

Administrative Conference of the United States
Adjudication Committee Meeting, Feb. 22, 2012

February 17, 2012

To: Members of the Adjudication Committee
Fr: Lenni Benson and Russell Wheeler
Re: Second Interim Draft, “Enhancing Quality and Timeliness in Immigration Removal Adjudication”

Below are the recommendations from our report that we suggest the committee take up at its February 22 meeting. They are the recommendations that do not involve shifting some of the immigration courts asylum jurisdiction to other forums, and the use of video and audio technology to enhance representation and to conduct hearings.

Please note:

- In the accompanying report, sections I-IV and VI are largely unchanged from the January 12 draft. (We have made some factual and interpretative changes based on comments received.)
- We have shaded the portions of section V (“Analysis and Recommendations”) that concern asylum and videoconferencing, i.e., the topics we propose the committee take up at meetings subsequent to the Feb. 22 meeting.
- We apologize for the state of the report manuscript. Headings are not uniform, table numbering and sequences are uneven, some footnote and other cross references are incomplete or in error. We produced the report under tight time deadlines during which we incorporated the results of our immigration survey into the analysis and adjusted recommendations based on those results and considered comments received up to the date we agreed to submit the draft to ACUS. And we wanted to honor that date to allow ACUS personnel to get the report into your hands before the three day weekend created by the February 20 federal holiday. As we say in the report’s footer, the final draft will not have these technical errors.
- Below we have listed the recommendation for discussion on February 22 and the page numbers of the report that provide the supporting analysis.

See pages 30-35, concerning resource enhancement, temporary immigration court personnel, and refined data on immigration court workload.

1. That the Executive Office for Immigration Review (“EOIR”) continue to seek appropriations beyond current services levels but that it plan for changes that will not require new resources.
2. To increase the immigration court workforce, that EOIR:
 - a. If it implements regulations to allow for temporary immigration judges, consider whether short-term temporary judges can bring the skill set required of an immigration judge and include transparent selection procedures and rigorous procedures for monitoring their performance;
 - b. Consider the National Association of Immigration Law Judges’ (“NAIJ”) proposal for recalling senior judges for temporary assignment;
 - c. Consider, in addition or in lieu of temporary judges, using the same likely pool of employees for assignment as temporary immigration court law clerks.

3. To refine its information about immigration court workload:
 - a. That EOIR explore case weighting systems in use in other high volume court systems to determine their utility in assessing the relative need for immigration additional judges and more accurate monitoring and reporting of immigration court workload, and consider a pilot project to test one or more methods. (We do not recommend any specific method or take a position on NAIJ's proposal.)
 - b. That the Department of Homeland Security ("DHS") revise the Notice to Appear ("NTA") form to allow the completing officer to indicate easily the officer's agency affiliation, being as specific as possible about the entity preparing the NTA because estimating future work of the court may depend on anticipating the priorities of the varied enforcement operations.
 - c. That EOIR expand its data collection field to provide a record of the sources of each NTA filed in the immigration courts.

See pages 36-39, concerning directing disputes to other forums, viz., NTA review

4. That DHS implement the ABA Immigration Commission recommendation to require DHS-lawyer approval for the issuance of any NTA—on a pilot basis in offices with sufficient attorney resources. Ideally, we would recommend that ICE attorneys must approve the NTA rather than an attorney within a separate component of DHS; this is because Immigration and Customs Enforcement ("ICE") is the agency that must commit the resources to prosecute and execute removal orders.

See pages 47-49, concerning directing disputes to other forums, viz., keeping DHS appeals to the Board of Immigration Appeals ("BIA") within DHS

13. To direct some appeals currently in the BIA's jurisdiction to more appropriate forums:
 - a. That DHS seek statutory and regulatory change to allow all appeals of denied I-130 petitions to be submitted to the United States Citizenship and Immigration Services' ("USCIS") Administrative Appeals Office (AAO).
 - b. That DHS amend regulations to send all appeals from Customs and Border Protection ("CBP") airline fines and penalties to AAO. Alternatively, CBP could eliminate any form of administrative appeal and have airlines and other carriers seek review in federal courts.
 - c. That the AAO, to ensure quality and timely adjudication of these important family-based petitions: create a special unit for the adjudication, formally segregating the unit from its other visa petition adjudications; issue precedent decisions more often and increase their visibility; and publicize clear processing time frames so that potential appellants can anticipate the time that the appeal will be in adjudication.

See pages 49-50, concerning directing disputes to other forums, viz., immigration court maintenance for DHS of filing and docketing information

14. That EOIR move as quickly as possible to electronic docketing and explore interim steps to provide limited electronic access to registered private attorneys, accredited representatives, and ICE trial attorneys.

See pages 53-61, and 64-67, concerning representation of aliens in removal proceedings, principally those who cannot afford to pay for lawyers.

18. That EOIR, to increase the availability of competent representation for respondents:
 - a. Continue to make the case to Congress, regardless of the likelihood of statutory change, that funding representation for those, especially those in detention, who are unable to pay the cost of hiring individual counsel will work efficiencies and cost savings.
 - b.. Consider a more intensive assessment of the paraprofessional programs that provide legal representation and the accreditation process and continue its assessment of the accuracy and usefulness of the pro bono lists provided at the courts and on the agency website.
 - c. Develop—in consultation with groups that are encouraging pro bono representation and seeking to improve the quality of representation in general—a national pro bono training curriculum, tailored to detained and non-detained settings and offer a systematic cycle of training in partnership with CLE and non-profit providers. The successful mock hearings and training materials developed in one location should be shared with the other courts and where possible, trainings should be recorded and those video or audio recordings made widely available to the public. With appropriate disclaimers and updates, these trainings may help to increase representation, pro bono participation, and even raise the sophistication of the respondents and their families about what to expect of their representatives.
19. To enhance the number and value of know-your-rights presentations, that EOIR:
 - a. Continue to give high priority for any available funds for the Legal Orientation Program (“LOP”).
 - b. While recognizing DHS requirements for KYR providers, continue to promote providers’ access to detainees and to help ensure that presentations are made sufficiently in advance of the initial master calendar hearings to ensure adequate time of the detainees to consider and evaluate the presentation information.
 - c. Consider giving LOP providers electronic access to the court dockets in the same manner as is provided to DHS counsel.
 - d. Negotiate with the detention officers to provide lists of new detainees, their country of origin and language requirements at the earliest possible stage to both the court and the LOP providers.
25. That EOIR encourage use of limited appearance in appropriate circumstances by modifying underlying regulations as necessary and
 - a. Consider issuing an Operating Policies and Procedures Manual (“OPPM”) to explain to judges circumstances in which judges may wish to permit limited appearances and necessary warnings and conditions they should establish; and
 - b. Amend the Practice Manual to reflect this modified policy.
26. That EOIR consider a limited multi-year pilot program in a large immigration court or a detention center with a large immigration docket to assess whether a pro se law clerk office could provide benefits that outweigh its costs, such as saving court time in explaining procedures and filing requirements and reduced need for continuances because a greater number of applications were complete upon submission.

See pages 66-67, concerning enhancing advice and assistance for practitioners and pro se respondents

27. That EOIR enhance the guidance available to practitioners and pro se respondents by:
- a. By developing, perhaps through the LOP in cooperation with a non-profit legal services providing, a pro se version of the Office of the Chief Immigration Judge (“OCIJ”) Practice Manual that explains terms and concepts with which lay persons, especially from other countries, are unlikely to understand.
 - b. Sharing best practices developed by individual courts or judges by collecting and disseminating supplement instructions that individual judges have developed to aid the parties in preparing submissions to the court.
 - c. Developing video kiosks in the waiting rooms or similar spaces within the courts so that the respondents can access the court website and find instructional materials.

See pages 67-73, concerning judges’ use of various case management devices to facilitate adjudication by narrowing issues in dispute.

28. That EOIR revise its coding scheme to allow judges or court administrators to identify what the regulations call “pre-hearing conferences” and others call “status conferences.”
29. That EOIR try to test the utility of status conferences by
- a. Assembling a working group or some other forum to probe more deeply judges’ perceptions of the costs and benefits of such conferences and when and how they are or are not useful.
 - b. Based on that probe, considering a pilot project in one or more courts to test the effectiveness of mandatory pre-hearing conferences to be convened in specified categories of cases and to evaluate situations in which the judge should order the trial attorney to produce essential records from the A File.
 - c. Evaluating the use EOIR Form-55 and/or create a new form and recommended procedure for stipulations by the represented parties.

See pages 73-76, concerning various procedural modifications to streamline removal adjudication, viz., the authority to effect administrative closure of cases

30. That EOIR seek to clarify the proper use of administrative closure by:
- a. Amending the OCIJ Practice Manual to define specifically “Motions for Administrative Closure;”
 - b. Issuing OPPMs or amending regulations to authorize the judge to initiate this motion *sua sponte*; indicate that a specific basis for administrative closure should be the failure of the parties to meet and confer as previously directed by the judge; and authorize government and private counsel under the procedural rules to object to the administrative closure orally or in writing. If the caseload of the court grows so large that the court cannot possibly address the backlog of cases, administrative closures of cases that ICE policy and directives would characterize as a low priority may be an appropriate mechanism to manage the workload of the courts.¹

¹ This closure of these cases might be seen as analogous to the procedures the BIA used to expedite adjudication of newer cases while working to reduce the backlog of old cases.

- c. Proposing a change to 8 C.F.R. § 1003.30 that allows the government to amend the charges and allegations in the NTA at any time in the proceeding. The new rule would liberally allow amendment at the first master calendar but once the respondent formally admitted or responded to the charges and allegations, amendment would only be considered based on motion to the court and good cause shown for why the government could not have presented the charges or allegations earlier.
- d. Developing guidance for judges on when administrative closure is appropriate over the objection of the respondent.

See pages 76-79, concerning proposals for “vertical” or “unit” prosecution, and similar steps

- 31. That EOIR not oppose plans that ICE Chief Counsel may devise for vertical prosecution arrangements in courts where the teams assigned would be larger than two attorneys.
- 32. That EOIR consider providing judges clearer guidance on what they may do to require that government counsel are fully prepared to represent the government and are responsible for necessary actions that DHS must complete between hearings. Specifically, EOIR can:
 - a. Make clear that the judge has authority to rely on a member of a prosecution team to follow up on important evidence, forensic examination, securing required security checks, locating government files, etc.
 - b. Instruct judges to treat all ICE trial attorneys as responsible for the actions and omissions of other trial attorneys in the same case. Judges may hold ICE trial attorneys accountable for the commitments made in prior hearings, in the same manner the court holds private counsel working in the same law firm or non-profit responsible.
 - c. Amend the Practice Manual to explicitly define the responsibility of the trial attorneys. This recommendation does not require an amendment of existing regulations.
 - d. Clarify the authority for judges to make conditional decisions on applications for relief where trial counsel did not secure completed agency action and clarify that the judges may continue the case for a period such as sixty days or some other period that does not create undue hardship on individuals who have been granted relief but allows the DHS sufficient time under the totality of the circumstances to complete the biometric or security check;
- 33. That EOIR authorize a special docket for cases awaiting biometric results with a special coding for these cases to allow later measurement of the degree to which the security checks are solely responsible for the delays. When the check is complete, if the trial attorney found the results of the security check warranted a resumption of the hearing, the trial attorney would move to calendar a resumed individual hearing to address the biometric results. If no further hearing is necessary, the trial attorney could file a notice with the court and respondent stating that no new evidence was presented in the results of the security check and upon receipt of this notice, the judgment would convert to a final order.

See pages 79-80, concerning proposals to streamline procedures in respect to asylum applications

34. That OCIJ, to facilitate the processing of defensive asylum applications
- a. Amend the Practice Manual that requires the filing of a defensive asylum application in open court to allow appropriate employees of the court (possibly judicial law clerks or senior staff trained by the court administrators) to accept the submission of the asylum application and provide the required statutory advisals, or
 - b. Alternatively the OCIJ could issue an OPPM 1) explaining appropriate procedures for the initial filing of the asylum application without the participation of the immigration judge; 2) authorizing court personnel to schedule a telephonic status conference with the judge and ICE attorney in any situation where the respondent or his/her representative expresses a lack of understanding. 3) noting that court personnel may renew, at the merits hearing, the advisal of the danger of filing a frivolous application and allow an opportunity for the respondent to withdraw the application; and 4) making clear that the filing with court personnel qualifies as a filing with the court for the purposes of triggering the 180 day work authorization period.²

See pages 80-82, concerning proposals to test additional uses of stipulated removal orders

35. That EOIR consider a pilot project to systematically test stipulated removals' utility as a mechanism to reduce detention time, allow judges to focus on contested cases, and assess the contexts, if any in which, the use of stipulated removals might diminish due process protections.
- During the pilot, most appropriately conducted in a detention center, the judges would direct attorneys for respondents and ICE counsel to confer and discuss the entry of a stipulated order of removal in cases where the NTA alleges removal on serious criminal grounds (we suggest this subset because in most criminal cases the conviction bars eligibility for relief, thus making a subset that is compatible with DHS priorities and a group likely to have limited defenses).
- EOIR would encourage judges to permit attorneys to make limited appearances to meet and advise detained respondents about the possibility of relief and the availability of a stipulated order of removal.
- In a randomly selected subset of cases, judges would hold an in person hearing and review of the advisals and assess the understanding of the respondent about the nature of the stipulated removal order and the voluntariness of the waivers.
- "Know-your-rights" presentations sponsored by the LOP program (discussed in Section III.B.) would have sufficient access to the respondents to allow them to make personal inquiries about their ability to contest removal or to establish prima facie eligibility for relief prior to the master calendar hearing. Respondents could be informed about the ability to request a stipulated order of removal after the presentation.
36. That EOIR consider designing, in jurisdictions where DHS routinely seeks stipulated removal orders and asks for a waiver of the respondent's appearance, a random selection procedure where

² In another part of our report we suggest eliminating these types of work authorization clock issues entirely by allowing an assumption of eligibility for work authorization after an application has been pending for 180 days. In our draft report we used the 150 days found in the statute, the regulations allow DHS 30 additional days for adjudication of the work authorization for a total of 180 days.

personal appearance is not waived and the respondent is brought to the immigration court to ensure adequate warnings and the waivers were knowing and voluntary.

37. That EOIR, if it undertakes such a project, encourage one or more advocacy organizations to prepare a video recording (with subtitles or dubbing in a number of languages) explaining removal proceedings, general eligibility for relief, and the possibility of requesting a stipulated order of removal should the respondent wish to waive the hearing and any application for relief including the privilege of voluntary departure.

See pages 82-85, concerning the use of EOIR adjournment codes to analyze case management practices.

38. That EOIR
- a. Continue its evaluation of adjournment code data, as an aid to system-wide analysis of case management practices;
 - b. Reevaluate its one-reason-only principle for the codes or devise codes that reflect the multiplicity of reasons for an adjournment.

See pages 85-88, concerning measures to augment judges' authority to promote attorney accountability.

39. To improve the performance of the private bar, that EOIR
- a. Develop procedures (as supplements to existing disciplinary procedures) to allow judges to issue orders to show cause why an attorney should not be publically reprimanded for lack of preparation, obstructive behavior, or other behavior that impedes the court's operation. Ideally, these procedures would be available to judges to sanction both the private bar and ICE trial attorneys (discussed below). Sanctions would not include monetary or formal disciplinary rulings.
 - b. Consider developing mandatory CLE materials that judges could order attorneys to complete (including passing a qualifying examination) based on a finding that an attorney's behavior is substandard due to lack of substantive or procedural knowledge.
 - c. Explore, if its resources are insufficient to develop such materials, pro bono partnerships with reputable CLE providers or consider seeing regulatory authority to impose fines to subsidize the cost of developing such materials.
- 40 That EOIR continue its efforts to implement the statutory grant of immigration judge contempt authority.

See pages 96-100, concerning BIA case management practices, viz., enhanced authority of members to refer cases to three-member panels.

46. That EOIR should seek to make the 2008 proposed regulations final allowing greater flexibility in establishing three-member panels

See pages 100-114, concerning steps to enhance transparency and court performance through changes in immigration court management.

47. To promote transparency about hiring practices within EOIR, that
 - a. EOIR publish annually, as do some courts, or post periodically, summary and comparative data on the gender and race/ethnicity composition of categories of EOIR personnel (e.g., judges, BIA members, staff by occupational category), as well as summary information on judges' prior employment, with due attention to any statutory restrictions to protect privacy.
 - b. Some other group, if EOIR is disinclined to post such information, or forbidden to do so, post such information based on judges' names on the EOIR website and Internet-available biographical information.
48. That EOIR consider incorporating some elements of current JPE models into its performance evaluation process, including use of a separate body to conduct reviews, agency-wide.
49. That EOIR seek to monitor immigration court performance by
 - a. Continuing its assessment of the adaptability of performance measures used in other court systems, publicize the results of its assessment; and
 - b. Including rank-and-file immigration judges in the assessment.
 - c. Including stakeholder DHS agencies in its assessment.
50. That EOIR, consistent with its commitment to transparency in the judicial discipline process, state on its "Immigration Judge Conduct and Professionalism" webpage that it is barred.
51. That EOIR assemble a working group of immigration judges and perhaps outside observers familiar with court management structures to evaluate alternatives to the current ACIJ structure.