September 25, 2003 EOIR Meeting Questions

1. In previous liaison minutes (March 2002), EOIR indicated that INS was responsible for tracking conditional asylum grants based on coercive population control policies. However, there have been no updates to the system since April 2002.

    - Are eligible conditional cases continuing to be granted, and if so, can EOIR provide us with figures for FY '02 and '03?

    Response:

    Please note that EOIR retains the responsibility for recording conditional grants made under its jurisdiction. The Bureau of Citizenship and Immigration Services (CIS)(formerly the Immigration and Naturalization Service (INS) manages the waiting list of conditional grantees including its own cases and those conditionally granted by EOIR, as they are reported to CIS. Eligible conditional grant cases continue to be granted. It is anticipated that shortly the fiscal year (FY) 2003 CPC Press Release and a CPC Fact Sheet will be posted on the EOIR web site. Prior news releases regarding the annual issuance of full asylum benefits based on CPC are available on EOIR's Web site at www.usdoj.gov/eoir/press/press.htm. The preliminary numbers for FY 2002 indicate that both INS and EOIR issued a combined total of 2,392 conditional grants of asylum. EOIR issued 1,992 and INS, now CIS, issued 400 conditional grants of asylum. There are no preliminary total conditional grants of asylum for FY 2003, as the fiscal year has not yet ended. All 1,000 FY 2002 final approvals were issued. Over 700 of the FY 2003 approvals have been issued, and CIS expects to issue the remaining approvals by the close of the fiscal year.

    - Which element of DHS is now responsible for tracking dates and fingerprinting results for conditional asylum grants, and how is that information communicated to EOIR?

    Response:

    The Department of Homeland Security (DHS), CIS Asylum Division, Office of Asylum and Refugee Affairs, continues to manage the CPC waiting list. The Asylum Division, working with data provided by EOIR, manages the CPC waiting list and initiates and verifies the results of background, identity and security checks, and issues final authorization numbers to eligible individuals as their security checks clear. As cases are

approved, CIS Asylum provides EOIR with data files and copies of the final approval notices that have been issued for EOIR cases.

Information concerning CPC conditional grants of asylum and the benefits and responsibilities for individuals with final grants of asylum is also available on the CIS website at www.uscis.gov/graphics/services/asylum/cpc.htm and at www.uscis.gov/graphics/services/asylum/types.htm. Please also see previous EOIR responses to similar questions at the March 7, 2002 and March 2001 Liaison Meetings available at: http://www.usdoj.gov/eoir/statspub.htm.

2. When issuing denials of visa petitions, BCIS commonly provides an outdated version of the EOIR-29 Notice of Appeal to BIA of Decision of District Director (used to appeal BCIS decisions). The EOIR-29 form does not clearly indicate that only the petitioner may sign, and due to the confusing manner in which the form is provided, the appeal is often submitted with only the beneficiary's signature. Improperly executed appeals are routinely dismissed as lacking standing.

- Is there any mechanism by which an appellant may cure such a filing defect, even if the error is discovered outside the thirty-day period for filing the appeal?

Response:

In any case in which an attorney becomes aware that a filing is defective, the attorney should immediately file a motion to amend that filing. The motion should clearly articulate what needs to be corrected and the attorney should attach a corrected version of the filing in which only the specific defect has been changed. The Board will take the motion into consideration in adjudicating the appeal.

- Can EOIR coordinate with BCIS regarding the distribution of the current forms to help avoid this confusion?

Response:

Yes. EOIR raised this issue with BCIS Service Center Operations and the problem has been corrected. All four Service Centers are now issuing the correct form. For future reference, issues concerning BCIS can be raised through the designated AILA BCIS Liaison to be addressed at the monthly BCIS CBO Meetings.

3. When an EOIR-26 Notice of Appeal to BIA of Decision of Immigration Judge is submitted by a represented foreign national without an EOIR-27 Entry of Appearance, the Clerk's Office routinely informs counsel that form EOIR-27 is needed for the Board to recognize that counsel as the attorney of record. Practitioners note that this is not the practice for appeals of visa petitions submitted on form EOIR-29. Is there any reason for this distinction? Can the Clerk's Office be directed to give the same instructions regarding the EOIR-27 in cases involving appeals of visa petition denials filed on form EOIR-29?

   Response:

   Counsel should always include an EOIR-27 with an appeal to the Board, whether it is an appeal from a decision of an Immigration Judge or a DHS official. As a courtesy, the Board's Clerk's Office generally notifies counsel when a Notice of Appeal from an Immigration Judge decision is filed with the Board without an EOIR-27. Since visa petition appeals are not filed directly with EOIR but are filed with DHS (which sets briefing schedules and prepares the record for adjudication by the Board), we suggest AILA contact the BCIS Office of Principal Legal Advisor at 202-514-2895 in this regard. Please also note, the instructions to the Form EOIR-29 instruct counsel that a separate notice of appearance (Form EOIR-27) is required when filing the Form EOIR-29.

4. The Board Practice Manual indicates that the submission of any supplemental documentation or motions in visa petition appeals must be made where the record lies. Practitioners are experiencing difficulty when the Service Center has issued a transfer notice, but the Board has no record of receiving the file, and rejects the submission. Is there a delay in the transfer of the record once the notice is issued, or is there a delay in recording that information with the Clerk's Office? Does the Board have any suggestions for practitioners to avoid the inappropriate rejection of such filings?

   Response:

   The Clerk's Office records the receipt of a visa petition file from DHS and enters the data in our computer systems within 48 to 72 hours of receipt. Confirmation that the Board has received a record from DHS can be obtained by calling the Clerk's Office. As stated in the Practice Manual, the Board cannot accept any filings of visa petition appeals until the file is at the Board. Any filings that were rejected may be resubmitted. We suggest AILA contact the BCIS Office of Principal Legal Advisor at 202-514-2895 concerning the delays between the receipt of the transfer notice and the actual transfer of the visa petition appeal file from DHS to the Clerk's Office.

5. We frequently raise the issue of judicial behavior: The matter involving Judge Ragno in Boston provides a timely example of extreme misconduct, and we applaud EOIR for its

quick action to remove him from the courtroom. As a matter of general policy, where EOIR is made aware of similar inappropriate behavior, can we expect the same swift and meaningful disciplinary action?

Response:

As previously stated in the responses to the March 7, 2002, and September 26, 2002, AILA questions at http://www.usdoj.gov/eoir/statspub/eoiraila0203.htm and http://www.usdoj.gov/eoir/statspub/eoiraila0209.htm respectively, the OCIJ takes all complaints against Immigration Judges very seriously, particularly those impugning the integrity of the hearing process. Complaints with specific allegations should be sent to the OCIJ or the Office of Professional Responsibility (OPR). See the OPR website at http://www.usdoj.gov/opr/index.html for further information. Complaints are addressed individually, and any action taken will be appropriate to that particular situation. Assistant Chief Immigration Judges (ACIJs) are available to discuss issues with the private bar. In addition, a list of all ACIJs and the Courts for which they have oversight responsibility is attached and will be made available on the EOIR internet at http://www.usdoj.gov/eoir/sibpages/ICadr.htm. Please note, however, that there has not been any disciplinary action against Immigration Judge Ragno; rather, we have commenced an investigation of the situation.

6. In addition to the guidelines set forth in the regulations, when reviewing appeals, and especially in considering whether to summarily affirm without opinion, does the Board take into account any information regarding the issuing Immigration Judge, such as complaints of inappropriate behavior or a history of reversals by the Board or Circuit Courts of Appeals?

Response:

No. Each case is considered individually based on the facts presented and the applicable law. If either party is concerned with the conduct of the Immigration Judge or with the Immigration Judge's ruling in the case, the party should raise that on appeal.

7. Section 106(c) of AC21 amended § 204 of the INA to provide that where an application for adjustment of status based on an I-140 petition remains unadjudicated for 180 days or more, the foreign national beneficiary may proceed with adjustment, even if the individual changes jobs or employers, so long as the position is in the "same or similar occupation." Can EOIR confirm that immigration judges have been educated regarding the portability provisions of AC21 and will consider those foreign nationals who can demonstrate compliance with the "same or similar occupation" requirement eligible to apply for adjustment of status in proceedings?

Response:

Immigration Judges have not been provided any specific training on this issue. However, Immigration Judges are required to keep abreast of all immigration-related legal changes. In light of your concern, we will point out the specific provision to the Immigration Judges.

8. Immigration Courts nationwide have recently implemented aggressive case completion policies that go beyond the case completion guidelines contained in prior memoranda. These new policies apparently mandate the completion of all cases pending longer than a fixed amount of time by an arbitrary date, regardless of the underlying circumstances in the matter. Does this change reflect a new policy directive from the Office of the Chief Immigration Judge, and if, so will the OCIJ provide a copy of the policy to AILA? If the efforts are merely local initiatives, what are these actions in response to? Are these efforts mandatory or are there exceptions contained within the directive to allow for individual immigration judge discretion?

   Response:

   Since its inception, it has been the policy of the Office of the Chief Immigration Judge to ensure that all cases are completed in a timely manner, as justice delayed is justice denied. OCIJ is tracking and identifying those cases which have been pending for an unusually long amount of time, with the goal of making sure that those cases are completed expeditiously. Cases have always, and will continue to be, adjudicated on their own merits.

9. To what extent does an immigration judge's productivity and ability to quickly complete large numbers of cases impact their evaluation as a judge?

   Response:

   Immigration Judges are not subject to performance appraisals. However, Immigration Judges' sole responsibility is to adjudicate cases, and the OCIJ expects Immigration Judges to do their job. Although OCIJ does not set specific hearing time limits for classes of cases, Immigration Judges have a responsibility to the public and to the people appearing before them to adjudicate cases timely and effectively. To that end, the OCIJ monitors all Immigration Judges' productivity levels to verify that they are meeting their job responsibilities, and if necessary, takes steps to assist that Immigration Judge in completing his or her duties. If issues arise concerning hearing schedules, concerns may also be raised with the respective ACIJ.

10. Given the push to move stalled cases, such as those awaiting BCIS action on underlying petitions, can the requirements for administrative closure be modified to allow immigration judges to administratively close matters without the concurrence of the DHS in limited circumstances, such as government inaction?

Response:

To date, there have been no new developments in this area. Please note, however, that pursuant to Board case law, the DHS must concur before administrative closure can be granted. Matter of Gutierrez-Lopez, 21 I&N Dec. 479 (BIA 1996), and cases cited therein. This question has been raised several times during past EOIR/AILA Liaison Meetings. See the EOIR responses for the November 29, 2001, EOIR/AILA Liaison Meeting at http://www.usdoj.gov/eoir/statspub/eoiraila0111.htm and November 8, 2000, at http://www.usdoj.gov/eoir/statspub/ailaqa.htm.

11. The new regulations enacted on June 13, 2003 eliminated 8 C.F.R. § 239.2(f). The regulations are silent as to whether or not an individual who has a pending naturalization application can have his or her case terminated by an immigration judge. What is EOIR's policy regarding this situation in light of the amendment to § 239.2(f). What is EOIR's position with regarding to administrative closure of these cases?

Response:

In order to reflect the transfer of functions of the former Immigration and Naturalization Service (INS) to the Department of Homeland Security (DHS) caused by the Homeland Security Act of 2002 (Pub. L. 107-296), the Attorney General reorganized title 8 of the Code of Federal Regulations in a final rule issued on February 28, 2003. See 68 FR 9824 (February 28, 2003); see also 68 FR 10349 (March 5, 2003). The Attorney General created Chapter V in 8 CFR and duplicated §239.2(f) in Chapter V, 8 C.F.R. § 1239.2(f), which continues to address *Termination of removal proceedings by immigration judge.*

12. What is current EOIR policy regarding requests for continuances by respondents in proceedings with pending visa petitions under *Matter of Arthur*, *Matter of Garcia* and *Matter of Velarde*? Will EOIR confirm that the holdings in these cases apply equally to all qualified visa petitions (*i.e.*, both family and employment-based petitions)?

Response:

There is no specific EOIR policy regarding requests for continuances. It remains within the discretion of the Immigration Judge whether to continue a case. *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), applies to family-sponsored visa petitions. There is no precedent extending the holding in *Matter of Velarde* (nor in the two earlier cases referenced above) to employment-based visa petitions.

13. Are there any policy directives or case completion goals arising from matters placed in proceedings as a result of NSEERS/Special Registration? These cases appear to be called up very quickly and given only brief continuances as compared to cases involving respondents who were placed in proceedings by other means.

Response:

There has been no change since the March 27, 2003, EOIR/AILA meeting, nor does EOIR have a policy regarding expedited treatment of these cases. See March 27, 2003, AILA agenda Q&As at http://www.usdoj.gov/eoir/statspub/eoiraila0303.pdf.

14. AILA has heard that the Department of Justice may attempt to dramatically limit immigration judges' ability to grant continuances in a variety of circumstances, including cases where the impediment to moving forward is slow adjudication by BCIS. Will EOIR comment on the proposed policy change, how it relates to existing regulation and established case law allowing the immigration judge to exercise discretion, and its impact on respondents' ability to have a fair hearing?

Response:

We are always looking to improve our process, and with the jurisdiction over immigration functions divided between DOJ and DHS, regulatory changes have been necessary. We anticipate future changes to the regulations in light of the division of immigration matters in 8 C.F.R. into two different chapters, which reflects the two distinctive Departments. We cannot comment on proposed regulatory changes. The Department is prohibited from discussing rulemaking with individual parties. If any change is made with respect to continuances, the public will be given notice and ample opportunity to comment through the rulemaking process.

15. What is the current policy regarding continuances to allow for filing or adjudication of a U or T visa application where the applicant has been placed in removal proceedings?

Response:

The OCIJ has no special policy with respect to these types of motions. Please note that regulations concerning victims of severe forms of trafficking in immigration proceedings may be found at 8 C.F.R. §1214.2 *Review of alien victims of severe forms of trafficking in persons; aliens in pending immigration proceedings.* See Final Rule at 68 F.R. 9823-9846 (February 28, 2003).

16. As of the March 2002, AILA/EOIR Liaison Meeting, the Board had planned to take action to reduce the backlog in preparing the certified administrative record (CAR) for judicial review. What steps have been taken, what is the current backlog, and has the Board been successful in developing a plan to address the possibility of a continuing or future backlog?

Response:

After implementation of the Board reform rule, an increase in Board decisions and corresponding appeals to the federal courts created a substantial backlog in the number of cases awaiting certification. Administrative resources were allocated to handle the increase in requests for certified records, and ultimately, the Board contracted a large portion of the certification function to a leading litigation support vendor. The backlog has since been significantly reduced. Provided that current trends continue and funds remain available, the Board expects to eliminate the certification backlog in November and thereafter expects to remain current in the certification process to keep pace with expected judicial filings.

17. Is the Board willing to reconsider its position on equitable tolling of time limits for Motions to Reopen in light of the fact that the majority of circuit courts of appeals who have reviewed the issue (1st, 9th, & 10th) have held that the time and number limitations for motions to reopen may be equitably tolled under certain circumstances?

    Response:

    The Board will consider arguments on this issue and others as they arise in the context of the cases pending before us.

18. Although the Board has an established procedure for consideration of Emergency Motions to Reopen and/or Stays of Deportation/Removal, there is no formal procedure for doing so at the Immigration Judge level; meritorious requests are often not acted on in a timely manner. Will OCIJ consider issuing model rules for processing emergency motions or requiring individual courts to develop their own local rules to avoid inadvertent prejudice to the movant?

    Response:

    The OCIJ is currently undertaking a review of all Local Operating Procedures nationwide to update and see if any procedures should be incorporated into regulations. This request will be taken under advisement in the context of this review. In the meantime, practitioners seeking emergency motions should contact the immigration court to bring the motion to the Judge's attention. If there is no action by the Immigration Court on an emergency motion, concerns can be raised with the respective ACIJ.

19. On the theory that a denial of relief is a sufficient changed circumstance to warrant a change in custody or cancellation of an existing bond, a DHS pilot program in Hartford, Connecticut is taking respondents into custody immediately after unsuccessful merits hearings, regardless of the respondent's intent to appeal. DHS has indicated the possibility that the practice may be expanded nationwide.

- Can EOIR comment on the effect this policy has had on the Hartford Immigration Court? Has the number of *in absentia* orders increased? What impact has the policy had on the detained docket?

Response:

There is not enough information available at this time to answer this question as the pilot program started in mid-August and has not been in place for enough time to make these types of assessments.

- Because it is often several days or more before a matter may be reset for a bond hearing, will EOIR consider conducting a separate custody determination, immediately at the close of the merits proceedings?

Response:

No. Any request for custody redetermination must first be addressed to the DHS. Once the DHS has made an initial custody determination - which, by regulation, they have generally 48 hours to make [8 C.F.R. § 287.3(d)] -- only then can an immigration judge review the determination. However, EOIR has and will continue to adjust bond hearing schedules as necessary.

20. What is the status of the proposed 212(c) regulations?

Response:

The regulation is pending at the Department.

21. Although EOIR has previously addressed the issue of how practitioners may bring a *St. Cyr*-eligible remand to the Board's attention, there appears to be no mechanism for independent review of eligibility for unrepresented cases on appeal. Especially in light of the Board's streamlining procedures, how adequately are *pro se* criminal foreign national cases reviewed for potential remand under *St. Cyr?*

Response:

Regulations allowing for single Board Member review and summary affirmance of decisions do not curtail review of the issues in the record. The Board does not draw a distinction in its depth of review between cases where the respondent is represented and cases where the respondent is pro se. The Board legal staff is well-versed on the applicability of the Supreme Court's decision in *St. Cyr.* However, while the Board reviews every case thoroughly, the Board is an adjudicative body and is not in a position to serve as advocate for either party.

22. We previously raised the issue of attorneys being prevented from using palm pilots or PDAs in certain courts (March 2002). OCIJ responded that it had requested a legal opinion from General Counsel. Has that opinion been issued? If not, may a temporary policy be adopted to allow PDAs in court until a contrary policy is warranted?

Response:

On May 28, 2003, the Office of General Counsel issued a legal opinion finding that electronic devices are permitted, provided that they are not used to record or disrupt proceedings. On June 13, 2003, the OCIJ provided a copy of the legal opinion to all its courts and gave the courts a sample notice that they could post in all waiting rooms regarding the use of electronic devices in the courtrooms. However, additional issues have arisen and OGC issued further advice to OCIJ on September 10, 2003. The OCIJ will be implementing a new policy in the near future.

23. Several dockets, including Salt Lake City and Ohio, have experienced a large increase in caseload. In addition, a higher number of foreign nationals with applications for relief before BCIS are being referred for removal proceedings. Are there current plans to increase numbers or detailing of judges or otherwise ameliorate the increasing number of cases?

Response:

The OCIJ is monitoring the caseload in Salt Lake City. This past year, we have added more detail weeks to Salt Lake City and we will continue to review the situation. We are also exploring the possibility of adding TeleVideo to assist in adjudicating cases there. As for Ohio, we recently moved the responsibility for the Ohio cases to the Arlington Immigration Court, which has resulted in more detail weeks for the Ohio cases and increased the number of judges available to adjudicate cases there.

24. Respondents in areas not directly served by an immigration court must often travel several hours by car or even be forced to incur the expense of air travel in order to appear in proceedings. In addition, the immigrant population of these traditionally less urban or outlying areas appears to be increasing. What steps, if any, are being taken to ameliorate the burden on respondents from outlying areas? At what point does such an area merit its own immigration court?

Response:

As previously stated in the March 7, 2002, and March 22, 2001, AILA meeting questions at http://www.usdoj.gov/eoir/statspub/eoiraila0203.htm and http://www.usdoj.gov/eoir/statspub/eoirailaMarch01.htm, EOIR is always reviewing its caseload to determine if increased volume over a consistent time

period warrants the establishment of a new immigration court. Selection of new court locations also hinges on budget availability, both for EOIR and the DHS. Due to budget constraints, there are no plans to open up any new immigration courts at this time.

25. What is the current status of the e-filing initiative? We saw that the first Notice regarding this program had been on the "under review" section of the OMB website, but was later removed. Have problems been encountered?

Response:

The e-filing initiative is nearing the end of its first phase, which is the integration of ANSIR and BIAP into a new system called Case Access System for EOIR (CASE). During the first quarter of fiscal year 2004 EOIR will conduct User Acceptance Testing (UAT) of the new system. Upon completion of UAT, EOIR will prepare for piloting and rollout of CASE. Availability of funds and scheduling issues will determine how long this rollout will take.

EOIR has also been working on laying the foundation for further phases of the e-filing initiative by holding working groups to develop policies and procedures. Due to funding issues in FY04, it is unlikely that practitioners will see the deployment of e-filing in the coming year. EOIR intends to keep the private bar abreast of our progress in e-filing, as AILA and its members are a key stakeholder in this process.

26. What is the BIA policy as to filings that did not arrive timely in the wake of Hurricane Isabel when the Government was closed for two days?

Response:

Due to inclement weather in the Washington, D.C. metropolitan area *(in this case Hurricane Isabel)*, most Federal Government offices were closed on Thursday, September 18, 2003 and Friday, September 19, 2003. Following procedures published in the Board of Immigration Appeals: Practice Manual and Questions and Answers, the Clerk's Office instructed its personnel to consider these two days as a Federal Holiday for processing appeals and legal documents. Documents received on Monday, September 22, 2003, through Tuesday 23, 2003, were date stamped and a Memorandum to the File explaining the inclement weather was attached to each document, becoming part of the permanent record.

Attachment

Attachment

Assignment of Duties in the Office of the Chief Immigration Judge

Judges **Thomas L. Pullen** and **Brian M. O'Leary** are Deputy Chief Immigration Judges.

Judge Pullen supervises the Chief Clerk of the Immigration Court, **Anthony A. Padden**. He and his Deputy Chief Clerk, **Mark L. Pasierb**, oversee the areas of Court Analysis, Court Evaluation and Court Operation, Policy and Procedure.

Judge O'Leary has overall responsibility for the Executive/Administrative functions within the Office of the Chief Immigration Judge. Working with Judge O'Leary is **John C. Summers**, the Executive Officer who is supported by Administrative Specialist, **Sheridan Butler**. Judge O'Leary also supervises the Language Services Unit headed by the Unit Chief, **Martin Roldan** and his Deputy Chief, **Karen Manna**.

Ms. Sue Almeter serves as the Special Assistant to the Chief Immigration Judge.

Ms. Loreto Geisse is Counsel to the Chief Immigration Judge. Ms. Geisse is assisted by **Ms. Margot Nadel**, Attorney Advisor to the Chief Immigration Judge. Both are responsible for providing legal advice to the Chief Immigration Judge and his staff.

Supervisory responsibility for the Immigration Courts is vested in the following Assistant Chief Immigration Judges (ACIJs):

1. Judge David W. Crosland (Daniel Echavarren - backup)

Management Assistant - Helena Moffett

- Honolulu, Lancaster, Los Angeles, San Pedro

2. Judge Larry R. Dean (Michael Rahill - backup)

Management Assistant - Lisa Coleman

- Dallas, El Paso, El Paso SPC, Harlingen, Houston, Houston SPC, Port Isabel SPC, San Antonio

3. Judge Daniel Echavarren (David W. Crosland - backup)

Management Assistant - Helena Moffett

- Portland, San Francisco, Seattle

4. Judge Anne J. Greer (Gail B. Padgett - backup)

Management Assistant - Zena Peyton

- Fishkill, New York, Ulster, Varick Street

5. Judge Michael C. McGoings (Phillip T. Williams - backup)

Management Assistant - Gregory Miller

- Bradenton, Krome, Miami, Orlando, San Juan

6. Judge Robert P. Owens (Anne J. Greer - backup)

Management Assistant - Patricia McDonald

- Eloy, Florence, Imperial, Las Vegas, Phoenix, Tucson, San Diego

7. Judge Gail B. Padgett (Michael C. McGoings - backup)

Management Assistant - Patricia McDonald

- Atlanta, Elizabeth, Memphis, New Orleans, Newark, Oakdale, Wackenhut (Jamaica, NY)

8. Judge Michael F. Rahill (Larry R. Dean - backup)

Management Assistant - Zena Peyton

- Batavia, Bloomington, Buffalo, Chicago, Denver, Detroit

9. Judge Phillip T. Williams (Robert P. Owens - backup)

Management Assistant - Mario Bowser

- Arlington, Baltimore, Boston, Hartford, Philadelphia, York

(Effective 07/24/03)