EOIR/AILA LIAISON MEETING AGENDA QUESTIONS AND ANSWERS
March 19, 2009

A. GENERAL POLICY QUESTIONS

1. For many years, EOIR has labored under increasing workloads, without corresponding increases in funding and other needed support. At the October liaison meeting, EOIR Director Kevin Ohlson discussed the severe funding situation facing EOIR, and how its funding request had been reduced from $249 million to $230 million. Mr. Ohlson told us that this budget reduction made it difficult for the EOIR to reach staffing goals for IJ positions, that training programs had to be cut, and that many needed technology and systems improvements were being delayed.

    a. Can EOIR comment yet on how the incoming Administration will view the place EOIR occupies within the overall immigration system?
    RESPONSE: We can say with confidence that the new Administration has identified funding increases for EOIR as a priority. This issue and the importance of coordinating resource increases between DOJ and DHS were topics of conversation at a recent meeting between the Attorney General and the DHS Secretary.

    b. Funding is key to having a system that runs effectively, enabling EOIR to hire immigration judges and key court personnel, to provide adequate training and support, and to ensuring that due process and fundamental fairness in the process is maintained. Will EOIR be seeking enhanced funding in order to meet its current and anticipated needs?
    RESPONSE: The 2009 appropriations bill, passed by Congress and signed by the President on March 11, 2009, includes an additional $5.0 million to hire judges and staff. As such, EOIR will continue hiring efforts currently underway. There are currently 224 judges on-board and EOIR is moving to increase that number to approximately 250. As an example, the Attorney General recently signed appointment orders for 12 new judges, most of whom are expected to EOD in April. The 2009 budget will also support additional staff, training (including conferences) and IT initiatives. EOIR is discussing additional resource increases with the Administration.

2. ICE enforcement policies have led to pressures on EOIR, and resulted in crowded dockets, case completion goals that many observers view as unreasonable, and pressures that impact the ability of an immigration judge to devote the time and attention necessary to properly hear and adjudicate a case. In addition, USCIS delays in adjudicating certain petitions and applications for noncitizens in removal proceedings (such as I-130 visa petitions, U visa petitions, and applications for Temporary Protected Status (TPS)), add to the frustration encountered by the

immigration courts, noncitizens, their counsel, and ICE assistant chief counsels as continuances are sought.

a. Do you see the relationship changing between EOIR, ICE and USCIS under the new Administration?
RESPONSE: We continuously strive to improve relationships between EOIR, ICE and USCIS.

b. Where USCIS is backlogged in adjudicating petitions and/or applications which will affect eligibility for relief from removal or will results in termination of removal proceedings upon the granting of the application by USCIS, can EOIR implement a policy to administratively close cases until the USCIS has completed its adjudication of the petitions and/or applications?
RESPONSE: Under Board precedent, a case may not be administratively closed if opposed by either party. *See Matter of Gutierrez-Lopez*, 21 I&N Dec. 479 (BIA 1996). Therefore, EOIR is not considering implementing such a policy. However, parties can file a joint motion to administratively close a case in which the respondent has a petition or application pending with USCIS, or in any other situation in which the parties believe it is the best course of action in the case.

c. Does EOIR expect to be able to engage ICE more at a policy level with respect to ICE enforcement, detention and prosecution policies?
RESPONSE: DHS/ICE is not a part of the Department of Justice and as such, EOIR cannot engage in such policy-level discussions with it. Further, such issues of inter-agency policy negotiations fall under the authority of the Office of the Deputy Attorney General.

d. With respect to detention in particular, the increased number of people in detention causes strains on the EOIR system in many ways. Detention dockets are soaring, and immigration judges often feel pressure to move those cases quickly. Most detainees are unrepresented, and detention makes it difficult for them to obtain legal assistance. For example, the sheer pressure of moving a large number of cases through a system that is straining from a budget shortfall has an adverse impact on the ability of the immigration courts to protect the substantive and procedural rights of those whose cases the courts hear. Observers express concern that due process can take a back seat to the case completion goals. The scheduling of bond hearings in certain areas is taking more than 3 days, and the actual conducting of the bond hearing even longer as ICE assistant chief counsel often do not have the A-files and the immigration judges feel that they are forced to continue cases until ICE has the A-files. Will EOIR consider, or is EOIR considering, addressing detention issues with ICE, with an eye toward changing detention policies to detain only those who are a threat to public safety and security or are a flight risk?

RESPONSE: Questions regarding DHS detention policy are best addressed directly to DHS. By regulation, DHS makes the initial decision whether to detain an alien who is not subject to mandatory detention under INA § 236(c)(1). *See* 8 C.F.R. § 1236.1. The regulations provide that DHS may release the alien in the exercise of discretion, provided that the alien demonstrates that his or her release "would not pose a danger to property or persons, and that [he or she] is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8). EOIR's role is limited to reviewing custody and bond determinations made by DHS pursuant to 8 C.F.R. part 1236. *See* 8 C.F.R. § 1003.19(a).

3. As ICE continues to detain more people, the courts' detained dockets are growing, straining the capacities of the immigration courts to handle detained cases. AILA is cognizant of the fact that there are limited resources. However, we believe that EOIR must take a fresh look at the length of time cases are taking on the detained docket. In some jurisdictions, there is only one judge, or at most two judges, handling a detained docket, which creates lengthy delays for the scheduling of final hearing. For example, in New York, for those individuals eligible for relief, a detained merits hearing is being scheduled approximately 7-8 months into the future. The detention is costly, and more significantly, many of the respondents cannot handle the prolonged detention and are choosing not to fight their cases, no matter how meritorious. The detained cases raise difficult issues and often require multiple court appearances before being ready to proceed. AILA requests that more judges be appointed to the detained docket to alleviate the lengthy backlog and detention.
   RESPONSE: EOIR is aware of the pressures on certain detained dockets and is continually assessing the placement of existing and new resources, with specific focus on detained dockets with heavy caseloads.

4. In our October 2008 liaison meeting we discussed how EOIR is implementing changes in the way it conducts IJ evaluations and BIA performance evaluations. EOIR indicated that union negotiations were in process for IJ evaluations but would conclude shortly, and that a new process was being implemented for the evaluation of new IJ's during the first two years of the bench.

   a. Are the union negotiations now complete? If so, what is the final agreement on how and when IJ's will be evaluated?
      RESPONSE: Negotiations are complete and the final agreement is undergoing final review and editing. EOIR is planning to have performance work plans in place for Immigration Judges on the same evaluation cycle as all other lawyers within the Department of Justice.

   b. What factors will be considered when evaluating a new IJ?
      RESPONSE: The performance work plans, when complete, can be requested through the Freedom of Information Act.

c. What is the best way for AILA members to provide feedback on new IJ performance?
RESPONSE: AILA members may provide feedback on court-related matters at any time to the appropriate Assistant Chief Immigration Judge. Local AILA representatives may also be a helpful contact for practitioners as those representatives often meet in local liaison with the ACIJs.

d. How do case completion goals impact an IJ evaluation?
RESPONSE: See the response to (b) above.

e. Will the criteria for the BIA performance evaluations be made public?
RESPONSE: The criteria for BIA performance evaluations can be requested through the Freedom of Information Act.

B. IMMIGRATION COURT ISSUES

5. An attorney must enter his or her appearance before the Immigration Court by filing Form EOIR-28. If an Immigration Judge's decision is then appealed to the Board of Immigration Appeals, the appealing party must file Form EOIR-27 to enter his or her appearance before the Board. Generally, where DHS is the appealing party, the attorney who had previously entered his or her appearance before the Immigration Court through filing an EOIR-28 is informed that he or she must file Form EOIR-27 within five business days or else they will not be considered attorney of record and is not obligated to represent the Respondent before the Board. The Respondent is also sent notice of the appeal by the Board. Where a Board decision is appealed to a Circuit Court and is sent back to the Board on remand, the Board again sends notice to both Respondent and the previous attorney of record, again requesting that the attorney submit a new Form EOIR-27 to the Board if the attorney wishes to continue as counsel of record.

   This process of entering an appearance at each step of the process illustrates that counsel is not obligated to represent a Respondent at different stages of proceedings unless he or she specifically indicates to either the Board or the Court that he or she wishes to represent the Respondent. As such, AILA takes the position that in the event a case is subsequently remanded from the Board to the Immigration Court, notice should be sent both to the attorney who recently submitted the Form EOIR-27 to the Board, requesting that he or she submit a new Form EOIR-28 if he or she wishes to continue as attorney of record, and to the Respondent, just as when the case is remanded to the Board from a Circuit Court, and just as when a case is appealed form the Immigration Court to the Board. If EOIR's position is different from that of AILA, please explain EOIR's position, and why it differs.
   RESPONSE: As of March 1, 2009, when a case is remanded from the Board to the Immigration Court, a copy of the Board's decision is provided to both the respondent and his or her attorney before the Board. *See* EOIR News Release,

Board to Begin Providing Copy of Decision to Aliens Who Are Represented by Counsel (Dec. 19, 2008). Therefore, the attorney is on notice that the case has been remanded, and has the opportunity to file a Form EOIR-28 with the court if he or she wishes to continue representing the respondent on remand. *See* Immigration Court Practice Manual Chapter 2.1(b) (Entering an appearance). EOIR notes that upon issuance of the decision, the Board generally returns the Record of Proceedings to the court within a week. A similar issue was raised in question 3 of the October 21, 2008, EOIR/AILA Liaison Meeting Agenda.

6. Access to docket information is becoming more of an issue in immigration proceedings, especially when DHS is physically transferring represented aliens to detention facilities throughout the country. The Immigration Courts have access to information regarding specific case information, such as filing dates, cut off dates, briefing schedules that are not readily available through the 1-800 general information number. In order to properly disburse information to represented aliens, AILA requests that private attorneys, who are already recognized as attorneys of record, by way of a properly submitted EOIR-28, or who submit a new notice of appearance via EOIR-28, have access to a "paper" docket printout of the EOIR computer information page pertaining to the alien. This information will allow attorneys access to quick and pertinent information, and may accommodate attorneys who would otherwise have to travel across state lines or hundreds of miles to physically review the Immigration Court file. Access to Court computer dockets is widely practiced via the PACER system in Federal District Courts and the federal circuit courts of appeal. Can the EOIR produce a paper copy of the EOIR computer information page to private attorneys upon request if properly noted as attorneys of record or upon submission of a notice of appearance?
   RESPONSE: EOIR's computer system currently does not have the capability to provide a paper copy of a computer information page similar to that available through PACER. Please note, however, that the Immigration Court Practice Manual provides guidelines for parties on inspecting the record and obtaining copies of the record. *See* Practice Manual Chapters 1.6(c) (Records), 4.10(c) (Record of Proceedings).

7. In our October 2008 liaison meeting, EOIR indicated that it would examine whether references to the ICPM can be placed on Court documents that are handed out to Respondents, both pro se and represented. AILA believes that references to the ICPM are particularly important on hearing notices, especially the non-initial Master Calendar Hearing notices and on Pre-Hearing Conference Orders. We also suggest a separate sheet of paper be attached to applications for relief that are handed out to pro se Respondents. We suggest that this sheet reference the ICPM's availability in the Internet and at the Clerk's window in immigration court.
   RESPONSE: EOIR is in the process of placing a reference to the Immigration Court Practice Manual on the hearing notices used by the courts.

8. Please provide instructions on the process by which an alien can file an I-589 asylum application prior to the initial master calendar hearing? Clarifying the process is critical for an alien who must file the asylum application within one year of admission, and the master calendar date is beyond one year from the alien's admission. We have received reports from members that in some immigration courts, immigration judges will strike out the date that the I-589 application was filed with the clerk of the immigration court and will mark the date that the I-589 application is marked as an exhibit at the master calendar hearing.

   RESPONSE: Under Operating Policies and Procedures Memorandum 00-01, Asylum Request Processing, "defensive asylum applications can only be filed with the Immigration Court at a Master Calendar or a Master Calendar Reset Hearing." *See also* Immigration Court Practice Manual Chapter 3.1(b)(iii)(A) (Defensive applications). If a respondent wishes for a hearing to be held earlier than originally scheduled in order to comply with the one-year filing deadline, he or she has the option of filing a motion to advance the hearing date. *See* Practice Manual Chapter 5.10(b) (Motion to advance).

9. At the October 2008 liaison meeting, we discussed how the Clerk's office treats *de minimus* clerical errors differently, such as a missed signature on an EOIR-27. Sometimes the Clerk will accept the filing and then notify the attorney of the error, allowing the attorney to correct it. Other times, the Clerk will reject a filing with a clerical error, which could cause the attorney to miss a deadline. Filing a Motion to Reopen or a federal court appeal is always a remedy, but this takes substantial resources which could be better used elsewhere. EOIR responded that "the Clerk's office offers the parties that commit filing errors the opportunity to correct such filings." Yet, our members still report problems with this issue. AILA request that the Administrator for the Office of the Chief Immigration Judge please remind local court administrators that it is the desire of the OCIJ that local court administrators offer parties and counsel the opportunity to correct *de minimus* filing errors in order to prevent hardship and injustice.

   RESPONSE: Filings with the Immigration Court are only rejected for certain specified errors, and the filing party is informed of the reason for the rejection. Immigration Courts now use uniform rejection notices nationwide. Parties wishing to correct the defect and refile after rejection must do so promptly. Immigration Court Practice Manual Chapter 3.1(d)(i) (Improper filings), (ii) (Untimely filings), and (iii) (Motions to accept untimely filings). If a party wishes the Immigration Judge to consider a filing despite its untimeliness, the party must make an oral or written motion to accept the untimely filing. Practice Manual Chapter 3.1(d)(iii).

C. BIA ISSUES

10. Members continue to express concern about the process by which filings submitted to the BIA's P.O. Box are treated. Quite simply, U.S. Express Mail envelopes are arriving timely to the P.O. Box on the due date; however, the Court

Clerk does not recognize that submission of the items to the P.O. Box as a proper filing until the Court Clerk physically retrieves the items from the P.O. Box. An item mailed by U.S. Express Mail, via the United States Postal Service, can be tracked using a verifiable tracking number that is tracked by an independent Government Agency, the U.S. Postal Service. The tracking number tells you the exact date and time when the item reached the P.O. Box or physical destination. The tracking number can be confirmed by anyone at www.usps.gov and the number is on the face of U.S. Express Mail envelope. Yet despite the existence of a verifiable tracking number which clearly confirms that an item of mail was filed on a specific date and time, the Court Clerk is taking the position that it is not filed until the Clerk "retrieves" the item of mail. This policy has opened the door to human error and has resulted in final orders of removal and the rejection of appellate briefs as received "beyond the due date."

a. AILA requests that corrective measures be taken and the Board should use the tracking number information as verifiable information regarding when and at what time an item arrived at the P.O. Box to properly document when and if an item arrived on the proper due date to eliminate human error. However, if such policy is not changed, the Board should eliminate the P.O. Box altogether, in light of the fact that it is not considered properly filed until a worker physically opens the P.O. Box, which may be opened one day or days after the due date.

b. If the Board policy is not changed and/or it continues to encourage the P.O. Box as a proper filing entity, AILA requests that the Board change its notices to indicate in bold print that "receipt" at the P.O. Box is not considered a "filing" until the Court Clerk retrieves items from the P.O. Box.

RESPONSE FOR (a) and (b): The Practice Manual encourages the customers to use the Clerk's Office street address when sending via same day delivery or overnight delivery, including Express Mail. The P.O. Box should be used when sending priority mail, certified mail, or registered mail. If a deadline is involved, the customer is encouraged to try to use a courier, send via overnight or same day delivery, or deliver by hand. See Appendix A of the Practice Manual. Whether sent to the street address or P.O. Box, the received date is determined by when it is received at the Clerk's Office. The Board retrieves its mail from the P.O. Box on a daily basis.

See **Practice Manual Chapter 3, Filing with the Board http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm**

The Board specifies the receipt rule in 3.1 (a)(i) — For appeals and motions that must be filed with the Board, the appeal or motion is not deemed "filed" until it is *received* at the Board. The Board does not

observe the "mailbox rule." Accordingly, receipt by any other entity — be it the U.S. Postal Service, commercial courier, or detention facility — does *not* suffice. See Chapter 1.5(a) (Office location), Appendix A (Mailing Addresses).

11. AILA members have reported that the Board denied motion to stay removal although subsequently it granted motion to reopen. This poses serious problems in two respects. First, it presents problem of inconsistency in adjudication of motion to stay removal and motion to reopen. If the Board grants motion to reopen, there is no reason why the motion to stay removal should not have been granted, because the movant established substantial likelihood of success on the merits. Second, the above-mentioned practice presents a serious problem for aliens who are removed following denial of stay request, while their motions to reopen are pending, because pursuant to 8 C.F.R. § 1003.2(d), physical departure, whether voluntary or involuntary, such motions are deemed withdrawn. 8 C.F.R. § 1003.2(d) provides, in pertinent part, that: "Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." Although the Fourth Circuit found the regulation invalid in *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007), no other circuit has reached a similar result. Therefore, other than aliens whose removal proceedings were completed in the Fourth Circuit, if motion to stay removal is denied, subsequent grant of motion to reopen would be meaningless. In fact, in such circumstances, the Board has vacated its prior decision granting motion to reopen upon DHS's motion to reconsider on the ground that the Board lacked jurisdiction due to the physical departure of the alien at the time the Board granted the motion to reopen.

    a. In light of the circumstances presented above and the Fourth Circuit precedent, would the Board be willing to suspend 8 C.F.R. § 1003.2(d)?
    RESPONSE: No.

    b. If not, what mechanisms would the Board be willing to implement in order to maintain consistency in adjudicating motion to stay removal and motion to reopen and to prevent removal of respondents who present meritorious claims for reopening?
    RESPONSE: The Board is authorized to grant stays as a matter of discretion, but only for matters within the Board's jurisdiction. Motions requesting a discretionary stay are not automatically granted. A pending motion to stay removal, deportation, or exclusion does not itself stay execution of the order. An order of removal, deportation, or exclusion remains executable unless and until such time as the Board grants the motion to stay.

12. For the cases that were decided with final orders and granted voluntary departure following the *Dada v. Mukasey*, 171 L. Ed. 2d 178 (2008), decision by the U.S.

Supreme Court and prior to the effective date of the new regulations, 73 FR 76927-76938 (December 18, 2008) *effective* January 20, 2009, how is the Board treating motions to withdraw voluntary departure where an alien has filed a petition for review but has not filed a motion to reopen? Are the motions to withdraw being deemed to be motions to reopen?

RESPONSE: If a motion to withdraw is filed with the Board within the voluntary departure time granted by the Board, we are granting the motion to withdraw and allowing withdrawal of voluntary departure. Generally, motions to withdraw are not being deemed motions to reopen.

D. PRACTICE MANUAL QUESTIONS

13. AILA members have reported that there appears to be different interpretations with regard to the consecutive pagination requirement under the new Immigration Court Practice Manual by both the members of the immigration bar and the IJs. Page 45 of the manual provides that all documents, including briefs, motions and exhibits should always be paginated by consecutive numbers, and if a party submits more than one filing in a proceeding, then the later filings should be paginated as if consecutive to previous filings. A sample index of exhibits provided in the manual, however, starts at page 1. Some practitioners and IJ's have interpreted that the consecutive pagination requirement applies to all document submissions from the beginning of the proceedings until the end of the proceedings. This interpretation yields the following sample:

    First Master Hearing:

    Motion to Reopen - pages 1 through 3
    Index of Exhibits – page 4
    Supporting Exhibits – pages 5 through 20
    Certificate of Service – page 21

    Second Master Hearing:

    Brief on Eligibility for Adjustment of Status – pages 22 through 32
    Index of Exhibits – page 33
    Supporting Exhibits – page 34-52
    Certificate of Service – page 53

    Other practitioners and IJ's have interpreted that the consecutive pagination requirement applies only to exhibits and do not apply to other submissions such as motions, memoranda of law, applications for relief, etc. This interpretation yields the following sample:

    First Master Hearing:

Motion to Reopen - pages 1 through 3
Index of Exhibits (no page number)
Supporting Exhibits – pages 1 through 20
Certificate of Service (no page number)

Second Master Hearing:

Brief on Eligibility for Adjustment of Status – pages 1 through 10
Index of Exhibits (no page number)
Supporting Exhibits – pages 21 through 50
Certificate of Service (no page number)

Please advise as to which interpretation is correct and, if neither interpretation is correct, please provide a sample of the correct interpretation.
RESPONSE: EOIR understands that the provision on pagination is an area of confusion for practitioners. The Immigration Court Practice Manual committee is reviewing comments EOIR has received regarding pagination. In the meantime, parties should use their judgment in following the Practice Manual Chapter 3.3(c)(iii) (Pagination and table of contents). Remember, however, that all pages of every exhibit should be paginated.

14. As stated above, the Immigration Court Practice Manual states that subsequent filings of each party are required to be continuously paginated. (Note: Many DHS counsel continue to file documents that do not have cover sheets and are not paginated for the particular submission on a particular day, much less continuously paginated from its last submission.) How should cases that have been remanded from the BIA be paginated?
RESPONSE: Please see the response to question 13, above.

15. What is the relationship of the old Immigration Judge's Benchbook to the new Immigration Court Practice Manual? Is the Benchbook still valid relative to those portions which are not superseded specifically in the Benchbook? Will an updated Benchbook be released in the near future?
RESPONSE: The Immigration Court Practice Manual is a comprehensive guide that sets forth uniform procedures, recommendations, and requirements for practice before the Immigration Courts. As such, it is directed at the parties appearing in court. The Immigration Judge Benchbook, by contrast, is a resource for Immigration Judges to use in conducting proceedings. The previous version of the Benchbook, to which AILA refers, has been completely revised into an electronic format. A revised Benchbook will soon be made available on the EOIR website.

16. Following the implementation of the Immigration Court Practice Manual, can an Immigration Judge continue to issue a Pre-Hearing Statement Order in which the IJ limits the number of pages of supporting documents that a non-citizen may submit in support of her application for relief?

RESPONSE: As mentioned above, the Immigration Court Practice Manual is directed to the parties appearing in court. The Practice Manual does not limit the discretion of Immigration Judges to regulate the course of the hearing. Practice Manual Chapter 1.1 (Scope of the Practice Manual); *see* 8 C.F.R. § 1240.1(a)(1)(iv), (c).

17. AILA would like to confirm that at this time, each immigration court has a copy of the ICPM available to the public, either in the lobby or at the Clerk's window. We would also like to suggest that if the ICPM is not easy to see in a court lobby area or if it is kept at the Clerk's window, that a prominent sign in the Court lobby indicate this fact.
RESPONSE: EOIR thanks AILA for its suggestion, and will take it under consideration.

As stated in the response to question 8(ii) of the October 21, 2008, EOIR/AILA Liaison Meeting Agenda, EOIR has made the Immigration Court Practice Manual available for review, upon request, at the front window of each Immigration Court.

Also, as stated in the response to question 7, above, EOIR is in the process of placing a reference to the Practice Manual on the hearing notices used by the courts.