AILA-EOIR LIAISON MEETING AGENDA
MARCH 25, 2010

AGENDA ITEMS

Pro Bono Issues

1. DHS continues to hold detainees in facilities which are two-to-five hours away from locations where attorneys and other legal service providers are located. The Immigration Courts have VTC units in the detained courtrooms, through which detainees appear for their removal proceedings. With the emphasis by EOIR on increasing pro bono representation, can EOIR increase the number of VTC units at the Immigration Court buildings (outside of the detained courtroom itself, say in an extra room or area) to allow local AILA pro bono committees and legal aid organizations to give Know Your Rights presentations to detainees being held in remote county jails and other facilities?

RESPONSE: While using VTC units in the immigration courts to conduct Know Your Rights presentations is a worthwhile proposal, EOIR does not currently plan to implement such a program. The primary purpose of the courts' VTC equipment is to conduct hearings by video conference, as called for under section 240(b)(2)(A)(iii) of the Immigration and Nationality Act ("Act") and 8 C.F.R. § 1003.25(c). The use of the VTC equipment to conduct hearings must take priority over all other uses. In addition, court staff would need to help organize and oversee any Know Your Rights presentations conducted by VTC. Many courts do not currently have enough VTC equipment or available staff for AILA's suggestion to be implemented.

Within DHS detention facilities, the VTC equipment is typically owned by DHS; therefore, EOIR would not be involved in purchasing additional VTC equipment in those locations. In addition, there are many logistical hurdles that would accompany installation of VTC units in detention facilities, such as there being no EOIR staff on site to provide VTC training, troubleshooting, and scheduling. However, EOIR may consider similar ideas in the future, and invites AILA to submit other suggestions for increasing pro bono representation.

2. Respondents who are served with a Notice to Appear and who subsequently appear before the Immigration Court are currently provided with a Free Legal Service Providers List. Additionally, this list is posted on the EOIR website. During the AILA-EOIR liaison meeting in October 2009, EOIR asked AILA for guidance regarding whether private attorneys should continue to be included along with non-profit organizations on the free legal providers list, as specified in 8 C.F.R. §1003.62. The AILA Pro Bono Committee and the EOIR Liaison Committee offers the following recommendation:

AILA recommends that EOIR prohibit private attorneys and private firms from inclusion on the free legal services list. Respondents reasonably believe that the attorneys listed on the Free Legal Service Provider's List will provide free legal services. However, the routine practice, as reported by various immigration court practitioners, is that many private attorneys who are on the list charge for legal services and thereby are using their inclusion in the list as a marketing tool. AILA did discuss the possibility of allowing attorneys to agree to have their names placed on the list only if they would promise to take on a pro bono basis every caller who obtained the attorney's name from that Free Legal Provider's List. While in theory this idea would enhance pro bono representation and the integrity of the list, it would require a great deal of oversight by the local immigration court and EOIR nationally; even with such oversight, it would still be difficult to ascertain whether or not private attorneys were simply placing themselves on the list to gain paying clients.

AILA encourages the involvement of private attorneys in pro bono services and will continue to encourage its membership to provide pro bono services by contacting non-profit organizations. In addition, almost every AILA chapter has a pro bono coordinator charged with facilitating pro bono representation from its members, which also provides a conduit to increase pro bono representation. For the foregoing reasons, AILA respectfully requests that private attorney and private law firms be removed from the list of "Free Legal Service Providers."

RESPONSE: Currently, a private attorney may appear on the List of Free Legal Services Providers as governed by regulation at 8 C.F.R. §§ 1003.61 *et seq.* EOIR thanks AILA for this recommendation and will take it under consideration.

Immigration Court

3. Pursuant to 8 C.F.R. §1240.11(a), the IJ must also notify the respondent of apparent eligibility for forms of relief. Where the record raises a reasonable possibility that the respondent may be eligible for relief, the IJ must advise the alien of the possibility and give him the opportunity to develop the issue. *See, e.g., Matter of Cordova*, 22 I&N Dec. 966, 970 n.4 (BIA 1999). Particularly in cases involving *pro se* respondents, AILA is concerned that current Immigration Judge inquiries do not touch upon certain forms of relief, and suggests that the addition of a few simple questions to the colloquy could enhance the opportunity to identify possible forms of relief not revealed under current practices generally used. For example, relief under the Violence Against Women Act or eligibility for a U visa are frequently not mentioned. The questions to be asked by the IJ could be fairly simple: "Are you a victim of a crime?"; or, if a respondent is a spouse or child of a lawful permanent resident or U.S. citizen, "Have you ever been a victim of domestic violence?"

a. Would EOIR considering instructing IJs to expand the colloquy in order to determine whether respondents may have other forms of relief available, and to inform respondents of additional forms of relief potentially available based upon replies?

b. Would EOIR consider revising the Immigration Judge Benchbook's Master Calendar Hearing Checklist, Bond Worksheet, and IJ Worksheet in Removal Proceedings, which currently do not include these forms of relief?

RESPONSE: EOIR thanks AILA for this suggestion. Due to the variety of forms of relief that may be available to respondents in removal proceedings, there is no set colloquy for determining pro se respondents' eligibility for relief. Rather, immigration judges adapt their inquiries to the particular circumstances of each case, as certain types of inquiries are not appropriate in all situations. For example, there may be privacy concerns with asking questions related to domestic violence at a master calendar hearing. In addition, it may not be appropriate to ask generic questions of all pro se respondents related to whether the respondents have ever been victims of a crime. This type of general inquiry would not be relevant to many respondents and could consume a large amount of hearing time, and could slow overall court docket administration if done at every master calendar hearing.

Immigration judges receive training on evaluating whether respondents qualify for relief. For example, at the 2009 EOIR Legal Training Conference, training was offered on assessing respondents' eligibility for various forms of relief, such as cancellation of removal. In addition, newly hired judges are trained regarding the obligation to investigate available forms of relief for respondents. Newly hired judges are taught a list of questions that identify the most common forms of relief, and they are instructed that this list is not all-inclusive. Newly hired judges also receive instruction on other less common forms of relief, such as relief under the Violence Against Women Act. EOIR will consider training newly hired judges on specific questions to ask respondents, when appropriate, regarding issues such as domestic violence and human trafficking.

Regarding the Immigration Judge Benchbook, resources in the Benchbook are always under consideration for revision. The Benchbook resources that AILA mentions are intended to be general outlines to assist immigration judges in conducting hearings. These resources are not intended to be exhaustive and cannot cover every situation that may arise in a hearing. However, EOIR will consider AILA's ideas regarding adding additional resources to the Benchbook.

4. Respondents are placed in removal proceedings, especially those in physical custody, on account of the DHS's assertion that it has clear and convincing evidence of alienage and deportability. Before the DHS makes any assertions to justify the initiation of removal proceedings, it should be presumed that the DHS is prepared with evidence to support its burden of proof to justify an arrest and detention of a respondent.

Immigration Court Practice Manual §3.1(b) addresses timeliness of filings with the Immigration Court. ICPM §3.1(d) addresses defective filings, including untimely filings by either party. ICPM §3.3(f) specifically references criminal convictions and notes that both parties must comply with the requirements under 8 C.F.R. §1003.41 regarding

criminal conviction documents. In light of these sections of the practice manual, AILA brings the following issues to EOIR's attention:

a. DHS routinely files a notice with the Immigration Court, along with the Notice to Appear, attesting that a case for a noncitizen serving a criminal sentence is prepared to go forward. For example, in Criminal Alien Program (CA) cases, the ICE Office of Chief Counsel files with the Immigration Court its Memorandum which states: "The Department's file and the Notice to Appear have been screened for legal sufficiency and the Service is ready to proceed based upon the documentary evidence in the Department's file."

b. DHS also arrests lawful permanent residents at their homes based on old criminal convictions and detains them without bond. However, upon the calendaring of the actual master court hearing, the DHS attorney appears without evidence of deportability (sometimes without evidence of the individual's alienage or even its A-file), thus calling into question the integrity of the entire removal process. The result is a prolonged detention of a potential non-deportable individual.

c. Immigration judges will often refuse to consider motions to terminate made by noncitizens and will continue the cases to allow DHS to get its A-files and criminal documents, lengthening the time of detention and clogging up the court dockets due to repeated master calendar hearings.

d. Lengthy periods of detention, changing of DHS attorneys on the detained docket, untimely filings by DHS attorneys, often after court-imposed deadlines, and/or DHS attorney continuances to obtain evidence of deportability that they should have had when filing the Notice to Appear, leave the non-citizens feeling helpless and as if the DHS attorney has an authority to disregard the court without sanction. AILA requests that Immigration Judges begin to impose the sanction of exclusion of evidence, so often imposed on respondents and private attorneys, to DHS attorneys who repeatedly fail to comply with court orders and evidentiary burdens within a set period imposed by the court or by the Immigration Court Practice Manual.

RESPONSE: The requirements in the Immigration Court Practice Manual are binding on both parties appearing before the immigration courts - respondents and the Department of Homeland Security. *See* the Immigration Court Practice Manual Chapter 1.1(b) (Scope of the Practice Manual – Purpose). With respect to untimely filings, Chapter 3.1(d)(ii) (Untimely filings) states that "[t]he Immigration Judge retains the authority to determine how to treat an untimely filing." All decisions regarding how to treat untimely filings, including any decisions to exclude filings submitted by the Department of Homeland Security, are made by immigration judges on a case-by-case basis.

5. AILA members have reported that some immigration court interpreters may not be adequately qualified to interpret in the foreign language for which they appear in court. A competent interpreter is a critical component of due process for any foreign national who is seeking relief before the immigration courts and who is unable to communicate in English.

a. AILA would like to inquire about the criteria used by Lionbridge Global Solutions II, Inc., in the hiring of their court interpreters: Is there a minimal threshold that is used in the hiring and certification of a court interpreter? If so, is the threshold comparable to that used in federal district courts?

RESPONSE: Candidates for contract interpreter positions are required to pass the Lionbridge Interpreter Skills Assessment, a task-based oral proficiency test. The passing score is equivalent to a score of at least 3+ on the scale developed by the Federal Interagency Language Roundtable, which is a Federal interagency organization established to coordinate and share information about language-related activities at the Federal level. The passing score on the Lionbridge Interpreter Skills Assessment is also equivalent to the passing score on examinations administered by the National Center for State Courts' Consortium for Language Access in the Courts.

The Lionbridge interpreter assessment was developed by a team of industry experts to address the following objectives:

- Meet or exceed the rigor of accepted testing methodologies, such as the State Consortium Certification / Exam;
- Use accepted testing and scoring methods to create a score for immigration court interpreters comparable to nationally used methods of testing court interpreters, including testing of consecutive and simultaneous interpretation, terminology use, language skills, and sight translation;
- Incorporate specific immigration court content and terminology, drawn from actual immigration court proceedings; and
- Include a method for evaluating new and rare languages with a flexible and industry-accepted exam design and administration to ensure that any language ordered by EOIR can be examined with validity, reliability, and practicality.

Rare languages for which no recorded test is available are tested with an assessment that combines English proficiency with the Lionbridge Rare Language Assessment**,** which is similar in content to the Lionbridge Interpreter Skills Assessment.

b. What mechanisms may be used to disqualify an interpreter believed to be incompetent, either before a court hearing or during a court hearing?

RESPONSE: For contract interpreters, a party may request that court staff submit a Contract Interpreter Performance ("CIP") Form to the EOIR Languages Service Unit. If warranted, a contract interpreter may be disqualified based on a CIP Form.

Disqualification may stem from lack of familiarity with protocol, substandard foreign language or English proficiency, lack of knowledge of immigration court terminology, inability to interpret accurately or completely, unprofessional behavior, inappropriate attire or hygiene, or a conflict of interest.

For staff interpreters, a party may request that the court raise the issue with the supervisory interpreter or the court administrator. For all interpreters, the attorney may raise the issue on appeal with the Board of Immigration Appeals. In all cases, if a party believes an interpreter is performing inadequately, the party must inform the immigration judge on the record at the hearing.

In addition, a complaint regarding a contract or staff interpreter can be filed online, by following the link titled "Report Concerns / Complaints About Interpreters," found under "Immigration Courts Nationwide" on EOIR's public website, available at http://www.justice.gov/eoir/sibpages/InterpComplaint.htm.

See also response to a similar issue that was raised in question 3 of the October 2007 EOIR/AILA Liaison Meeting Agenda.

6. In the October 2009 AILA-EOIR Liaison Minutes (Question 8), EOIR concurred with AILA that the instructions to Form I-601 do not specifically designate the use of this application for fraud/misrepresentation waivers under INA §237(a)(1)(H) in removal proceedings and under INA §241(f) in deportation proceedings. EOIR indicated in discussion of the item at the meeting that discussion with USCIS would be forthcoming concerning the issue. Have such discussions been initiated? Until any such discussions have resulted in a change to the current status, will EOIR reconsider its prior response and post instructions on the EOIR website for guidance both to the Immigration Judges and the public concerning the proper application form and process for seeking the benefit of such waivers, including the proper process for paying required biometrics fees?

RESPONSE: EOIR does not currently plan to provide instructions on its website relating to either the Form I-601 (Application for Waiver of Grounds of Inadmissibility) or the application process for waivers for fraud or misrepresentation under section 237(a)(1)(H), or former section 241(f), of the Act. EOIR notes that 8 C.F.R. § 103.7(b) provides that the Form I-601 is to be used for filing applications for waivers of inadmissibility under section 212(h) or (i) of the Act. The regulation does not provide for any other use for the Form I-601.

As noted in EOIR's response to question 8 of the October 2009 EOIR/AILA Liaison Meeting Agenda, if a party disagrees with a determination in a particular case, the party may appeal that determination to the Board of Immigration Appeals. As also stated in that response, if AILA believes that a particular immigration judge has adopted an inappropriate policy regarding applications for waivers under section 237(a)(1)(H) or former section 241(f), AILA is welcome to raise the issue in local liaison with the Assistant Chief Immigration Judge. In addition, AILA is welcome to provide the Office

of the Chief Immigration Judge with examples of particular courts where this practice is occurring.

Motions to Reopen: Immigration Court and Board of Immigration Appeals

7. In *Kucana v. Holder*, no. 08-911, 2010 U.S. LEXIS 764 (1/20/2010), the U.S. Supreme Court again reaffirmed the importance of motions to reopen. At the October 2009 liaison meeting, a discussion was held regarding the transfer of court files from archives to local courts and between local courts to allow counsel to review records of proceedings instead of filing FOIA requests, which EOIR noted has increased in the last year.

a. Counsel should not have to travel across the country to be able to timely review a court file and determine whether a motion to reopen could be meritorious or to prepare for the case. In addition, some courts do not have local file storage (i.e. Los Angeles) and all non-active files are sent offsite. Where the issue is a detained noncitizen and his eligibility for relief through a motion to reopen, the ability of counsel to review a record of proceeding is absolutely critical and time sensitive. Has the issue of allowing counsel to review the record of proceedings locally and, where counsel finds it necessary, then file a FOIA request been further considered by EOIR (question 20 from 10/28/09 minutes)?

RESPONSE: There are prescribed processes for reviewing the Record of Proceedings (ROPs) at the immigration courts. *See* 8 C.F.R. §§ 103.10, 292.4(b), and 1292.4(b). Parties to a proceeding, and their representatives, may inspect the official record, except for classified information, by prior arrangement with the immigration court having control over the record. *See* the Immigration Court Practice Manual Chapter 1.6(c)(i) (Records – Inspection by parties). Persons who are not parties to a proceeding must file a request under the Freedom of Information Act (FOIA) to review a copy of a ROP. *See* the Immigration Court Practice Manual Chapter 12.2(a)(ii) (Non-parties).

As the question notes, local storage of inactive records in some locations is logistically difficult. However, EOIR's records policy prioritizes local retention and directs courts to retire closed-status ROPs to the Federal Records Center six months after a case is closed. See Uniform Docketing Manual available at http://www.justice.gov/eoir/efoia/newudms/DocketManual.pdf. Moreover, to facilitate the 90 day time limit for reopening prescribed by 8 C.F.R. § 1003.2(c) and §1003.23(b), EOIR regularly retains ROPs for the prescribed 90 days, at the last forum where a final agency decision was rendered. This retention facilitates the prompt adjudication of any motions to avoid preclusion from relief under section 240B(d) of the Act.

If a file has already been retired from the court to the Federal Records Center, the court, upon a party's request, can retrieve the file. Parties should contact the court with any questions regarding reviewing files in preparation for motions to reopen, or requests that a file be sent to a different court for the party to review.

When a court is unable to accommodate this request, the centralized FOIA process currently in place provides counsel with the most reasonable access to the ROP. The centralized processing of FOIA requests by EOIR is designed to minimize the need for counsel to travel from one location to another.

b. Transcript request for appeals from denials of motions to reopen: In certain cases, the issue of removability was not established by clear and convincing evidence (i.e., no conviction record, no evidence of alienage presented) and an order of removal is entered in absentia by the immigration judge. A motion to reopen is filed with the immigration judge by a pro se applicant or a new incoming attorney facing a possible time issue, under the assumption that removability was properly established. The motion is denied and then the file is transferred to the Board. The Board sets a briefing schedule but does not provide a transcript from the hearing at which the in absentia order was entered. Although a respondent or the attorney can send a written request for production of a transcript, the Board's briefing schedule indicates that an extension of the briefing schedule can be made but until granted, the written request does not stay the briefing schedule. AILA requests that the Board reconsider its policy and issue a transcript of the underlying proceeding.

RESPONSE: Transcripts are not normally prepared for denials of motions to reopen, including motions to reopen *in absentia* proceedings. *See* Board of Immigration Appeals Practice Manual Chapter 4.2(f)(Transcription). The Board is not currently considering revising this policy.

c. Filing an EOIR FOIA is routine and necessary when an attorney takes over a case with a history. Recently there have been excessive delays in having motions to reopen ruled on in detained cases due to a pending FOIA request. Oftentimes immigration judges find that they cannot rule on a motion to reopen in such cases because FOIA unit has the file, and thus, they cannot hold bond hearings to redetermine custody matters. AILA suggests placing FOIA requests in "tracks" to assist with this issue and/or consider transferring the files to local courts so that attorneys can review the files without filing FOIA requests (see letter a above).

RESPONSE: EOIR currently has a tracking system that is designed to meet the FOIA standards for "tracking," which are defined by the Department of Justice. "Multi-Track Processing" is a system in which simple requests requiring relatively minimal review are placed in one processing track and more voluminous and complex requests are placed in

one or more other tracks. Requests granted expedited processing are placed in yet another track. Requests in each track are processed on a first in/first out basis.[1]

When a hearing date is scheduled and the ROP is with the FOIA Service Center, the court notifies FOIA of the scheduled hearing and FOIA promptly completes the FOIA request to return the file to the court prior to the hearing date. Occasional delays arise if the ROP has been sent offsite for processing through the certification unit. Nevertheless, once the EOIR FOIA Service Center is notified that a matter is scheduled in the court, a request to expedite the certification center processing is made.

EOIR is unaware of excessive delays in having motions to reopen ruled on in detained cases due to a pending FOIA request. Despite the continued increase in cases received at the FOIA Service Center, the median number of days to process fiscal year 2009 requests was 18 for simple requests, 29 for complex requests, and 25 for expedited requests. For fiscal year 2009, the average number of days was 21 for simple requests, 34 for complex requests, and 28 for expedited requests.

d. With the advent of DAR in many courts, can copies of the court hearings be provided by the local court without filing a formal FOIA request? In the courts with the tape recorder machines, can files be transferred for copies of the tapes to be made without filing a formal FOIA request?

RESPONSE: The digital audio recording (DAR) of a proceeding constitutes documentation of the proceeding until an appeal is filed that requires that a transcript be prepared for appellate purposes. As such, parties may be required to file a request under FOIA to obtain copies of the recordings of the court hearings. *See* the Immigration Court Practice Manual Chapter 12 (Freedom of Information Act).

However, courts have the discretion to provide parties or their legal representatives with a copy of the hearing recordings. For hearings recorded on cassette tapes, the party must provide a sufficient number of 90-minute cassette tapes. If a party is requesting a copy of a hearing recording recorded by digital audio recording, the court would provide a compact disc. *See* the Immigration Court Practice Manual Chapter 1.6(c)(iii) (Copies for parties).

8. In *Martinez Coyt v. Holder*, no. 05-77080, ---F.3d---, 2010 U.S. App. LEXIS 1158, the Ninth Circuit recognized not only the importance of motions to reopen and the problems with unadjudicated stay motions, but it also recognized the tension among the statutory right to file a motion to reopen within 90 days, the statutory requirement to effectuate the removal within 90 days, and the departure regulation at 8 C.F.R. § 1003.2(d). The court found that the departure regulation "completely eviscerates" the

[1] U.S. Department Of Justice Freedom Of Information Act Annual Report Fiscal Year 2009, Section III, Acronyms, Definitions, And Exemptions, available at http://www.justice.gov/oip/annual_report/2009/sec3.pdf.

statutory right to file a motion to reopen. Further, the only way to harmonize the statutory right to file a motion to reopen within 90 days and the statutory requirement to effectuate the removal within 90 days is to find that "the physical removal of a petitioner by the United States does not preclude the petitioner from filing a motion to reopen." The court's reasoning applies equally to a situation where a person is removed before filing a motion, and therefore is deprived of the statutory right seek reopening. The Ninth Circuit is the second court of appeals to find that 8 C.F.R. § 1003.2(d) is invalid. *See William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). These pre-IIRIRA regulations are no longer consistent with the post-IIRIRA immigration statute. Will EOIR consider initiating a rulemaking process to revoke the departure bars in 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1)?

RESPONSE: EOIR cannot comment on pending litigation matters. While EOIR is not currently considering revising the regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), EOIR welcomes any additional written suggestions regarding potential revisions to the regulations.

Emergency Stays of Deportation/Removal

9. In *Kucana v. Holder*, no. 08-911, 2010 U.S. LEXIS 764 (1/20/2010), the U.S. Supreme Court again reaffirmed the importance of motions to reopen. The Ninth Circuit recently weighed in on the importance of motions to reopen and emergency stays of removal in *Martinez Coyt v. Holder*, no. 05-77080, ---F.3d---, 2010 U.S. App. LEXIS 1158 (9th Cir. 1/20/2010). In *Martinez Coyt v. Holder*, the Ninth Circuit held that where the DHS removes a noncitizen before the Board has ruled on his motion to reopen or motion to reissue a decision, the regulation at 8 C.F.R. 1003.2(d) (stating that a motion to reopen is deemed withdrawn upon the departure of the noncitizen) is invalid as applied to a forcibly removed noncitizen. Particularly in asylum, withholding of removal and claims under the Convention against Torture, life and death of a noncitizen is often at issue where a stay is not granted. In light of these two decisions, AILA wishes to again follow up regarding the procedures for motions to reopen and motions for emergency stays of removal before the Immigration Courts as there is no written policy as there is in the Board Practice Manual.

a. In courts where there is only one immigration judge, how are motions for emergency stays of removal handled when the immigration judge is in court or out of the office (i.e. a sick day, CLE, vacation, family emergency, etc.)?

RESPONSE: Motions for emergency stays of removal are given to the immigration judge presiding over the case and, if he or she is not available, to the first available judge at the court. If no judge is available, the situation would be resolved by the court administrator in coordination with the Assistant Chief Immigration Judge.

b. In courts where VTC judges hear cases, what is the procedure for handling emergency motions for stays as the immigration judge is not located in the city where the filing of the emergency motion takes place?

RESPONSE: Such a situation would be handled as described in section (a), above.

c. Will EOIR consider revising its policy for both the Immigration Courts and the BIA so that the filing of a motion to stay temporarily stays removal until the Immigration Court or BIA can adjudicate the motion? The Ninth Circuit has implemented this policy pursuant to General Order 6.4(c)(1) ("Upon the filing of a motion or request for stay of removal or deportation, the order of removal or deportation is temporarily stayed until further order of the court."). *See* http://www.ca9.uscourts.gov/rules/General%20Orders/General%20Orders.pdf.

RESPONSE: The policy that a stay of removal takes effect upon the *granting* of a motion for a stay, rather than the *filing* of a motion for a stay, is governed by the Federal regulations. *See* 8 C.F.R. §§ 1003.2(f), 1003.6, 1003.23(b)(1)(v). Any change to this policy would necessitate a change to the regulations.

Board of Immigration Appeals

10. In the October 2009 AILA-EOIR Liaison agenda (Question 21), AILA noted the continuing problem of extremely significant delays between the time of filing of an appeal from denial of I-130 petition to the time of submission of the USCIS record of proceeding (ROP) to the BIA for adjudication. EOIR indicated in response to Question 21(a), in part, that "EOIR has reached out to different offices in the Department of Homeland Security, including United States Citizenship and Immigration Services, to better coordinate the receipt and return of records of proceedings in appeals and motions regarding decisions of DHS officers. EOIR will continue to communicate with DHS to address this concern."

At virtually the same time as the October liaison meeting, the AILA-USCIS Liaison Committee met with USCIS where a similar agenda item was presented to the USCIS. The USCIS response was: "It is USCIS's goal to process the receipt of all EOIR-29 Notices of Appeal in a timely manner. The regulations provide that the EOIR-29 can be deemed either a motion to reopen or an appeal to the BIA. Once an EOIR-29 is received, the petitioner has 30 days to also file a brief. After receiving all offered documentation, USCIS prepares a record of proceeding (ROP) and responds to the arguments presented on appeal. The regulations do not provide a specific timeframe by which USCIS must forward the ROP to the BIA, however, we make every effort to do so as quickly as possible. If you are aware of EOIR-29 matters that have been pending for months with a particular USCIS office or location, we encourage you to raise your concerns with the local FOD." *See* AILA Liaison/USCIS Meeting Questions and Answers, 10/27/09, Item 8, page 14 available at

http://www.uscis.gov/USCIS/Office%20of%20Communications/Community%20Relations/AILA_Q&A_27OCT09.pdf.

Since all parties have expressed an interest in moving the process forward and yet significant delays (in excess of one year or more) continue to be experienced, AILA renews its inquiry concerning the status of the discussions with USCIS to resolve this issue. AILA is ready and willing to participate in and facilitate such continuing discussions to reach a positive resolution of the delay issue, to the benefit of all parties.

RESPONSE: The Board reiterates its responses to questions 21 and 22 of the October 2009 EOIR/AILA Liaison Meeting Agenda. The regulations do not authorize the Board to compel DHS to provide a record of proceedings to the Board within a certain amount of time. Attorneys may write to USCIS and request transmission of the appeal to the Board.

11. Section 8.5 of the BIA Practice Manual addresses oral argument before the Board. Under the BIA Practice Manual and 8 C.F.R. 1003.27(a), oral argument is open to the public and employees of the Department of Justice, subject to space limitations and subject to an advance written request by the noncitizen that the argument be closed to the public. The only cases in which the argument is closed unless the noncitizen expressly waives its closure are cases involving asylum, withholding of removal/deportation, claims under the Convention against Torture, and abused spouses/children. See 8 C.F.R. 1003.27(b). We understand that the Board of Immigration Appeals scheduled oral argument in three cases this winter. Going forward, can the Board publish an argument schedule (with issues for arguments) so that interested parties can attend the argument?

RESPONSE: The Board will take this recommendation under consideration. The Board will need to review concerns regarding privacy, limited space to accommodate additional attendees, and oral argument cancellations.

Technology Issues

12. Access to the automated EOIR information system ((703) 305-1662 or 1-800-898-7180 (toll-free)) is regularly disrupted for maintenance for entire weekends at a time. This causes significant problems for attorneys representing detained individuals in that they will not have access to decision information for several days, possibly leading to an individual being removed before an appeal or stay can be filed. AILA is also concerned that the Department of Homeland Security might not be subject to this information delay given the computerized system through which the Department apparently has direct access to case information online. Why, at this time, does the system require that the information available on the system be unavailable for entire weekends at a time, with frequent such disruptions? Is there any way that the required maintenance can be completed with less disruption to the information flow? Will EOIR consider making the online system available to all attorneys and individuals to ensure that the playing field is level in this regard?

RESPONSE: EOIR conducts routine maintenance on its database and systems, including the 1-800 line, one weekend each month. When the 1-800 line is unavailable because of maintenance during these scheduled maintenance weekends, DHS is not able to access case information from EOIR.

13. AILA thanks the Board for its "grace period" policy posted for filings due between February 5 and February 19, 2010. The grace period was granted as the Board of Immigration Appeals was closed on account of the recent snowstorms in the Washington, D.C. area. AILA would like to raise the following points in anticipation of future events:

a. In *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006), the Board held that the failure of a courier to timely deliver a notice of appeal does constitute an exception circumstance. The Board recognized the Second and Ninth Circuit rulings; however, non-citizens in nine other circuits plus the D.C. Circuit remain under the holding in *Matter of Liadov*.

b. As there currently exists no means by which to file electronically, can the Board revisit *Matter of Liadov* as inclement weather or mechanical failures of transportation may prevent the timely physical arrival of a notice of appeal with $110 payment from areas outside of the D.C. beltway? As the DHS facilities and contract jails come on line with computer access in their libraries, detained noncitizens who are pro se could file their own notices of appeal electronically and complete the fee waiver online.

RESPONSE: The Board's policies regarding postal or delivery delays and delays due to natural or manmade disasters is outlined in the Board of Immigration Appeals Practice Manual at Chapter 3.1(b). In certain circumstances, such as the recent snowstorm in the Washington, D.C. area, the Board has exercised its discretion by granting a "grace period" for filings to address inclement weather or natural disasters. In the event that a party's filing with the Board has been rejected and the party wishes to refile, Chapter 3.1(c)(iii) of the Board of Immigration Appeals Practice Manual explains that the refiling must include a motion and documentary evidence to support the motion. However, EOIR is not currently able to receive electronic submissions.

Attorney Sanctions Questions

14. In response to Item 6d on the October 2009 agenda, EOIR identified systemic reasons for requiring completion of the "Pro Bono" box on the new Form EOIR-28. AILA agrees that there may be many reasons for representation on a pro bono basis in addition to the indigence of the respondent. AILA further notes that many AILA members continue to believe that disclosure of the specific financial terms of the attorney-client relationship may have consequences adverse to respondent. What consequences, if any, will be imposed for failure to disclose a pro bono representation, other than that EOIR will have an incomplete statistical record for Pro Bono Program development?

RESPONSE: A similar issue was raised and addressed in question 5 of the October 2009 EOIR/AILA Liaison Meeting Agenda. An attorney who does not identify himself or herself as providing pro bono representation on a Form EOIR-28 might not be able to benefit from the courtesies provided in the Operating Policies and Procedures Memorandum 08-01, *Guidelines for Facilitating Pro Bono Legal Services* (OPPM 08-01). As with all Federal forms, an attorney must complete the form accurately and completely. *See* 8 C.F.R. §§ 1003.102(f), (t). Disciplinary consequences could result from serious and material breaches of this rule (*e.g.*, an attorney or accredited representative indicates that he or she is providing pro bono representation when he or she is not).