AILA-EOIR AGENDA QUESTIONS AND ANSWERS
October 18, 2006

Attorney Generals's Recommendations for EOIR

AILA has read with interest the DOJ Report regarding the AG's recommendations, and as stakeholders in the quality of quality of justice rendered by the EOIR at all levels, we laud the DOJ for working on improving the Immigration Courts and the BIA. Nevertheless, we have questions and concerns about many of the recommendations:

1. Streamlining Process. Section 12 deals with changes to the streamlining process, and AILA is deeply concerned that the BIA adequately review all appeals.

(a) Will AILA and the private bar be able to have any input into the recommendations and proposed changes to streamlining before they are put into effect? If so, would it be possible to have this input in the rule making part of the process, rather than in response by way of comment after a rule is issued? If not, why not?

RESPONSE:

The Department of Justice ("the Department") and the Executive Office for Immigration Review ("EOIR") are drafting regulations to implement the Attorney General's directives, and EOIR expects that all interested parties will have the opportunity to comment. EOIR welcomes suggestions from the parties and other interested persons, but there will be no formal mechanism in place for input before rule making. Suggestions from the parties and other interested persons can be addressed to EOIR's Office of the General Counsel.

The Attorney General is eager to address the problems that have been identified in his extensive study, during which AILA participated and gave substantial and helpful feedback. Any further opportunity for public participation at this time could cause greater delays in implementing important changes identified by the Attorney General. In any case, the Department fully expects that AILA and all other parties will have an opportunity to participate in the agency's actions during the rulemaking process. An important impetus for the reforms has been the request by many stakeholders, including AILA, that the Attorney General take swift action to allow the Board of Immigration Appeals ("the Board" or "BIA") to address issues more fully. Further, many of the rules involve procedural adjustments and not significant new burdens or immigration benefits that would accrue to, or that would be taken away from, the parties during any comment period.

(b) While the two issues specifically noted in Section 12—use of one member decisions to clarify poor or intemperate decisions and use of three membership panels to issue decisions in complex cases-- are salutary, how will the BIA identify which IJ decisions need either of these treatments? Will attorneys for respondents have the opportunity to request such specific treatment due to their familiarity with the record?

RESPONSE:

The Board will continue to review each case carefully and craft its decision to the issues raised in each particular instance. In this regard, a great deal depends on the arguments raised by the parties on appeal, so it is not only welcome but incumbent upon attorneys for either party to raise such issues on appeal. The Board already encourages appealing parties to make explicit and well-supported arguments for three-Board-member review. That remains the same.

(c) AILA attorneys have noted a high volume of respondent appeals in which the IJ's denial of relief is summarily affirmed by a single BIA member. (Some of these [decisions] are ultimately reversed by courts of appeal). The BIA does so by reliance on the rule that gives deference to the IJ's fact-findings. However, when the IJ grants relief, especially in a close or difficult case, the BIA often reverts to its former "de novo" approach to review and reverses the IJ's grant of relief. Will the anomaly be addressed by the changes that the DOJ reports recommends?

RESPONSE:

No changes to the Board's standard or review are currently contemplated in the Attorney General's directives. The premise of the question, that the Board applies one standard (clearly erroneous) to respondents' appeals and another standard (de novo) to DHS appeals, is incorrect. The Board applies the same standard of review in every case regardless of the disposition by the immigration judge or the Board's ultimate decision on appeal. Under the regulations, the Board "will not engage in de novo review of findings of fact, determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous. The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo." 8 C.F.R. §1003.1(d)(3).

Regarding reversals, in some close cases the Board may conclude that the immigration judge's findings of fact were not clearly erroneous, but might disagree with the immigration judge's legal conclusion that based on those findings, the respondent has met his or her burdens of proof or persuasion to warrant relief. This is pursuant to the Board's authority under the regulations, which permit de novo review of questions of law, judgment, or discretion.

Regarding the high number of summary affirmances, or affirmances without opinion, noted in this question, the volume has actually been decreasing at the Board. In fiscal year 2003, approximately 36% of the Board's decisions were AWOs. That number declined to approximately 32% in fiscal year 2004. In fiscal year 2005, approximately 20% of the Board's decisions were AWOs, and in fiscal year 2006, only 15% of the total decisions were AWOs.

If either of the parties believes the Board may have applied an incorrect standard of review, the appropriate remedy is to file a motion to reconsider.

(d) Will AILA and the private bar have input into the standards to be employed for determining which cases should be published as precedent?

RESPONSE:

The Board has published 26 decisions in fiscal year 2006 and looks forward to issuing more decisions that will serve as guidance to the immigration community. The Board has stated certain criteria for publication, "including, but not limited to: the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest." Board Practice Manual 1.4(d). While suggestions are always welcome, there will be no formal request for input into the criteria for publication at this time. Keep in mind that the Board may only address important issues in the context of the cases as they arise before us. The best input that the parties can provide for publication is to fully develop issues and provide thorough briefs so that the Board can consider publication.

(e) Item 14 of the DOJ report calls for the IJ to have sanction authority for frivolous or false submissions and egregious conduct. Since neither the respondent's attorney nor the attorney for DHS is a DOJ employee, will the IJ's authority to sanction apply to both the respondent's attorney and the DHS attorney? If not, why not?

RESPONSE:

The language of section 240(b)(1) of the Immigration and Nationality Act states that "The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this Act." The language of the statute itself is not limited to a single party, but rather focuses on the action or inaction that is in contempt of the immigration judge's authority regardless of who is responsible. Clearly, there are significant differences between the situations of private and government counsel, and these will need to be carefully considered in drafting the regulation. At this time, we do know that there will be high-level EOIR oversight of the program, and that it will be used only in very limited circumstances where the conduct is clearly in contempt of the immigration judge's proper exercise of authority. In addition, there will be an opportunity to comment on any specific proposed measures during the course of the regulatory drafting process, and we encourage you and your constituents to do so.

(f) If the position of EOIR/DOJ is that there are other mechanisms to sanction DHS counsel, will those mechanisms be made public so that opposing counsel as well as the IJ know what to do in those cases when it is necessary to sanction DHS counsel?

RESPONSE:

EOIR cannot comment on what mechanisms may or may not be in place to discipline Department of Homeland Security ("DHS") counsel. As noted above, there is much work to be done in developing the proposed regulation. As specific measures become clearer, there will be further opportunities for the private bar to raise issues of concern both at similar liaison meetings and during the regulatory process.

(g) Understanding that the DHS has a mechanism to discipline its employees, we believe that it is inequitable to proceed with the disciplinary process in this one sided fashion. Could EOIR draft its new proposed rule to permit immigration judges to sanction both attorneys for the DHS and the private bar?

RESPONSE:

See the response to question 1(e).

2. AILA applauds the seriousness with which DOJ will take the complaint process regarding IJ conduct. (Item 11of the DOJ Report). Will EOIR consider posting in the public area of each EOIR court, the OPR and OIG addresses and complaint procedures in order to facilitate respondents, attorneys and witnesses reporting such inappropriate IJ conduct?

RESPONSE:

The Office of the Chief Immigration Judge ("OCIJ") is currently developing a plan pursuant to the Attorney General's directives regarding complaint procedures, and will consider the publication and/or posting of all complaint procedures as part of that process. AILA raised a similar question regarding complaint procedures in the AILA-EOIR liaison agenda questions dated March 16, 2005. As reflected in that response, if a respondent or a respondent's attorney believes that an immigration judge has conducted him or herself improperly or has engaged in misconduct, a complaint can be filed with OCIJ or the Office of Professional Responsibility (OPR). See response to Question 12 of AILA-EOIR Liaison Agenda, March 16, 2005, available at *http://www.usdoj.gov/eoir/statspub/eoiraila031605.pdf*.

In the meantime, the Assistant Chief Immigration Judge (ACIJ) assigned to each court remains available to accept informal comments as necessary from members of AILA and other interested parties regarding issues of concern at the Immigration Courts. Question 9 in the AILA-EOIR liaison agenda questions dated October 17, 2005 addresses information regarding ACIJs and their geographic areas of responsibility. See response to question 9 of AILA-EOIR Liaison Agenda, October 17, 2005, available at *http://www.usdoj.gov/eoir/statspub/eoiraila101705.pdf*. Also, 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. OCIJ encourages communication between interested parties and the ACIJ assigned to the particular Immigration Court and is willing to explore the possibility of expanding existing communications between ACIJs and local AILA chapters.

(a) The AG's report makes provisions in Section 1 for performance evaluations for IJs and recommends that there be a "formal process" to evaluate and improve the work of IJs. The goal of these evaluations is to identify "areas where an immigration judge or a board member may need improvement." What criteria will EOIR use in order to determine whether an IJ or BIA member "may need improvement? Can you give us any information on how these evaluations will be handled? For example, will evaluators actually travel to Immigration Courts to monitor the performance of immigration judges?

RESPONSE:

The criteria for evaluation are still being developed and the procedures for conducting the evaluations are being reviewed at this time. EOIR considers this an important and serious matter. In developing the appropriate criteria for evaluation, the agency will take into account the goals of the Attorney General's directive, the concerns that gave rise to the directive, and the highest ideals of government service, professionalism, and judicial performance. We do not have more specific information to provide at this point as the development of performance evaluations for Immigration Judges is still in progress.

(b) Will any group or individuals outside of EOIR be involved with the evaluations of immigration judges? Will EOIR seek or consider AILA's and the private bar's input with regard to the recommendations in the AG report? AILA has among its membership attorneys with a broad range of experience, including Immigration Court practitioners, former immigration judges, and government officials. As pointed out above, AILA and the private bar are stakeholders in the quality of justice rendered by EOIR. Will EOIR consider input from AILA on either the evaluation of the IJs and the BIA or on the training recommendations outlined by the AG in his report?

RESPONSE:

The Attorney General took into account both government and public input when issuing his directives. As we work to implement these directives we will continue to take into account the full range of appropriate input bearing on each. The individual evaluations of Board Members and Immigration Judges are an internal management matter. The Department will have the final word on the form, content, and process of the Board Member and Immigration Judge evaluations. However, we recognize the value of input by parties appearing before Board Members and Immigration Judges with respect to the general operations of our courts and welcome any suggestions from private parties and the Department of Homeland Security on ways to improve our process. Training of our judges is fundamental to the efficient operation of our courts and we are happy to partner with all of our stakeholders in an effort to enhance the court's function. Additionally, OCIJ plans to assign a specific ACIJ the responsibility of overseeing Immigration Judge training. Beyond this, it is too early to comment on the process.

Removal of Immigration Judges

3. Has EOIR ever removed an IJ for:

(a) improper judicial conduct/temperament, or

RESPONSE:

Yes.

(b) incompetence (inadequate knowledge of the law/inability to manage time/articulate proper legal reasoning)?

RESPONSE:

No.

(c) What are the criteria that EOIR/DOJ would use in deciding whether to take such drastic action?

RESPONSE:

There are a myriad of reasons for the removal of federal employees, including many conduct related offenses, and the unsuccessful performance of job duties.

EOIR Law Clerks

4. How many judicial law clerks and "attorney advisers" are employed at the Immigration Courts nationwide? According to the EOIR website there are 218 IJs nationwide (though the GAO says 225). AILA has discussed the possibility of advocating a policy that each IJ have his/her own law clerk, so as to increase the overall efficiency and quality of adjudications within EOIR. Please comment.

RESPONSE:

There are currently 29 Judicial Law Clerks and 11 Second Year Attorney Advisor employed in 23 Immigration Courts. In fiscal year 2008, OCIJ will have a total of 55 Judicial Law Clerks and Second Year Attorney Advisors in 30 Immigration Courts. It is not possible under the current budget and projected future budgets to hire a law clerk for each Immigration Judge. OCIJ remains open to suggestions for working with AILA, law schools, and other interested parties to encourage and strengthen the volunteer internship programs at the Immigration Courts.

EOIR Policies Regarding Unaccompanied Alien Children

5. Recently, EOIR began holding video conferencing hearings for children detained in Corpus Christi, Texas. Since the Corpus Christi detention center opened earlier this year, advocates for the children have been struggling to find pro bono resources to represent the children. The remote location of the facility, coupled with the lack of pro bono networks, has created a serious problem.

On September 16, 2004, EOIR issued Interim Operating Policies and Procedures Memorandum 04-07: (Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children), calling for some modifications to the ordinary courtroom operations and configurations in cases involving unaccompanied children. The intent of the guidelines is to help IJs develop an atmosphere in court that is conducive to enabling the child to present his/her case. The use of video conferencing for removal hearings for unaccompanied children negates the intent of the guidelines. Unaccompanied children are particularly vulnerable, and the video conferencing hearings destroy any opportunity a child may have to develop the relationship of trust critical to

ensuring that potential avenues of relief are explored. Furthermore, the video conferencing of children's hearings inhibits the ability to obtain pro bono counsel for the children. Many attorneys are understandably reluctant to represent a child with whom they cannot meet in person. We respectfully request that EOIR stop all video conferencing for removal hearings and all group removal hearings for children. As an alternative, we propose sending over an IJ at certain pre-scheduled times to hold court at the Corpus Christi Detention Center.

RESPONSE:

EOIR appreciates the efforts of attorneys who provide pro bono representation to unaccompanied minors. Although we cannot agree to discontinue the use of video conference for removal proceedings, which is expressly authorized by statute, OCIJ will monitor the handling of cases of unaccompanied alien children in Corpus Christi, Texas, to ensure that Immigration Judges employ appropriate procedures and provide additional training as necessary.

Additionally, in September 2006, EOIR awarded a subcontract for a Legal Orientation Program (LOP) through the Vera Institute of Justice to the University of Houston Law Center, Immigration Law Clinic (Clinic). The year long LOP pilot project is intended to address the legal needs of Unaccompanied Alien Children in the custody of the Office of Refugee Resettlement's Division for Unaccompanied Children Services (DUCS) who are in juvenile shelter care in Corpus Christi, Texas.

The LOP pilot project will utilize the skill and resources of law students and legal staff of the Clinic to meet the immediate legal needs of these children by carrying out biweekly legal orientations (rights presentations), as needed and appropriate. The interactive orientations, which cover available legal rights and options, will be conducted in the language most appropriate for the children. Individual orientations (intakes) will be provided to the children following the general orientation in order to respond to specific concerns and questions and provide more comprehensive screening.

The Clinic will also research channels to recruit, train and mentor San Antonio and Corpus Christi pro bono attorneys to serve the children's legal needs. This effort may also include conducting a legal training in Corpus Christi to increase the pool of pro bono attorneys and mentors willing and trained to serve the children's legal needs.

The Clinic will further research legal issues involved in children's cases to identify which children could most benefit from legal counsel, and provide representation for select children before ICE, the Houston Asylum Office, and/or EOIR, who are seeking relief from removal (e.g. asylum, SIJ, prosecutorial discretion). Any representational activities will be performed using non-government funding.

OCIJ will continue to evaluate the appropriate use of video conferencing equipment with particularly vulnerable populations and is open to further discussion with AILA and other interested parties regarding methods to ensure a courtroom atmosphere that is conducive to enabling particularly vulnerable respondents to present their cases.

Corroboration of Asylum Claims

6. The REAL ID Act has made it necessary for asylum applicants to corroborate their claims. (INA 208 (b) (1) (B)) Many attorneys rely on submitting affidavits from witnesses and experts rather than having them testify in person. This is because in many areas of the country, respondents as well as the witnesses, live very far from the Immigration Court and it is too expensive and time consuming for the witnesses to appear personally before the Court. This is particularly true for low-income respondents, who can't afford to transport both themselves and their witnesses to court. Although IJs usually admit such evidence into the record, many of those same IJs either completely ignore the substantial corroborating evidence submitted or claim insufficient proof exists to support the claim. Several Circuit Court decisions have remanded asylum cases to the BIA, after specifically addressing the fact that the IJ had disregarded corroborating evidence that would substantiate a respondent's claim. Would EOIR consider articulating clear guidelines to ensure that IJs make specific reference to and address corroborating evidence in the record when issuing decisions?

RESPONSE:

One of the Attorney General's measures to improve the Immigration Courts and the Board of Immigration Appeals is improved on-bench reference materials and standard decision templates. We will take this suggestion under consideration in addressing that directive.

Closing of Immigration Courts in Boise and Helena

7. Recently the Immigration Courts in Boise and Helena, Idaho were closed and all cases from those courts were transferred to the Immigration Court in Salt Lake City, Utah, making it prohibitively expensive for Montana and Idaho based respondents, their attorneys, and their witnesses to travel to hearings. Does EOIR plan to reopen the Courts in Boise and Helena? If so, when? In the future, could EOIR consider conferring with all stakeholders in the particular Immigration Court, including the private bar, prior to making a decision to close the particular Immigration Court?

RESPONSE:

The dockets in Boise and Helena were not transferred. EOIR has continued operating both dockets and will do so in the future. DHS has made adjustments, unilaterally, but that will not affect the ongoing dockets in Boise and Helena.

Change of Venue Requests

8. Some IJs routinely state that they have no authority to deny change of venue motions requested by DHS. This does not comply with the regulations and the case law. (8 CFR 1003.20(b); Matter of Rahman, 20 I&N Dec. 480 (BIA 1992) Can EOIR reiterate to IJs that they

do have authority to deny motions to change venue made by DHS and that the IJs must follow the regulations and case law in adjudicating motions to change venue, whether the motion is brought by the DHS or by the respondent?

RESPONSE:

Immigration Judges must adjudicate motions to change venue pursuant to 8 C.F.R. § 1003.20, including motions filed by DHS. If a party does not agree with a ruling by an Immigration Judge on a motion, the party may appeal that decision to the Board. Further, if a party believes that an Immigration Judge has adopted an inappropriate policy regarding the handling of cases or motions, 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.

Filing at the BIA

9. Given the recent BIA decision in the Matter of Liadov (Int. Dec. 3540, 9/12/2006), finding that a late filing which is solely the fault of an overnight courier service does not excuse that late filing and the two Federal Court decisions, Oh v. Gonzalez, 406 F. 3d 611 (9th Cir. 2005) and Zhong Guang Sun v. U.S. Department of Justice, 421 F. 3d 105 (2d Cir. 2005), in which the Ninth Circuit and the Second Circuit respectively held the opposite, would EOIR consider setting up alternative ways to file appeals and memoranda of law?

(a) AILA is aware that very few respondents and/or attorneys used the electronic filing program for filing BIA appeals. The fact that the BIA had to receive the payment in form of a check or money order before the appeal was considered "filed," had a lot to do with their reluctance to use the program. Has the BIA considered instituting both electronic filing and electronic payment?

RESPONSE:

Yes, electronic filing has been EOIR's long-term goal for some time. EOIR first has to integrate all of its databases and move to an Internet-based system that can accommodate electronic filings. This is underway now with the implementation of the new data system called CASE. At an appropriate point in the future, EOIR will focus on electronic files and electronic filing. At that time, EOIR will consult with AILA representatives.

(b) Would the BIA consider allowing memoranda of law to be filed electronically with the BIA? This is the practice at many federal courts. This would have many benefits. For example: it would cut down on the instances of the BIA's dismissing appeals for the respondent's failure to file a memorandum of law, when the respondent actually did file a memorandum of law.

RESPONSE:

As stated previously, electronic filing is EOIR's long-term goal.

(c) In the meantime, what can a respondent do if his appeal or memorandum does not reach the BIA in a timely fashion due solely to courier error? Would the BIA accept a copy of the filing with the appropriate check (if necessary) with proof of courier error?

RESPONSE:

The parties may file a motion to reconsider any decision that the Board has made, however, the Board's precedent in *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006) should be considered.

Breakdown of EOIR Statistics on IJ Grants of Relief

10. The 2005 EOIR statistics indicated that 12% of all cases presented before EOIR were granted. Can EOIR provide a breakdown of which applications for relief the 12% grant rate includes? Can EOIR provide a breakdown of applications filed, denied and approved for asylum, withholding, CAT, Cancellation of Removal for LPRS, Cancellation of Removal for non-LPRs, 212(c)) waivers, etc?

RESPONSE:

Please see appendix A for the detailed response.

Control of Local Immigration Court Docket

11. AILA members have reported that cases scheduled far in advance for hearings in the Harlingen Immigration Court have been changed at the last minute without notice to the parties and to even the Immigration Judge. This results in great inconvenience to all parties to the hearing, including the Immigration Judge. The Immigration Court in Harlingen has informed the affected attorneys that these changes come from Falls Church, and that the local court has no opportunity to notify the parties ahead of time.

Is it true that Falls Church is making such changes without notice to or control of the local Immigration Judges and Court? AILA respectfully asks that such changes be made more in advance of the hearing date so that notice could be sent or given to attorneys, respondents, and their witnesses, as well as the Immigration Judges before the hearing date. If it is impossible to send out notices to the parties before the hearing date, AILA respectfully suggests that EOIR/Fall Church or EOIR/Harlingen contact the parties by telephone to inform them that their hearings have been rescheduled.

RESPONSE:

Recently, the Harlingen Court opened an additional hearing location for detained cases. This required the rescheduling of some cases on other dockets. Master calendar hearings were not rescheduled. To avoid resetting cases to new dates, some master calendar hearings were consolidated to a single judge. Some individual calendar hearings were rescheduled. In those instances, notices were sent, and attorneys were called regarding the new date. Attorneys were allowed to request an adjournment if the new date was not acceptable. Currently, if rescheduling is required at the Harlingen Court, written notices are being sent at least two weeks in advance.

BIA Extension Requests for Detained Aliens

12. The BIA recently revised its policy on granting briefing extension requests for detained non-citizens. Initially the BIA sought to shorten briefing extension deadlines from 21 to 15 days; however, after hearing from the private bar that a shorter briefing schedule might make it more difficult for detained aliens to obtain legal representation, the BIA decided to keep the 21-day extension. AILA members thank the BIA for taking the private bar's comments into consideration; however, AILA members still have concerns. Many attorneys take over cases from pro se detained respondents and the respondents have often asked for an extension before they retain counsel. By the time the detained respondent's mail containing the transcripts has been screened by security and arrived at the attorney's office, at least ten days will have elapsed. This gives the attorney little if no time to review the transcript, prepare and file the memorandum of law. Would the BIA consider amending the new policy to make distinctions between extensions requested by pro se respondents and those requested by attorneys?

RESPONSE:

The briefing schedule belongs to the respondent. Thus, attorneys making an appearance in a case must pay strict attention to filing deadlines. Keep in mind that in detained cases, the Board will accept reply briefs filed by the parties within 14 days after expiration of the briefing schedule, however, the Board will not suspend the processing of a case to await reply briefs. Board Practice Manual 4.7. It is incumbent on the parties to submit timely briefs. When necessary, supplemental arguments may be made in a reply brief as long as the initial brief was timely. Please note that the Board's policy is to reset the briefing schedule upon notice from DHS that they have moved a detained respondent to a different detention facility, if this move has impacted the respondent's receipt of transcripts and briefing schedules.

The reduction in briefing time came from the Department's request that the Department of Homeland Security, the Immigration Courts, and the Board work together to reduce overall processing times in cases involving detained aliens so that aliens would not have to suffer unnecessary delays in detention. This is a priority for the Department. In response, the Board's processing times have been dropping steadily in the last three years. In fiscal year 2004, the average processing time for an appeal involving a detained alien was 127 days. In fiscal year 2005, it was 122 days, and in fiscal year 2006, the average processing time was 98 days.

Arriving Aliens and Adjustment of Status

13. On May 12, 2006, EOIR and ASCUS jointly published interim regulations that deleted the prior regulatory bar to "arriving aliens" in removal proceedings being able to adjust and that also designated ASCUS as the agency with jurisdiction over the adjustment applications of arriving aliens, with one limited exception. See 71 Fed. Reg. 27585. The interim regulations, effective immediately, were "applicable to all cases pending administrative or judicial review on or after the date." 71 Fed. Reg. at 27590. The interim regulations came after six circuits courts reached conflicting conclusions about whether 8 CFR 245.1 (c) (8) and 1245.1(c) (8) violated the adjustment statute, with four courts invalidating the regulations, such that IJs were adjudicating the adjustment applications of these "arriving aliens" in those jurisdictions. We have five questions:

(a) What is EOIR's position with regard to IJs in the jurisdiction of those Courts of Appeals, which have found that "arriving aliens" have the right to file adjustment applications in removal proceedings? See, e.g., Bona v. Gonzales, 425 F.3d 663, 664-65 (9th Cir. 2005) (finding arriving aliens "entitled to apply for adjustment in the removal proceedings")

RESPONSE:

EOIR does not take a position regarding how the regulation is to be applied in a particular circuit. The Immigration Judges must interpret and apply the regulation in the context of individual cases.

(b) Currently, our members report that some IJs (and BIA panels) proceed forward on pending removal cases, notwithstanding the fact that an adjustment application has been filed with ASCUS. We suggest, in light of current EOIR and BIA caseloads, that this is a poor use of resources, given the significant likelihood that adjustment will be granted and further removal proceedings will be unnecessary. Would EOIR consider issuing guidance to IJs to ensure nationwide uniformity of procedure?

RESPONSE:

As noted above, the Immigration Judges must interpret and apply the regulation in the context of individual cases. OCIJ does not believe guidance should be issued through their office regarding the application of the regulation, which was published as an interim rule, at this juncture. Of course, to the extent that novel issues of wide application are raised in an individual case or a group of cases, the Board will consider issuing a precedent decision to provide uniformity and guidance. As noted above, the best course for the parties is to fully develop issues and provide thorough briefs so that the Board can consider publication.

(c) Would EOIR consider initiating a meeting with ICE General Counsel, if EOIR believes that a solution to the problem listed directly above requires ICE input? We are referring to the Howard memorandum regarding remand of adjustment cases to ASCUS for non-arriving aliens.

Ideally, those cases should be continued, or better yet, terminated without prejudice, or administratively closed if the DHS does not object. It is important that the IJ have control over his/her own docket, and be able to decide whether or not a case goes forward. Administrative closure has the disadvantage of requiring the District Counsel's consent. We do not believe that the District Counsel's opposition would be in and of itself a rational reason for denial of a continuance. Cf. Merchant v. Attorney General, __F.3d.__ 2006 U.S. App.LEXIS 21667 (11th Cir. August 25, 2006)(finding that the BIA abused its discretion where it failed to grant a continuance when labor certification has been approved and I-140 and adjustment application were pending before ASCUS); Benslimane v. Gonzalez, 430 F. 3d 828 (7th Cir. 2005)(IJ made legal error in denying continuance where respondent had filed I-130 and I-485 as part of marriage based adjustment but had not filed adjustment with IJ.)

RESPONSE:

EOIR is willing to meet with ICE General Counsel but does not plan to dictate a course of action to DHS.

(d) AILA has heard reports that the BIA is denying motions to remand, continue, or hold these cases in abeyance on the asserted basis that neither the BIA nor IJs have jurisdiction over these adjustment applications. This response on the part of the BIA misses the point. It is a matter of administrative efficiency that with thousands of pending cases, the BIA not waste its time (or trigger federal appeals) in cases where an agreed upon resolution before the ASCUS can resolve the problem. Would EOIR consider communicating this concern to the BIA, in the hopes that the BIA adopt a policy of administrative efficiency by either continuing these cases or holding them in abeyance in order to afford the respondents a full and fair opportunity to have their adjustment applications decided by ASCUS?

RESPONSE:

The Board staff has been instructed that, under the regulations, neither the immigration judges, nor the Board, has jurisdiction to adjudicate adjustment of status applications for arriving aliens, unless they come within the narrow exception articulated in 8 C.F.R. § 1245.2. The Board will grant a motion to remand, hold in abeyance, or administratively close cases where both parties have filed a motion to do so or otherwise agree to close the cases. The determination to file a joint motion to administratively close a matter is within the purview of the parties. While the Board understands that a removal order may not be carried out, the Board will proceed to adjudicate the case as long as one of the parties goes forth to request a final decision. The Board is not able to just hold the cases due to existing regulatory deadlines.

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

Document Verification

14. According to a 2003 Department of State cable to all Embassies and Consulates, diplomatic posts will respond to requests for document verification only from DHS attorneys or Immigration Judges. Given the regulation at 8 CFR 287.6 concerning the certification and authentication requirements for foreign documents, does EOIR accept the fact that verification of foreign documents is available only upon request by the DHS or the IJ? If not, does EOIR recognize the fact that private attorneys cannot always obtain certification of foreign documents, and will EOIR accept proof of reasonable efforts by the attorney to authenticate the documents as compliance with 8 CFR 287.6?

RESPONSE:

EOIR does not take a position regarding how the regulation is to be applied. The Immigration Judges must interpret and apply 8 C.F.R. § 287.6 in the context of individual cases and the Board will address this issue as it is raised in cases before it.

Executive Office for Immigration Review
Office of Planning, Analysis, and Technology
Decisions on Applications for Relief
FY 2005

	Grants	Denials	Abandoned	Withdrawals	Others	Total
Applications for Asylum	11,747	19,159	3,649	13,435	12,621	60,611
Asylum Withholding	4,282	19,483	4,212	10,806	9,121	47,904
Applications for Suspension of Deportation	347	67	3	23	38	478
Applications for Discretionary Relief under 212(c)	1,521	577	51	42	209	2,400
Applications for Adjustment of Status	9,420	1,349	187	223	1,275	12,454
Applications for Withdrawing the Application for Admission	3	0	0	0	1	4
Cancellation of Removal - 242 A	2,534	1,245	88	145	631	4,643
Cancellation of Removal - 242 B	3,531	6,669	327	627	1,619	12,773
Convention Against Torture	458	18,654	765	7,020	6,743	33,640
Total Applications	33,843	67,203	9,282	32,321	32,258	174,907

There were 74,235 Immigration Judge decisions with applications for relief in FY 2005.This chart represents decisions per application for relief, a case may have decisions on multiple applications.

Total number of Immigration Judge decisions for proceedings in FY 2005 was 264,723.

Closed cases which do not fall into one of the four categories listed above are counted as “Other” completions, e.g., changes of venue, terminations, or grants of some other form of relief.

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