as an attorney under the laws of a state, territory, or the District of Columbia. Applicants must be U.S. citizens and have a minimum of 7 years of relevant post-bar admission legal experience at the time the application is submitted, with 1 year experience equivalent to the GS-15 level in the Federal Service. HR receives the applications and reviews them for seven (7) years post-bar legal experience, citizenship, and bar membership. HR forwards the applications of qualified candidates to OCIJ for consideration.

OCIJ evaluates the applications, looking for experience in at least three of the following areas: knowledge of immigration laws and procedures; substantial litigation experience, preferably in a high-volume context; experience handling complex legal issues; experience conducting administrative hearings; or knowledge of judicial practices and procedures. After reviewing the written applications, OCIJ selects applicants for an interview when appropriate. Following the interviews, the Chief Immigration Judge makes recommendations to hire to the Deputy Director and Director of EOIR, who in turn forward their recommendations to the Deputy Attorney General. The Deputy Attorney General is the selecting official.

16. Does OCIJ anticipate hiring new immigration judge positions in the near future, and if so, for what locations?

RESPONSE:

EOIR posted an Immigration Judge vacancy announcement with USAJOBS, available at http://www.usajobs.gov, on September 9, 2005. As noted in the announcement, there are currently 8 vacancies. The announcement will be open through September 9, 2007; however, OCIJ will accept and review applications on a rolling basis. All applications must contain a prioritized list of geographical preferences taken from the comprehensive list of court locations. An applicant may not select more than five locations.

17. Does OCIJ anticipate expanding any courts or creating any new courts in the near future?

RESPONSE:

Without a final budget for fiscal year 2006, the issue of expanding or opening a court in the near future is premature.

BIA Filing and Clerical Errors

18. We continue to receive reports of BIA decisions, notices, transcripts, and briefing schedules not being properly/timely served on the respondent or attorney of record or, in some cases, not being served at all. Other issues include failure to provide a complete order, or service on the wrong attorney. Attorneys also report being incorrectly notified that their appeal notices had not been received at the Board or that their appeals had been dismissed. Even where there was ample evidence that the error was clearly on the side of the Clerk's Office, the respondents were required to file motions to reopen. Such motions require a fee and, for represented respondents, additional attorney time and costs.

a. Will the Board review its procedures for taking responsibility for reopening cases or correcting errors when there has been improper service, or lack of service, on a party? At present the burden is put on the attorney or respondent to present such information in a formal, fee'd in motion to reopen, often at significant cost and delay to the respondent.

RESPONSE:

The Board follows procedures to ensure that, if a decision or other correspondence is returned as undeliverable due to the Board's error with respect to the address, the decision or correspondence is reissued. In that circumstance, the error is corrected without the need for an affirmative motion and the payment of an accompanying fee. The Board is aware of the possibility of such mailing errors and acts to reissue the decision without undue delay. The Board's response to 3(c) in the September 30, 2004, liaison questions describes that process more fully. *See* http://www.usdoj.gov/eoir/ailaarchive.htm.

In the above-described scenario, the undeliverable mail brings the possible error to the attention of the Board such that the Board can look into the matter. In other scenarios, the party

must file a motion to raise the possible error. Although the Board may *sua sponte* reopen and reconsider to correct an obvious procedural mistake, not all issues are obvious. Any party – whether the alien or DHS – who wishes to bring an alleged error to the Board's attention, must do so by motion with proof of service on the other party. Motions allow parties the opportunity to identify for the Board any error in law, fact, or procedure which may exist in a prior Board order. If a party files a motion, he or she can be confident that the Board will reexamine its prior decision in light of his or her assertions of error.

With respect to the filing fee associated with motions, the majority of motions do not involve errors in service. Parties may assert such error to no avail if the record of proceedings does not support the assertion. The proposal that only some motions require a fee presents an operational obstacle. The nature and merit of a motion is known only after filing and adjudication of the motion. However, the Board is mindful that the filing fee may present a hardship. As such, the Board entertains fee waiver requests (Form EOIR 26-A). *See* 8 C.F.R. § 1003.8(a)(3). In addition, a party may call the Clerk's Office, which may be able to spot clear address errors and correct a problem. However, filing a motion is the only sure way to bring a matter back to the Board's attention.

b. Is the Board aware of these persistent clerical issues originating from the Clerk's office, and is there any review mechanism in place to track and/or correct such mistakes?

RESPONSE:

The Board is working with EOIR's computer staff to perfect the attorney address function in the new CASE system. The Clerk's Office staff has been asked to verify addresses when issuing notices, briefing schedules, and orders. Further, as previously described, when correspondence is returned to the Board as undeliverable, the Board has procedures in place to review the record of proceedings and to reissue notices, briefing schedules, or orders if the Board made a mistake on the address. *See* Question 3(c) from the September 30, 2004, meeting at http://www.usdoj.gov/eoir/ailaarchive.htm.

19. Attorneys report that motions to remand are not being put in files in a timely manner and that, as a result, a decision on the merits is reached without consideration of the new information. It would be unfair for the respondent whose timely filed motion to remand was not considered to have to restyle the motion as one for reopening and pay an additional fee. What solution can the Board provide where there is clear error in consideration due to improper or untimely filing by the Clerk's Office?

RESPONSE:

When the Board finds correspondence that was not filed in the record of proceedings before a decision was rendered, the Board will review the correspondence, and if appropriate, reopen *sua sponte*. However, to ensure Board review when either of the parties argues that a

Board decision was erroneous, the parties must file a motion to bring the arguments to the Board's attention. If the filing fee presents a hardship, the respondent is encouraged to file a fee waiver request (EOIR Form 26A).

20. Several attorneys report filing briefs on appeal, yet having a decision issued as if none were received. Where there is clear evidence of error in the Clerk's Office that a brief was timely submitted and received, yet not properly put before the adjudicating Board member, what remedies could be taken before the expense and effort of filing a motion to reopen?

RESPONSE:

If the Board discovers that a brief was not paired with the record of proceedings prior to the adjudication of the appeal, the Board will review the record and take appropriate action on its own initiative. Importantly, however, practitioners should not conclude that the Board did not receive or consider a brief simply because the Board did not specifically refer to the brief in its decision. Again, although the Board takes steps to correct errors on its own initiative when it finds errors, the only way to ensure that a possible error comes to the attention of the Board is through the filing of a motion. Fee waivers are available to aliens facing financial hardship.

Emergency Motions and Stays

21. While we understand the Board's heavy caseload, there appears to be a general unwillingness to consider emergency motions for stay in a timely manner, with several practitioners noting that the decision on the stay was reached after the Board's decision on the underlying motion. Practitioners are forced to obtain relief in Federal Court to avoid the processing issues at the Clerk's office. Can the Board comment on the actual procedures used to review such motions?

RESPONSE:

If an alien is in the custody of DHS and faces imminent removal from the United States, the Board immediately will act on the alien's motion for an emergency stay. *See* BIA Practice Manual, Chapter 6, *Stays and Expedite Requests*, at http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm. If an alien is not detained and does not face imminent removal, the Board adjudicates the stay motion along with the underlying motion to reconsider or reopen. If an alien is taken into DHS custody while a motion is pending, the Board will expedite the adjudication of the motion. In addition, the Board will contact DHS to verify that removal is imminent. Again, when removal is imminent, the Board acts immediately to adjudicate the motions. If removal is not imminent, the Board adjudicates the underlying motion on an expedited basis because the alien is detained.

Juveniles in Removal Proceedings

22. When unaccompanied and unrepresented children are detained, whether in a juvenile detention center or in foster care:

a. Does EOIR identify, monitor or track minor respondents? Is there any estimate of the number of unaccompanied children currently in proceedings?

RESPONSE:

Yes, EOIR does track those cases. As of September 26, 2005, approximately 1,698 unaccompanied juvenile cases were pending.

b. What constitutes proper service on a minor in proceedings and on whom are court documents normally served?

RESPONSE:

Immigration courts generally serve minors with hearing notices and other documents in the same manner it serves such documents in any other case. However, immigration courts should be sensitive to any special needs these cases may present. As more fully explained below, in September, 2004, OCIJ issued an interim policy and procedures memorandum regarding cases involving minors. Practitioners are encouraged to submit comments to the Office of the Chief Immigration Judge regarding this issue, so that their suggestions may be reviewed prior to the finalization of the guidelines. As with any other respondent, whenever a represented minor is to be served with any document, service must be made upon the attorney or representative of record. 8 C.F.R. § 1292.5. If an alien is in an Office of Refugee Resettlement (ORR) facility, the juvenile is served via the custodian of the facility.

c. Are any special provisions made to assure that there is actual service of such notice or other document on a minor is completed and effective?

RESPONSE:

As noted above, there are no special procedures for serving minors.

23. Are any special precautions taken to protect the interests of children, specifically:

a. If a minor needs additional time (for example, more than one master calendar continuance to find an adult relative or attorney), are immigration judges under any instructions to liberally grant additional time?

RESPONSE:

In September 2004, OCIJ issued guidance and suggestions to immigration judges adjudicating cases involving unaccompanied alien children. *See* OPPM 04-07, *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (Interim),* at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm. The suggestions focus primarily on assisting the judge in ensuring that the juvenile respondent understands the nature of the proceeding, effectively presents evidence about the case, and has appropriate assistance. There are no special instructions for handling requests for continuances in cases involving unaccompanied alien children. Rather, immigration judges must adjudicate such motions on a case-by-case basis. A party who believes that an immigration judge erred in denying a motion to continue may raise the issue on appeal to the Board.

b. Given minors' limited ability to understand the law and nature of the proceedings, have immigration judges received any specific training for juvenile cases?

RESPONSE:

As part of the annual training for immigration judges in August of 2005, OCIJ arranged a presentation about children appearing as witnesses during immigration hearings and the fundamentals of child development. In addition, as previously conveyed, OCIJ issued guidance in September 2004 about adjudicating cases involving unaccompanied alien children. *See* OPPM 04-07.

Immigration judges are to encourage the use of pro bono resources to provide children with legal representation. Steve Lang, the Pro Bono Counsel within the Office of General Counsel, is the point of contact regarding pro bono efforts related to juveniles. The Pro Bono Program promotes representation of juveniles before the immigration judges and the Board. Together with OCIJ, the Pro Bono Program continues to work closely with ORR and nonprofit organizations to better identify and resolve issues affecting legal access, as well as to design and implement new initiatives aimed at improving legal assistance for unaccompanied alien children. Such initiatives include the UNHCR-funded National Center for Refugee and Immigrant Children, as well as new ORR-funded pro bono pilot programs for unaccompanied alien children.

c. In some jurisdictions, the immigration court appears to have assigned a particular immigration judge or judges to manage the juvenile docket. Is this policy uniform throughout the country? If not, in the courts where juvenile dockets have been segregated and assigned to a particular immigration judge, has OCIJ found this to be helpful?

RESPONSE:

All immigration judges have the authority to hear cases involving unaccompanied alien children. OCIJ has not had a policy of assigning such cases only to particular immigration

judges. Some courts handle a number of these cases and particular immigration judges within those courts tend to handle them. Other judges, however, also may handle the cases.

d. Are asylum or other relief hearings handled in any way differently for juveniles than for adults? If so, how?

RESPONSE:

OCIJ plans to issue additional guidance about the handling of juveniles' hearings and welcomes suggestions from AILA. The already issued interim guidance instructs immigration judges to ensure an appropriate courtroom setting, including modifying the courtroom as appropriate. *See* OPPM 04-07. The interim guidance also suggests that immigration judges ensure appropriate courtroom procedures and explain the proceedings at the outset, prepare the child to testify, employ child-sensitive questioning techniques, make appropriate credibility assessments, and control access to the courtroom.

EOIR Verification for Issuance of EADs for Applicants in Proceedings

24. USCIS has implemented new procedures for verifying eligibility for employment authorization documents ("EADs") for applicants who are in proceedings, which include "administratively" closing the application, stating that jurisdiction over the case is with this immigration judge. The EAD will not be issued unless proof of a "pending" predicate application is provided to USCIS. Has EOIR worked with USCIS to develop a uniform policy regarding providing notice of this procedure and evidence of eligibility to applicants?

RESPONSE:

While DHS is solely responsible for granting employment authorization and for verifying eligibility for employment authorization documents for applicants in proceedings, EOIR makes available to DHS computer data that reveals whether an alien has filed a predicate application. EOIR transmits data about pending applications to DHS on a nightly basis.