AILA-EOIR LIAISON AGENDA QUESTIONS
September 30, 2004

1. AILA is concerned that individual Immigration Courts may be adopting blanket policies on a local level which are either more restrictive than, or contravene, the regulations. For example, with respect to requests for telephonic appearances, the EOIR office at the El Centro Detention Center refuses to even accept motions for telephonic hearings, saying that the Immigration Judges sitting at El Centro will not grant such a request. This self-described "court policy" exists even though it is contrary to the regulations and despite the practical concern for respondents and counsel that the center is located about four hours from the Los Angeles metropolitan area. Where such restrictions are not dictated by the individual case factors, such a policy severely impacts the Respondent's ability to obtain counsel.

A. Is there any specific guidance from EOIR regarding individual courts adopting restrictive blanket policies, whether for telephonic appearances (even for master calendar hearings)?

Response

The Office of the Chief Immigration Judge has been advised that there has been no blanket policy adopted by Immigration Judges who sit in El Centro against motions for telephonic hearings. Any "court policy" which is believed to be contrary to the regulations or to interfere with a respondent's ability to be heard should be raised with the Assistant Chief Immigration Judge of the particular Immigration Court. The Assistant Chief Immigration Judge will investigate the matter. You may visit the EOIR website at www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm to obtain a list of the Assistant Chief Immigration Judges and their areas of responsibility.

B. Must any such policy be published as part of a Court's Local Operating Procedures? AILA is concerned that such a blanket policy is not only contrary to 8 C.F.R. §1003.25(c) (provisions for telephonic hearings), but also severely impacts the ability of Respondents to obtain counsel.

Response

Yes. A policy or procedure to consistently handle motions or cases in specific ways should be published in the Local Operating Procedures. However, Immigration Judges possess broad discretion over the conduct of individual removal proceedings. See 8 C.F.R. § 1240.1

2. In prior liaison meetings, EOIR indicated that the ability to accept fees for motions and applications filed before the Court was a primary goal of the E-Filing initiative; please update us

on E-Filing, especially as to any action regarding fees. AILA reminds EOIR that the agency's continuing inability to accept filing fees is a great hardship in most jurisdictions. Where the CIS office is accessible in person at all, receipting a fee at a CIS office prior to filing with EOIR can take two to six hours; otherwise the fee must be sent via mail, with predictable delays and complications in processing; further, CIS officers are usually poorly trained and will often refuse to accept a fee without the filing, or insist on taking originals meant for the Court. Mishandling of filings further increases costs and the chances that an application for relief may not be properly adjudicated. This is not simply an inconvenience, but again impacts Respondents' ability to retain counsel by dramatically increasing the cost of preparing and filing applications.

Response

The e-filing initiative is still in its first phase, which is the integration of EOIR's databases (ANSIR and BIAP) into the new Case Access System for EOIR (CASE). Regression Testing and full systems testing were conducted in the summer of 2004. EOIR plans to pilot test the new database at the Board beginning in October and then conduct a series of Court pilots beginning in December. Once all pilots are deemed successful, EOIR will roll out the database to the rest of the agency, completing the transition in 2005.

In addition to the integration of the database, EOIR has been working with the Department of Treasury's pay.gov staff to implement electronic payment of fees. EOIR has developed a project plan showing the steps that must be taken to make electronic fee payment a reality. Once the interfaces have been established with pay.gov, EOIR intends to pilot electronic fee payment for matters filed with the Board. EOIR also intends to work closely with DHS to determine whether they wish to accept certain court filing fees directly through their electronic system.

3. Members working with pro bono attorneys at larger law firms and/or agencies report difficulties receiving notice when a firm or agency name is not included in BIA correspondence.

A. What provisions does the Board make to ensure that information taken from an attorney's Entry of Appearance includes the firm or agency name?

Response

The Board's current computer system has a line for the law firm's name, and the Clerk's Office copies the firm name into the system from the Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27). Although the computer system has been programmed to print the firm name, the firm name has not printed consistently on the notices. We will work with the computer staff to resolve any problems with the address line and hope to resolve any

problems in the new database which is tentatively scheduled to be piloted this fall.

B. Is there a way to ensure that the attorney and firm names are included in all correspondence?

Response

The Board will continue to work with its computer staff to resolve any issue involving the attorney and firm names.

C. Does the Board currently have a policy in place to seek corrections to attorney addresses when correspondence might have been returned to the Board for insufficient address?

Response

When correspondence is returned as undeliverable, the Board has procedures in place to review the record of proceedings to determine whether the correspondence was sent to the most recent address of record, and to reissue decisions if the Board made a mistake on the address. This process has greatly improved because the Board now stores records of proceedings on site for 90 days before returning them to the Immigration Courts. This has reduced the delay and expense of having to retrieve files from the Immigration Courts and has improved processing times for motions to reopen or reconsider.

The majority of the Board's returned mail is caused by the respondent moving and not filing an Alien's Change of Address Form (Form EOIR-33/BIA) with the Board. If a Board document is returned because of an insufficient address, the Board will review the file for a more complete address and will, where appropriate, reissue the notice or decision.

4. The recently published *St. Cyr* regulations detail EOIR's current position on eligibility for 212(c) relief for aliens convicted of certain crimes prior to the effective dates of AEDPA and IIRIRA. Although AILA previously commented on deficiencies in the draft regulations, it appears that initial version was adopted largely without change. We renew our previously voiced concerns, especially as they related to relief for aliens removed or deported under pre-*St. Cyr* law with unfiled, pretermitted or denied 212(c) applications.

A. Currently a Circuit Court may act to vacate a pre-*St. Cyr* order, but cannot effect the alien's return due to EOIR's limitation on reopening. *See, e.g., Zalawadia v. Ashcroft,* [*371 F.3d 292*] (5th Cir. 2004). Will EOIR consider making a limited exception to its rule that removal or deportation—whether lawful or not—voids the authority to reopen a case, for example, [by creating a] procedure for bringing back an LPR who has been deported

based upon "bad" law. Although such a finding would require DHS to accommodate the applicant's reentry to the United States to resume proceedings, if EOIR could agree to reopen cases in these limited circumstances, it might facilitate action by DHS. Such a change would prevent the gross miscarriages of justice as we are currently [experiencing].

Response

EOIR does not have authority to contravene the regulations which prohibit reopening after the alien has departed the United States. See 8 C.F.R. § 1003.2(d). The Board and Immigration Judges will apply the appropriate statutory, regulatory and circuit law on a case-by-case basis.

B. Will EOIR either reexamine its current limitations on the timing of Motions to Reopen for 212(c) relief under St. Cyr or adopt a more expansive standard for its sua sponte authority to review late-filed motions, especially in cases of pro se or poorly represented respondents?

Response

EOIR does not have authority to contravene the regulations which impose time limitations on motions to reopen. The Board has exercised its authority to grant late motions to reopen sua sponte in appropriate cases involving eligibility for section 212(c) relief under St. Cyr. Decisions to reopen a case sua sponte are made by the Immigration Judges on a case-by-case basis.

C. While we understand that EOIR prioritizes all motions and other filings made by detained respondents, will EOIR consider expediting as a class Motions to Reopen under the new regulations for 212(c) relief for legal permanent residents in custody?

Response

Cases involving detained aliens will continue to remain a high priority. However, neither the Board nor the Office of the Chief Immigration Judge have plans to expedite section 212(c) motions filed under the final rule. See 69 FR 57826 (2004). At the Board, section 212(c) appeals and motions involving respondents in DHS custody are already placed on a fast track. The Board and Immigration Judges also consider expediting cases where the parties file motions for expedited review explaining their reasons for the request.

D. Will EOIR address its limitation of 212(c) relief to convictions resulting from pleas but not trial, when the plain language of the statute specifies that the relief is available without regard to how that conviction was reached?

Response

The Board and Immigration Judges will address this issue on a case-by-case basis pursuant to the statute, applicable regulations, and controlling circuit law.

5. While we understand that the Board largely considers issuing precedent decisions as the issues arise, we would like to suggest some areas in need of further development. Such guidance is relevant to practitioners and Immigration Judges alike, especially in the current context, where summary AWO decisions are the norm.

A. Exceptions to the "one year rule" in asylum cases. Regulations were amended over three years ago to relax and expand the exceptions, but no Board precedents have been issued since that date;

B. Revisit *Matter of Cruz*[*, 15 I&N Dec. 236 (BIA 1975),*] on termination for naturalization eligibility. Immigration Judges will not terminate unless ICE tells them the client is prima facie eligible, citing *Cruz*, however, the case was decided almost 30 years ago when naturalization procedures were completely different, and there was direct and immediate recourse to District Court for review. Given the split of CIS and ICE into different agencies, it is impossible to get ICE to acknowledge prima facie naturalization eligibility, with the result that the important safeguard of allowing IJ termination in these cases has become totally frustrated;

C. Revisit *Matter of Shaar*[*, 21 I&N Dec. 541 (BIA 1996),*] in light of fact that VD is now limited to 60 days post-completion, and extensions at the close of proceedings are either entirely foreclosed or depend on a fortuitous choice of circuit case law. The blind application of *Matter of Shaar*, without any reference to the changes wrought by IIRIRA is resulting in the irony of respondents declining to apply for VD in any case where there is even the remotest possibility of future relief.

Response

The Board appreciates the suggestions regarding the need for publication and will continue to consider publishing decisions that will provide guidance concerning the scope or appropriate application of the regulations to these issues.

The decision whether to publish in any particular case depends upon a variety of factors, including how fully the parties have developed the issues and arguments before the Board in the case and the extent to which individual Board members believe that the decision will provide useful guidance in future cases.

By regulation, only Board panel decisions or Board en banc decisions may be designated as precedent decisions. 8 CFR §1003.1(g). A panel

decision or en banc decision becomes a precedent decision only upon majority vote of the permanent Board members. Id.

Many decisions involving the one year rule or its exceptions are fact-specific and may not provide particularly useful principles or guidance in other cases. In some cases in which the *Matter of Cruz* issue has been raised, there have been alternate grounds on which the motion to terminate was denied in addition to the lack of DHS acknowledgment of prima facie eligibility. The Board will address the continuing validity of *Matter of Cruz* and the continuing applicability of *Matter of Shaar* in suitable cases presenting such arguments.

6. Many members report that DHS is filing Notices to Appear without having even obtained sufficient evidence to make a prima facie case of removability. Where facts are in dispute, this lack of investigation and preparation by DHS results in delays that are especially prejudicial to respondents in custody, as well as additional stress on EOIR's overwhelmed docket. In some jurisdictions, DHS regularly and inappropriately relies on EOIR's efforts to move its docket to establish its removal case: For example, where a permanent resident has been charged with removability, but the government has not obtained any suitable evidence of conviction, the Trial Attorney relies on the Immigration Judge's order to the respondent to provide such evidence as part of any applications, requiring the respondent to apply for relief prior to having even a shred of evidence of removability. Poorly prepared cases are a burden not only on the respondent, but for the Immigration Judge and the entire docket.

A. Will EOIR consider requiring a prima facie showing of the factual allegations supporting removability at the filing of the NTA or at the initial master calendar?

Response

At present, the Office of the Chief Immigration Judge does not have plans to issue guidance to Immigration Judges on this issue. The issue of removability must be addressed as the issue arises in the context of a particular case before the Immigration Judge.

B. Will EOIR consider terminating cases where DHS has failed to establish at the initiation of proceedings that the government can meet its burden, instead of inappropriately shifting that responsibility to the respondent?

Response

As noted above, the issue of removability must be addressed by the Immigration Judge on a case-by-case basis. A respondent who believes that the Immigration Judge incorrectly shifted the burdens of proof set forth in INA section 240(c) should appeal that legal issue to the Board. Conversely, issues of an operational nature should be raised with the

court's Assistant Chief Immigration Judge

C. As the government by law has the burden of proof on the question of removability, as well as the burden of going forward, cannot EOIR issue guidance that it is DHS that must initially present its position before the matter can go forward?

Response

Please see responses to questions A and B above.

7. Where CIS denies an application for permanent residence, and a respondent renews the application before the Immigration Court, will EOIR clarify and confirm the prevailing practice that the respondent need not submit a new application to the Court (or CIS filing fee, if already paid)? Where the current counsel or respondent do not have a copy of the underlying application, some DHS offices have taken the position that it will not provide a copy of the pending or adjudicated application to the Court and will only provide a copy to the Respondent after a FOIA request. Can EOIR confirm that the Court may order DHS to produce the application for adjudication?

Response

The regulations state that an applicant retains the right to renew his or her adjustment application under INA section 245 in removal proceedings and thus no additional fees need to be paid. See 8 C.F.R. 1245.2(a)(5)(ii) EOIR does not believe that this provision gives Immigration Judges authority to order the DHS to produce previously-filed adjustment applications. However, pursuant to 8 C.F.R. § 1003.35(b), Immigration Judges do have the authority to subpoena documentary evidence on a case-by-case basis.

8. Will EOIR confirm how it evaluates individual Immigration Judges' performance in relation to case completion goals, and whether it uses any performance weighting system, such as the Performance Work Plan (PWP) system, to assign values to Immigration Judges' completion or continuation rates. Members report numerous problems with case scheduling which are reported by Immigration Judges to relate to case completion requirements, including: double, triple and quadruple booking merits hearings; scheduling complex cases in insufficient time slots and either refusing to provide additional time, extending court hours late into the evening or necessitating a continuance far in the future.

Response

EOIR does not evaluate individual Immigration Judge's performance in relation to case completion goals through a Performance Work Plan (PWP) system. Specific issues concerning case scheduling at an Immigration Court may be raised with the appropriate Assistant Chief Immigration Judge. You may visit the EOIR website at www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm to obtain a list of the

Assistant Chief Immigration Judges and their areas of responsibility.

9. While we understand that EOIR has deemed it efficient to use video hearings with the Headquarters Immigration Court in Falls Church, especially where there are unavoidable staffing issues, members continue to voice concerns. More frequently, practitioners are finding that video proceedings are the exclusive means to proceed in a case, often with little or no notice prior to hearing, and without any provisions for in person hearings.

A. Is EOIR planning to expand the number of Immigration Judges sitting at the Headquarters Immigration Court in Virginia in lieu of replacing Immigration Judge positions in the field?

Response

There is no plan at present to expand the number of Immigration Judges sitting at the Headquarters Immigration Court.

B. What provisions are made to inform those appearing in court that the hearing has been designated for video hearing? For example, practitioners in New Orleans are being served currently by Immigration Judges sitting via video at Falls Church, however, there was no warning that the prior Immigration Judge at that court was being transferred, nor any information to the public as to whether the change would be permanent.

Response

While advance notice that a hearing will be conducted through video conference is not required, EOIR will take this comment under advisement.

C. What provisions are made for practitioners in jurisdictions not currently served by an in person Immigration Judge (i.e., Louisiana or Utah), to be able to appear in person for hearing?

Response

A respondent may request to appear at the court in-person and such request will be adjudicated on a case-by-case basis.

D. What study, examination or provisions has EOIR made to the actual design and physical set up of video hearings in the Courtroom? The vast majority of Courts were not designed for remote viewing, and as a result, there is confusion in terms of where to look, where to place the camera, microphones, and other equipment; participants report that they are unsure where to look when speaking, an inability to see more that one party at a time, and privacy issues. For example, in New Orleans, the parties sit next to each facing a TV monitor. Attorneys and clients do not have separate tables from the trial attorneys. Every time an attorney wants to confer with the client, she has to ask for recess and step

outside the court; further, the close quarters make it impossible for both DHS and the Respondent to maintain any privacy or confidentiality during the hearing.

Response

The Assistant Chief Immigration Judge can be contacted if a party believes that a particular court's set up is not conducive to the conduct of hearings.

E. Are steps being taken to accommodate the special needs of video hearings in New Orleans or any other affected venue? What are these steps and who has EOIR consulted?

Response

If EOIR is made aware of any special needs requiring corrective action, it will look into facilitating such changes as necessary.

F. How will the review of motions, evidence, and rebuttal evidence submitted by parties in video hearings be handled?

Response

This issue must be addressed by an Immigration Judge on a case-by-case basis as EOIR continues to explore the most efficient means of utilizing available technological advancements.

10. The EOIR automated case status phone is extraordinarily useful, however there remain problems, especially with confusing or incomplete information. While we understand that EOIR assumes its E-Filing initiative will put many of these concerns to rest, it is not yet operational, and not all respondents will have access to online information.

A. The computer system does not include complete information in many cases, in others the information is confusing. For example, there is no information regarding Motions practice, especially Motions to Reopen or Reconsider; further, information on stays (either automatic or requested) as well as bond amounts or appeals, is unavailable.

Response

EOIR is open to the possibility of providing more information on the 1-800 number, such as information regarding motions, stays, and bond decisions, but will have to first determine if it is technologically feasible to do so. EOIR expects that such information will be made available when electronic filing procedures are implemented. Moreover, this information may be subject to Privacy Act and confidentiality concerns.

B. The system remains silent in many cases on other key decision information and Immigration Judge assignment.

Response

Please see answer to question (a) above.

C. The vocabulary used by the system is confusing, for example, an administratively closed case is labeled "completed," but there is no distinction from cases that have been terminated or have final orders.

Response

Please see answer to question (a) above.

D. Would it be possible for the 1-800 number to indicate whether, when and by whom a Notice of Appeal from an Immigration Judge's decision has been filed?

Response

The 1-800 number presently indicates whether and when an appeal has been filed with the Board.

11. Practitioners note that they are seeing an increasing number of denials of Motions to Change Venue, especially for pro se applicants, even where there is no DHS opposition and pleadings have been entered. Many of the cases appear to involve respondents with limited or no English skills without counsel who filed pro se. Further, few pro se respondents are aware of the possibility to change venue.

A. Are immigration judges under any guidance as to keep cases and not to transfer cases to other jurisdictions?

Response

In 2001, the Office of the Chief Immigration Judge issued Operating Policies and Procedures Memorandum (OPPM) 01-02, entitled Changes of Venue, which is available to the public on the EOIR website at www.usdoj.gov/eoir/efoia/ocij/oppm01/OPPM01-02.pdf. This OPPM offers guidance as to an Immigration Judge's authority to change venue and also addresses the procedures to be followed in relation to a motion to change venue. No other guidance has been issued to Immigration Judges regarding such motions.

B. Will EOIR consider providing notice to respondents that change of venue is available under certain circumstances?

Response

The regulations at 8 C.F.R. § 1003.20 and OPPM 01-02 provide sufficient notice of the availability of motions to change venue.

12. Members continue to report that clerks are inappropriately "front-desking" pleadings and

motions, essentially making legal decisions, by rejecting or refusing to accept filings. For example, a clerk rejected a proposed order on a terminated case because he disagreed with the content; in another, the clerk refused to accept a Motion for a Bond Hearing or in the alternative a Joseph Hearing, for a Respondent charged as an arriving alien because the clerk determined that arriving aliens are not entitled to bond.

A. What guidance can EOIR provide on the limits of the court clerks' authority to accept and reject filings and make legal decisions?

Response

As noted in question 4 of the November 11, 2001 AILA Agenda Q&A's at www.usdoj.gov/eoir/statspub/eoiraila0111.htm, Immigration Court clerks are authorized to reject any filings that do not comply with the regulations or local operating procedures (e.g., no certificate of service, incorrect number of copies, untimely, etc.). The Uniform Docketing System Manual, as well as various Operational Policy and Procedures Memoranda (www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm), offer guidance to Immigration Court staff regarding when and how to accept filings. The Uniform Docketing System Manual is not currently available on the EOIR website, but may be made available by making a FOIA request. If an attorney believes a document has been wrongfully rejected, he or she can contact the appropriate Court Administrator or Assistant Chief Immigration Judge.

Similarly, the Clerk's Office at the Board is authorized to reject documents that are not properly filed as a matter of procedure. The most common reasons for rejecting an appeal or motion are (A) failure to pay a fee or submit a fee waiver application when a fee is required, (B) failure to submit proof of service on the opposing party, and (C) filing a brief out of time. When rejected, the document is returned to the party with an explanation for the rejection. Parties may correct the defect and refile the document but must do so by the original deadline, unless an extension is granted by the Board. See Board Practice Manual, chapter 3 at www.usdoj.gov/eoir/bia/qapracmanual/pracmanual/chap3.pdf. The Clerk's Office does not reject filings based on legal sufficiency.

B. Can EOIR standardize the practice nationwide to avoid rejection or untimely consideration of filings where they are not fully in compliance with local rules?

Response

At present, the Office of the Chief Immigration Judge does not have plans to issue any further guidance to Immigration Court staff on this issue. If an attorney believes documents are being wrongfully rejected, he or she

can contact the appropriate Court Administrator or the Assistant Chief Immigration Judge. To obtain contact information for a Court Administrator you may visit the EOIR website at www.usdoj.gov/eoir/sibpages/ICadr.htm.

13. FOIA requests at EOIR are extremely backlogged, with clerks reporting delays in excess of six months. Requests for expedited processing appear to be denied with boilerplate language citing no proof of life threatening or other emergent circumstances, even when filed for persons in custody on final orders awaiting travel documents where the basis for any action can only be finally discovered upon careful review of the materials sought in the FOIA. Further, although EOIR has indicated that members should call the FOIA officer with expedite matters, the clerk will not return calls.

A. Is EOIR aware of this conundrum and the extreme hardship it creates for those in custody and under threat of imminent removal?

Response

The method by which EOIR responds to requests for expedited records is determined by regulation. A description of that method is provided below, in response to question B.

B. Will EOIR revamp its FOIA expedite procedures to recognize and accommodate those cases where the respondent is detained under a final order and does not have the ability to provide proof of harm, as that information is in the EOIR file sought?

Response

EOIR does not intend to revamp its FOIA expedite procedures but will continue to strive to provide timely and responsive customer service. EOIR is required to respond to FOIA requests in the order in which they were received. See 28 CFR § 16.5(a).

Congress amended the FOIA in 1996 to provide for the expedited processing of FOIA requests. The legislative history of the amendment, however, explains that the categories of cases qualifying for expedited treatment are intended to be narrowly applied, because "given the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do not qualify for its treatment," and "an unduly generous approach would also disadvantage those requesters who do qualify for expedition, because prioritizing all requests would effectively prioritize none." See H.R.Rep. No. 104-795, at 26 (1996).

The Department of Justice has published regulations, found at 28 CFR §

16.5(d)(1), that address the expeditious handling of FOIA requests. In accordance with that rule, requests for expedited processing are taken out of order and given expedited treatment only when: (I) normal processing could reasonably pose an imminent threat to the life or physical safety of an individual; (ii) there is an urgent need to inform the public about an actual or alleged federal government activity; (iii) the loss of substantial due process rights are at stake; or (iv) a matter of widespread and exceptional media interest because there exists possible questions about the government's integrity which affect public confidence.

In accordance with 28 CFR § 16.5(e), a requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. Because the formality of certification may be waived as a matter of administrative discretion, EOIR does not require a request for expedited treatment to be certified. But specifics as to why the FOIA processing should be expedited are still required. Within ten calendar days of receipt of a request for expedited processing, EOIR decides whether to grant expedited treatment, and notifies the requestor of the decision by mail. If a request for expedited treatment is granted, the request is given priority and processed as soon as practicable. If a request for expedited treatment is denied, an appeal of that decision may be directed to the Department of Justice Office of Information and Privacy. See 63 FR 29591 (1998).

14. Has the BIA formulated a policy regarding correcting its own errors? This issue was brought up at a previous liaison meeting in 11/2001, and EOIR indicated that it was examining the matter further. Several AILA members have reported situations in which the BIA made a mistake, but required respondent not only to file a motion to rectify the error, but also to pay for the privilege. For example: where the Board granted an extension of time in which the respondent could file a memorandum of law, but issued its decision before the due date and before receiving the respondent's memorandum, the Board required the respondent to pay for and file a motion to reopen before it would reopen and reconsider its erroneous decision.

A. Is there anything a respondent can do in case of a BIA error short of paying for and filing a motion?

Response

The purpose of a motion to reconsider is to give the parties a chance to identify for the Board any error in law, fact, or procedure in a prior Board decision. A properly filed motion to reconsider is the only guarantee that the Board will reexamine its prior decision. In limited circumstances, the Board will sua sponte reopen a decision to correct an obvious procedural

mistake. For example, the Board has a policy of sua sponte reopening and reissuing decisions where a Board order is returned to the Clerk's Office as undeliverable by the United States Postal Service because of a mistake by the Board in the address.

However, unless the respondent files a motion to reconsider with the Board, the respondent runs the risk that the Board might not reopen a case.

B. If the respondent must file a motion in order to correct a BIA error, could the respondent at least not have to pay for the motion? Please comment.

Response

If financial hardship exists, the respondent may apply for a fee waiver (Form EOIR-26A). The parties may call the Clerk's Office and point out obvious processing errors, but if the parties want to protect their interests, they should file a motion to reconsider.

C. Is it necessary for the DHS/ICE Litigation Unit to file a motion to correct a BIA error, or is the practice of resolving these issues via more informal means a courtesy provided only to the government?

Response

The same procedural rules apply to both parties. ICE is required to, and does, file written motions to reconsider.

15. Many of our members complain of Immigration Judges not differentiating between respondents who show up late for a hearing and those who do not show up at all. Some respondents are late for their hearings because of legitimate, unusual traffic problems, illnesses, etc. Other respondents arrive at the EOIR building in a timely fashion, but are unable to reach the courtroom on time for reasons beyond their control. Respondents often wait in long lines in order to gain access to the federal building or even to get on an elevator once they're in the building. In some jurisdictions the courtrooms are spread over several floors, and it is very confusing for the respondent, who often does not read, write or understand English, to navigate the EOIR maze and reach the correct courtroom in a timely fashion.

While we understand that it is important that hearings proceed in an efficient and timely fashion, it is even more important that respondents be given due process, and have their day in court. The BIA has never issued any precedent decisions granting a motion to reopen for a respondent who appeared late for his hearing, although it has done so in several non-precedent decisions

A. Why has the BIA not chosen to make decisions such as these precedent decisions? Would it consider doing so in the future?

Response

Many decisions involving "late appearances" are fact-specific and may not provide particularly useful principles or guidance in other cases. The Board will address the in absentia issues within the context of cases presenting such arguments.

B. Would EOIR be willing to formulate a policy directive for its Immigration Judges that "late shows" are to be treated differently than "no shows?"

Response

At present, the Office of the Chief Immigration Judge does not have plans to issue a policy to Immigration Judges on this issue. Immigration Judges must decide how to handle these situations on a case-by-case basis.

C. Would EOIR consider formulating a policy that would direct the Immigration Judges to attempt to contact a respondent or attorney of record by telephone before issuing an order in absentia? Most Immigration Judges will refuse to proceed or contact the government if the DHS attorney is not at the hearing, but do not think to afford the respondent the same courtesy.

Response

The Office of the Chief Immigration Judge does not have plans to issue a policy to Immigration Judges on this issue.

16. We understand that EOIR has a blanket policy against sending or receiving faxes from respondents or their attorneys, and that the intent is to avoid unnecessary confusion over filing and/or receipt of court filings. However, as an absolute bar, this policy leads to situations that are wasteful of court time and resources.

A. Would EOIR consider relaxing its strict "no fax" policy on request of the respondent or counsel and after authorization by court personnel?

Response

Please see the response to question B below.

B. Could EOIR review the possibility of such a policy with its offices in remote locations, such as Actual or other remote locations?

Response

OPPM 97-5, which may be viewed by visiting the EOIR website at www.usdoj.gov/eoir/efoia/ocij/97-5.pdf, states that no case-related legal documents may be filed or received in the Immigration Court through fax transmission. The Office of the Chief Immigration Judge does not have plans to rescind or modify this OPPM at present. The implementation of

electronic filing procedures will moot this issue.

The Board's Practice Manual states that the Board will not accept faxes or other electronic submissions without prior authorization. Currently, the Board will consider accepting faxes in cases involving emergency stays of removal, as long as certain conditions are met. See Board Practice Manual Chapter 3 at www.usdoj.gov/eoir/bia/qapracmanual/pracmanual/chap3.pdf.

17. EOIR is currently unable to accept an EOIR-28 Entry of Appearance for a matter that is not yet [in] the docketing system, other than when requesting a bond hearing. Without any requirement that the Notice to Appear be served on counsel or the respondent at the time of filing with EOIR, there is little or no notice as to scheduling of cases, requiring constant checking with either the court or the automated phone system; mail delivery of hearing notices is often unreliable. The inherent insecurity of the system leads inevitably to scheduling conflicts and absentia orders.

A. Will EOIR consider requiring that the Notice to Appear be served on the respondent or counsel of record before DHS at the same time it is filed with the court, as with other items filed with EOIR?

Response

Service of the Notice to Appear is the obligation of DHS and EOIR cannot impose obligations on DHS with respect to service of the Notice to Appear.

B. In its future design of the E-filing system, will EOIR consider addressing this issue, by allowing pre-registration of a case or "A" number for notice of receipt of any filing and any hearing notices?

Response

Yes.

18. DHS/ICE has indicated that its pilot program to detain respondents at the close of merits hearings will continue in Denver as a more permanent program, but not in Atlanta; ICE has also indicated it will expand this program to other jurisdictions. When the matter was previously raised regarding a prior incarnation in Hartford, Connecticut, EOIR indicated it did not have any data on the program. Given the higher numbers and longer duration of the pilot, please provide the following information:

A. Has EOIR seen an increase, decrease or no impact on the number of respondents requesting a change of venue?

Response

For the period April 1, 2004 through August 30, 2004, EOIR has seen an increase in the number of respondents requesting a change of venue in Atlanta and Denver, as compared to the same period for the previous year. In Atlanta, it was an increase of 84% and in Denver it was an increase of 41%.

B. Has EOIR seen an increase, decrease or no impact on the number of respondents requesting a custody hearing at either court's related detained docket?

Response

For the period April 1, 2004 through August 30, 2004, EOIR has seen a decrease in the number of respondents requesting a custody hearing in Atlanta and Denver, as compared to the same period for the previous year. In Atlanta, it was a decrease of -7% and in Denver it was a decrease of -30%.

C. Has EOIR seen an increase, decrease or no impact on the number of respondents requesting continuances of their matters?

Response

For the period April 1, 2004 through August 30, 2004, EOIR saw an increase of 34% in the number of continuances in Atlanta, while in Denver there was a decrease of -4% in the number of continuances, as compared to the same period for the previous year.

D. Has EOIR seen an increase, decrease or no impact on the number of respondents filing Notices of Appeal?

Response

For the period April 1, 2004 through August 30, 2004, EOIR saw a decrease of -46% in the number of respondents filing notices of appeal in Atlanta, while in Denver there was an increase of 7% in the number of respondents filing notices of appeal, as compared to the previous year.

E. Has EOIR seen an increase, decrease or no impact on the number of respondents withdrawing or vacating a previously filed Notice of Appeal?

Response

For the period April 1, 2004 through August 30, 2004, EOIR saw a decrease of -67% in the number of withdrawn appeals in Atlanta, while in Denver there was an increase of 43% in the number of withdrawn appeals, as compared to the same period for the previous year.

F. How has the pilot program impacted the workload of Judges and court staff in each city and each detained court?

Response

For the period April 1, 2004 through August 30, 2004, Atlanta saw a -10% decrease in the number of matters received and a 42% increase in the number of matters completed. For the same period, Denver saw a -30% decrease in the number of matters received and a -17% decrease in the number of matters completed.

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EOIR PRO BONO PROGRAM UPDATE

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EOIR is also pleased to provide the following update on the EOIR Pro Bono Program.

The EOIR Pro Bono Program continues to improve upon and expand two of its successful initiatives - the BIA Pro Bono Project and the Legal Orientation Program.

BIA Pro Bono Project

Since January, 2001, the BIA Pro Bono Project has matched over 300 detained case appeals with pro bono attorneys, law students and Board Accredited Representatives across the country. The first of its kind, the Project uses innovative software to identify detained and unrepresented individuals with pending cases before the Board of Immigration Appeals. Once identified, cases are screened by local pro bono attorneys, and summaries of selected cases are distributed through the Catholic Legal Immigration Network, Inc. (CLINIC) to over 350 recruited representatives. CLINIC staff then work to match these cases with pro bono counsel and monitor their progress.

AILA and the American Immigration Law Foundation (AILF) have provided tremendous support for the BIA Pro Bono Project since its beginning. With AILA's continued support, we hope to continue to increase the number of pro bono attorneys participating in the Project, as well as expand the Project to assist greater numbers of detained and non-detained individuals.

Legal Orientation Program

The Pro Bono Program is also well into the second year of the Legal Orientation Program. Funded through a $1 million congressional appropriation, EOIR subcontracts with non-profit organizations to make live group rights presentations to detained individuals in EOIR removal proceedings at seven (7) major immigration detention facilities across the country. These are: Port Isabel, Texas, Eloy, Arizona, Batavia, New York, Seattle, Washington, Lancaster,

California, Aurora, Colorado, and El Paso, Texas.

Legal Orientation Programs include: 1) group orientations for all detained respondents prior to their first Master Calendar hearing, reviewing the immigration removal process and options for relief; 2) individual orientations for interested and unrepresented detainees who have specific questions regarding their cases; 3) self-help legal materials and group workshops; and 4) pro bono referral services for those who need assistance pursuing claims for relief.

In its first full-year of operation, over 17,000 detained individuals attended the Legal Orientation Program's group orientation, and over 5,500 were provided with individual orientations. This represented approximately 20% of all detained respondents whose immigration proceedings were completed during the same time-frame.

The success of the Legal Orientation Program will depend, to some extent, on the ability of the participating non-profit agencies to recruit pro bono counsel for cases identified through the program. For this reason, EOIR appreciates the continued support of local AILA chapters in the cities and regions where Legal Orientation Programs are located.