AILA - EOIR LIAISON MEETING AGENDA QUESTIONS AND ANSWERS

April 6, 2011

I. ASYLUM - EAD CLOCK

A. What is the status of asylum EAD clock policy guidance?

RESPONSE: The Executive Office for Immigration Review (EOIR) is continuing to review additional guidance regarding the EOIR asylum adjudications clock. Please note that EOIR does not issue Employment Authorization Document (EAD) guidance.

B. Why are individuals whose cases are remanded from the BIA to the immigration court unable to obtain an EAD?

RESPONSE: EOIR has no jurisdiction over EAD issuance. Instead, the Department of Homeland Security (DHS) is responsible for adjudicating applications for work authorization. EOIR's "asylum clock" is premised on INA § 208(d)(5)(A)(iii), which describes the timeline for adjudication of asylum applications, not work authorization. That "clock" stops once the asylum application has been adjudicated. Questions regarding eligibility for work authorization following a remand from the Board of Immigration Appeals ("BIA" or "Board") should be addressed to DHS. A similar issue was raised in question 28 of the October 28, 2009, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila102809.pdf and question 1 of the October 17, 2005, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila101705.pdf.

C. Can the EOIR HQ policy that the clock stops if the attorney or respondent is unable to accept the first hearing date (OPPM Code 22) be eliminated? We have received reports where the IJ has offered an individual hearing only 12-14 days from the master. How can IJs set an individual hearing so soon when it conflicts with the 15-day document submission deadline as indicated in ICPM?

Recommendation: When a judge schedules a hearing within 15-30 days of the Master Calendar Hearing, the attorney should be allowed to reject that hearing date without stopping the clock and take the next available, provided it is within 180 days from the filing.

Background: We have been informed by IJs in Denver that they have been instructed by EOIR HQ to schedule individual hearings on asylum within 180 days of submitting the I-589. In order to get an EAD, the respondent must take the first available hearing. However, the first available date may be 12-14 days from the master hearing. This raises a number of concerns including**:**

(1) Ethical issues for attorneys that are recently retained and do not have sufficient time to prepare for an individual hearing within 12-30;

(2) IJs are stopping the clock if the attorney does not take the first available date, so counsel's choice is to forego an EAD or proceed to a merits hearing with only limited time to prepare in 12-30 days;

Example: An IJ in Denver told the attorney that he would let the clock run and gave one of his regular dates in 2012, but noted that he has received instruction from HQ telling him to move the 2012 cases to within the 180 days. DHS counsel also suggested that in those cases USCIS may not grant EAD.

RESPONSE: EOIR has no plans to change this policy. When an asylum application is pending before an Immigration Court, EOIR tracks the time elapsed since the filing date to measure compliance with the asylum adjudication goal of INA § 208(d)(5)(A)(iii). By regulation, this period does not include any delays requested or caused by the applicant, see 8 C.F.R. § 1208.7(a)(2), and ends with the adjudication of the application.

To facilitate compliance with the adjudication goal of INA § 208(d)(5)(A)(iii), the individual hearing is scheduled for the first available hearing date. Generally, when setting a case from a master calendar hearing to an individual hearing, a minimum of 14 days should be allowed. This time period may be shortened if requested by the applicant, or in the absence of exceptional circumstances, where the two-week delay would prevent the court from completing the case within 180 days. *See* section IX. E., OPPM No.00-01(Asylum Request Processing), available online at http://www.justice.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf.

II. ASYLUM - *RAMOS V. HOLDER*

A. Has the Board taken El Salvadorian gang-related asylum claims under advisement with regard to the issue of a particular social group?

RESPONSE: The Board issues decisions on a case-by-case basis.

B. Are these cases being held in abeyance?

RESPONSE: No.

C. What is the status of EOIR review of *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009)?

Background: The 7th Circuit in *Ramos v. Holder* held that former gang members can constitute a particular social group and remanded *Ramos* to the Board. The Asylum Office issued a memorandum on this same issue on March 2, 2010. In *Crespin-Valladares v. Holder*, 09-1423, which was decided on February 26, 2011, the 4th Circuit remanded to the Board to reconsider the particular social group "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses." In its decision, the 4th Circuit further held that the Salvadoran government is unable or

unwilling to control MS-13's activities.

RESPONSE: EOIR cannot comment on pending cases.

III. ASYLUM - *MATTER OF R-A-*

In 2001, Attorney General Reno vacated the Board's decision in *Matter of R-A*, 22 I&N Dec. 906 (BIA 1999) and remanded the case to the Board for reconsideration. In 2005, Attorney General Ashcroft also remanded the case to the Board for reconsideration of the issue of whether certain victims of domestic violence constitute a particular social group. On September 25, 2008, the Attorney General again remanded *Matter of R-A* to the Board for reconsideration. In the most recent request for remand to the Board, the Attorney General lifted the stay, allowing for adjudication. A number of cases involving aliens alleging that they have been victims of domestic violence in their home countries have been held in abeyance while *Matter of R-A* was being reconsidered.

A. What is the status of guidance relating to *Matter of R-A-*/domestic violence?

RESPONSE: No guidance has been issued apart from the Attorney General's decision.

B. What is the status of the cases that were held in abeyance?

RESPONSE: There has been no change in how the Board handles *Matter of R-A* cases.

IV. ATTORNEY NOTICE OF HEARINGS

A. Is EOIR willing to publish guidance requiring the local courts to provide telephonic notice of a scheduled bond hearing to the attorney of record?

Background: It is our observation that court practices vary regarding attorney notification of bond hearings. Some courts will only send notice of the scheduled hearing by mail. Other courts will call respondent's counsel to notify counsel of the bond hearing and verify counsel's availability. As a bond hearing is appropriately set within a day or two of filing the motion, there are jurisdictions in which counsel is not receiving timely notification from the court.

RESPONSE: EOIR does not currently plan to publish guidance regarding telephonic notice of a scheduled bond hearing. If there are concerns that attorneys are not receiving timely notice of hearing dates, these concerns are properly raised with the appropriate Court Administrator. Specific examples of cases, with A numbers, should be provided to the Court Administrator. A similar issue was raised in question 10 of the October 10, 2007, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila101007.pdf.

B. How can counsel enter an appearance and obtain timely notice of hearings if he or she is unaware that the respondent's file has been transferred to EOIR?

Background: When counsel represents a client before USCIS and the case is transferred to EOIR, counsel's entry of appearance is not forwarded to EOIR. As a result, aliens are receiving NTAs and notices of hearing, without the attorney's knowledge. This becomes especially problematic if the alien is detained. At times, aliens are transferred to court the day of the hearing without prior notice. Counsel is not present, as a notice of hearing was not mailed to the attorney. Failure to advise counsel is counter to judicial efficiency, impedes on an alien's due process rights, and causes attorney/client friction. IJs are forced to continue master hearings so that counsel can be present at a future date, or aliens may proceed without counsel believing their attorney is not going to appear. Aliens believe that their attorneys are being contacted by the court directly regarding upcoming hearings. It is our understanding that counsel cannot enter an appearance unless EOIR has the alien's file.

Example: Client participated in a credible fear interview. Attorney entered an appearance and was present during the credible fear interview. The Asylum Office forwarded the referral to EOIR and the client was scheduled for a master hearing. Counsel received a copy of the referral notice a week after the decision had been made, but never received a master hearing notice. Client's family contacted the attorney the morning of court when the client was transferred to court. Court was "annoyed" that attorney was not prepared to proceed.

Example: Attorney represents a client before USCIS in filing I-130 and I-485. The I-485 is denied, an NTA is issued, and the attorney receives copies of both. The case is forwarded to EOIR; however, the notice of hearing is only sent to the alien, not the attorney.

RESPONSE: EOIR does not accept an EOIR-28 unless and until a Notice to Appear (NTA) has been filed, except in a bond hearing before an Immigration Judge. Attorneys are encouraged to use the 1-800 information line to ascertain whether the NTA has been filed, so they can enter a notice of appearance. A similar issue was raised in question 6 of the March 22, 2006, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila032206.pdf and question 17 of the September 30, 2004, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila093004.pdf.

V. HIRING OF NEW IMMIGRATION JUDGES

Please provide us with further updates on the hiring process for immigration judge positions. Namely, please provide information on when new judges will be hired for positions that have been open in some courts and what EOIR expects in terms of hiring new judges in the future.

Background: At our last meeting in November 2010, AILA asked EOIR several

questions about the hiring of new immigration judges in various courts. AILA thanks EOIR for its responses and for the hard work in hiring qualified individuals and filling judge positions where necessary throughout the United States. At the November meeting, you responded that EOIR had advertised vacancies in 15 locations for FY 2011.

RESPONSE: One of Attorney General Eric Holder's High Priority Performance Goals for fiscal years (FY) 2010 and 2011 was to increase the number of immigration judges by 19 percent in order to be able to adjudicate detained cases within a reasonable period of time. Since the beginning of FY 2010, EOIR has hired 51 immigration judges, increasing the immigration judge corps by 22 percent. Due to normal attrition, the current immigration judge corps is 268 strong, marking an increase of approximately 16 percent over FY 2009. On January 21, 2011, the Department of Justice announced a temporary hiring freeze, leaving many of our pending vacancies temporarily suspended, including most of those planned for FY 2011. Prior to the temporary hiring freeze, however, EOIR hired new immigration judges for two of the 15 locations you reference – one in Detroit and one in Boston.

VI. EFFECT OF AUGUST 20, 2010 MORTON MEMO ON COURT DOCKETS

A. Since the release of the August 20, 2010 John Morton memo, "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions," and the recent publication of interim guidance from USCIS regarding the expedited handling of petitions and applications, has there been an increase in the number of proceedings terminated?

RESPONSE: There has been an increase in the percentage of cases terminated since the release of the Immigration and Customs Enforcement (ICE) memorandum referenced above. From August 2010 (when John Morton issued the memo) through the end of February 2011, 12% of all immigration judge decisions ordered termination. For the same time period the previous year (August 2009 – February 2010), 10% of all immigration judge decisions ordered termination.

B. Has there been any organized effort from EOIR to encourage the ICE Office of Principal Legal Advisor to revisit its current procedures on agreeing to joint terminations without prejudice?

Background: We thank EOIR for seeking action from ICE and USCIS to eliminate from court dockets the numerous cases with pending petitions. We also acknowledge that fundamentally, ICE and USCIS are responsible for remedying the situation. Our members report that thus far, nothing has changed in many jurisdictions regarding the procedure for seeking termination without prejudice.

RESPONSE: The August 20, 2010, ICE guidance and the companion February 2, 2011, United States Citizenship and Immigration Services (USCIS) guidance have been

distributed to all of the Immigration Courts. EOIR is continuing to liaise with DHS regarding this matter. If AILA wishes to provide EOIR with a list of those jurisdictions in which AILA members have reported that DHS procedure has not changed in accordance with the above guidance, EOIR will provide this information to DHS.

VII. STAYS OF REMOVAL

Would EOIR consider an automatic stay that takes effect from the filing of a motion for a stay until the adjudication of the stay motion?

Background: At our last two meetings, we voiced concerns regarding the timely adjudication of Emergency Motions for Stays of Removal filed in conjunction with Motions to Reopen. 8 C.F.R. §§ 1003.2(f), 1003.6, 1003.23(b)(1)(v) state that a stay of removal takes effect upon the granting of a motion for a stay, not at the time of filing a motion for a stay. Detained aliens with a final order of removal are being removed from the U.S. within days of their apprehension. 8 CFR § 1003.2(d) mandates that a Motion to Reopen is deemed withdrawn upon the departure of the alien, although the speedy removals of some aliens will continue to trigger challenges to this regulation. *See Pruidze v. Holder*, --- F.3d ----, 2011 WL 320726 (6th Cir. 2011).

In the Second Circuit Court of Appeals, the government has agreed that upon filing a motion for stay, there is an automatic stay of removal until such time as the court acts on the motion. Would EOIR consider a similar stay procedure?

RESPONSE: EOIR reiterates its responses to questions 8 and 9(c) of the March 25, 2010, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila032510.pdf. Stays are governed by law and regulations. Some stays are automatic; others are discretionary. 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 based on federal law and regulations. *See* INA §§ 240(b)(5)(C), 240(c)(7)(C)(iv); 8 C.F.R. §§ 1003.2(f), 1003.6, 1003.23(b)(1)(v), 1003.23(b)(4)(ii), and 1003.23(b)(4)(iii)(C). Any change to this policy would necessitate a change to the regulations. EOIR welcomes any additional written suggestions regarding potential revisions to the regulations.

VIII. LIMITED APPEARANCES

Has EOIR issued guidance on limited appearance? If not, would you consider doing so?

Background: In the October 2008 liaison meeting, AILA raised the issue of permitting limited appearances in Immigration Court. As suggested at the meeting, limited appearances encourage more pro bono participation. In addition, Section 2.3(d) of the EOIR manual specifically allows for limited appearances. Limited appearances can be useful in various settings:

An attorney may want to review the record of proceeding in order to determine whether they would or could handle the case.

Many attorneys or their clients may not have the resources to represent an individual beyond a bond hearing, particularly if the individual is detained.

At the meeting, EOIR stated that it would consider issuing guidance on limited appearances.

RESPONSE: EOIR is considering the issue.

IX. BIA - ADJUDICATION OF APPEALS/JOINT MOTIONS

A. Please describe the BIA's internal process to manage appeals filed for detained aliens. For example, how long does it take to get the case into the BIA system?

RESPONSE: The goal is for the clerks to enter appeals within two days of receipt.

1. Is there one person who manages appeals filed by detained aliens? If the BIA does not have anyone assigned to these cases, would it consider doing so to allow attorneys to make inquiries on pending cases for detained respondents?

RESPONSE: The Clerk's Office has three clerks assigned to handle appeals regarding detained aliens. Inquiries on detained cases can be made by calling EOIR's automated query system (1-800-898-7180) or by calling the Clerk's Office directly at (703) 605-1007. The receptionist in the Clerk's Office is trained to answer routine inquiries regarding pending cases. If the receptionist is unable to answer the question, the call will be transferred to the clerk or supervisor responsible for the case. The goal is for the clerks and supervisors to respond to telephonic inquiries within one business day.

2. Would the BIA create a process or procedure for attorneys of record to make inquiries on detained cases that differ from appeals filed by non-detained aliens?

AILA members have reported delays at the BIA in adjudicating joint motions to reopen, issuing briefing schedules and extensions of briefing deadlines, and with requests for stays of removal pending the adjudication of motions to reopen and other substantive motions. Most of the cases involve detained aliens.

RESPONSE: Please see inquiry process for detained cases as described above and the new process regarding joint motions described below.

B. When a respondent and the government file a joint motion to reopen, would the BIA consider assigning that motion to either a judge or a clerk so the motion can be adjudicated immediately? If not, what other process would the Board consider to ensure

that agreed upon motions are acted upon quickly?

Recommendation: EOIR consider a streamlined process, for either detained or non-detained cases, to adjudicate joint motions within 5-10 days from the date they are filed.

RESPONSE: The Board is currently implementing a new process to identify Joint Motions to Reopen at the early stage of docketing the motion. This change should result in quicker processing of Joint Motions to Reopen. The Board will continue to make every effort to adjudicate joint motions on a separate track from other cases, in an attempt to expedite review. If the parties are concerned about the length of time it is taking to obtain resolution on a particular joint motion, the parties may file a Motion to Expedite. *See* Chapter 6.5 of the Board's Practice Manual, available online at http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm.

C. On occasion, issues arise with regard to briefing schedules on BIA appeals. One such example is when a respondent has filed an application with USCIS or other agency that will dispose of the appeal, and the government agrees with respondent to hold a briefing schedule in abeyance pending the outcome of the application. In such circumstances, would the BIA agree to hold a briefing schedule in abeyance where the parties have agreed to do so? If not, what would be the reason to require a brief? If the BIA would agree to this process, what would be required from the parties to grant the request and how quickly could the BIA act on the motion to ensure that an unnecessary brief is not required?

RESPONSE: The Board generally does not hold appeals in abeyance while other matters are pending. *See* Chapter 5.9(i) of the Board's Practice Manual available, online at http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm.

X. APPEALS TO BIA OF I-130 DENIALS

A. Attorneys are unable to file legal memoranda on a case until such time as the case arrives at the BIA and is docketed. Is there any way to correct this situation to ensure that I-130 appeals get to the BIA expeditiously and attorneys are notified when the case is docketed so they can file legal memoranda in support of the appeal?

Background: We are aware that the issue of timely appeals of I-130s to the Board was discussed in the November 2009 liaison meeting; however, there still appears to be a significant problem in the handling of these appeals. When a local USCIS office or a service center denies an I-130, an appeal must be filed with USCIS on Form EOIR-29 together with the $110 filing fee. The file should be transferred to the BIA for further processing and adjudication. Form EOIR-29 asks whether the appellant wishes to file a separate written brief or statement after filing the appeal. Oftentimes, the file is not transferred to the BIA by USCIS and the appeal is either not docketed or just languishes at USCIS. We have a statutory obligation to file within a specified time period.

At the November 2009 meeting, various options were presented by AILA in an attempt to rectify the situation. Specifically, implementing a process to accelerate the ROP, directing the parties to submit a brief or transfer the record to the Board at a certain date, sanctioning the party who fails to comply, or to have the Board refuse to consider a brief. EOIR had indicated that it will continue to communicate with DHS to address these concerns. Unfortunately, members in significant numbers are still reporting that appeals are not being forwarded.

RESPONSE: EOIR reiterates its response to question 21(b) of the October 28, 2009, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila102809.pdf. EOIR does not have access to USCIS's databases, which track benefits information. Thus, EOIR, does not know when a visa petition has been filed or adjudicated, or when an appeal has been filed to the Board, until the record of proceedings reaches the Clerk's Office. Therefore, these concerns and recommendations should be directed to DHS. Once the Clerk's Office has received the file, the case information is entered in EOIR's database. The Board issues a filing receipt to the parties so that the parties are aware that the matter is now at the Board and is ready for adjudication. Any forms or supplemental filings should be sent to the Board as soon as possible.

B. What efforts has EOIR made to rectify the situation?

RESPONSE: EOIR reiterates its responses to question 10 of the March 25, 2010, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila032510.pdf and questions 21 and 22 of the October 28, 2009, liaison meeting agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila102809.pdf. 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. EOIR continues to reach out to USCIS to facilitate the transfer of files. In addition, the Board may, in its discretion, remand cases that have become stale to allow the parties to submit further evidence where the passage of time may make a difference. Also, attorneys may write to the USCIS office which has administrative control of the file and request transmission of the appeal to the Board.

C. What suggestions does EOIR have that could assist respondents who are in proceedings and are awaiting a decision on their appeal? Many immigration judges are reluctant to indefinitely continue a case awaiting adjudication of an I-130 appeal.

RESPONSE: This question brings up issues that are best addressed on a case-by-case basis. Therefore, these concerns should be raised with the Immigration Judge in a particular case. Additionally, EOIR reiterates its response to question A(2) of the March 19, 2009, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/eoiraila031909.pdf. The parties may 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 this is the best course of action in the case.

XI. CHANGE OF VENUE:

At our November meeting, we raised the problem of immigration judges improperly requiring respondents to admit and concede the allegations in an NTA as a prerequisite to considering a motion to change venue. It was agreed that this is contrary to the practice manual. At the meeting, EOIR asked for specific examples of courts where this is occurring, rather than choosing to issue a general advisory. Below is a list based on responses from AILA members in various jurisdictions. Would EOIR consider issuing a general advisory?

a. **El Paso** – Numerous attorneys report that it is common practice in El Paso for EOIR to require respondents to admit and concede. Several also stated that it is further required that all applications for relief be filed rather than just an offer of proof as to eligibility.

b. **Oakdale** – Several attorneys report that respondents are required to admit and concede prior to a motion for change of venue.

c. **Atlanta, Buffalo, Cleveland, Denver, Memphis, Los Angeles and Seattle** are all courts that attorneys have reported as requiring respondents to admit and concede. The comments on these courts were general in nature, and we are in the process of obtaining more specific information about these cases.

RESPONSE: AILA raised a similar question (# IV. B.) in the November 18, 2010, AILA-EOIR Liaison Meeting Agenda, available online at http://www.justice.gov/eoir/statspub/EOIR_AILA_Final%20Agenda-Fall%202010.pdf. EOIR provided the following response:

> Motions to change venue are decided on a case-by-case basis in accordance with 8 C.F.R. § 1003.20 and Board case law. *See, e.g.*, *Matter of Rivera*, 19I&N Dec. 688 (BIA 1988). EOIR has already issued guidance to the Immigration Judges regarding such motions. *See* OPPM 01-02, "Changes of Venue," available online at http://www.justice.gov/eoir/efoia/ocij/OPPMLG2.htm. If a party does not agree with the Immigration Judge's decision regarding a motion to change venue, the party may appeal the decision to the Board. If a party believes that an Immigration Judge has adopted an inappropriate policy regarding such motions, the party is welcome to raise the issue with the appropriate ACIJ.

EOIR thanks AILA for providing specific examples of Immigration Courts where AILA has concerns about this issue. While EOIR does not plan to publish a "general advisory," the Chief Immigration Judge will raise this issue as an item for discussion among the Assistant Chief Immigration Judges who oversee those courts.

XII. UPCOMING EOIR PUBLIC ENGAGEMENT INITIATIVES AND REQUESTS FOR INPUT

A. Language Access Plan
B. Regulatory Review