EOIR/American Immigration Lawyers Association (AILA) Meeting

March 29, 2012

EOIR Welcome

Director Juan Osuna's opening remarks and introduction of Acting General Counsel, JuanCarlos Hunt. EOIR is committed to listening and keeping communication open, and always welcomes AILA's input.

Introductions

All attendees introduce themselves. (Round table seating)

Questions and Answers

I. Regulations/Rulemaking Update

AILA QUESTION: During the fall 2011 liaison meeting, AILA noted that there remain "several areas where the Department of Justice, in its communication with AILA and the public, has indicated it may revise or extend existing regulation." AILA specifically identified (a) ineffective assistance of counsel; (b) the "departure bar"; and (c) incompetency determinations (including EOIR's Advance Notice of Proposed Rulemaking). Can EOIR provide any updates on the status of these and other regulatory additions or changes, including the timeframe for agency action.

EOIR RESPONSE: As discussed at the November 3, 2011, AILA-EOIR Liaison Meeting, EOIR is currently working on several regulatory matters. Mental competency in proceedings before EOIR, departure bar and ineffective assistance counsel are the top priorities.

Ineffective Assistance of Counsel:

EOIR continues to push within its limits for publication of the proposed regulation in response to Matter of Compean, addressing ineffective assistance of counsel.[1] This regulation continues to be one of EOIR's highest priorities. As noted during the Fall 2011 meeting, publication of a regulation can be a lengthy process. This is because EOIR does not control the internal timelines of Departmental components and other agencies, which must also review and provide input on the regulation. The regulation is currently under review at the Department. Upon publication of the proposed regulation in the Federal Register, stakeholders will have an opportunity to provide comments during the notice and comment period.

[1] See *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009).

Departure Bar:

EOIR anticipates providing a response this year to the petition for rulemaking filed by the American Immigration Council requesting amendment of the regulatory provision known as the "departure bar."[2] In particular, EOIR will announce whether it will initiate a separate rulemaking to address the departure bar. EOIR is working with Departmental components and other agencies in order to make this determination.

Mental Competency:

EOIR drafted an Advance Notice of Proposed Rulemaking (ANPRM) to solicit input from the public regarding mental competency issues in immigration proceedings before EOIR. A proposed regulation addressing these issues continues to be a priority for EOIR and the agency is moving as quickly as it can within the time constraints imposed by the regulatory process.

Recognition and Accreditation:

Briefly, EOIR will give an update on other regulatory initiatives. On March 14, 2012, and March 21, 2012, EOIR hosted two open public meetings to discuss potential amendments to the EOIR regulations governing the recognition of organizations and accreditation of representatives who appear before EOIR. EOIR is pleased that more than 150 participants from all over the country, including AILA members, planned to participate in each meeting, either in person or on the phone. EOIR has prioritized amending these regulations because we want to alleviate immigration fraud and enhance the ability of legitimate organizations to assist individuals in proceedings before EOIR. EOIR is an active partner in the inter-agency unauthorized practice of immigration law initiative, and encourages legitimate organizations to provide authorized representatives.

Regulatory Review Process:

This year, the Department will be publishing an ANPRM soliciting comments from the public about regulatory amendments that the Department is considering pursuant to the Department's Regulatory Review Plan and the objectives of Executive Order 13563. This round of review will focus on reviewing and amending the selected EOIR regulations to eliminate duplication, ensure consistency with the Department of Homeland Security's (DHS) regulations, and delineate clearly the authority and jurisdiction of each agency. On March 6, 2012,

[2] The "departure bar" is the regulatory provision at 8 C.F.R. sections 1003.2(d) and 1003.23(b)(1) that prohibits aliens from filing a motion to reopen or reconsider with the Board of Immigration Appeals (Board) or immigration courts after their departure from the United States. This regulatory provision also renders a motion to reopen or reconsider withdrawn if the alien departs the United States while the motion is pending.

the Department submitted the ANPRM to the Office of Management and Budget for review. On March 19, 2012, OMB completed its review and approved the ANPRM for publication. This updated information is publicly available on OMB's website: http://www.reginfo.gov/public/do/eoDetails?rrid=121518.

Other Regulatory Priorities:

EOIR continues to work with Departmental components and DHS on other regulatory priorities, including the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA).[3] Also, EOIR is working with the Department to draft a regulation making improvements to the List of Free Legal Service Providers. As part of its eWorld Initiative, EOIR will also be prioritizing publication of a final regulation establishing electronic registration of attorneys and representatives practicing before the Board and immigration courts. Due to the time that has elapsed since publication of the proposed rule, EOIR intends to solicit public comments on this regulation. EOIR will also publish a notice in the Federal Register prior to implementing the electronic registration process.

In addition, this year, EOIR will be publishing a final rule addressing the procedure by which EOIR forwards asylum applications for consideration by the Department of State.[4] EOIR will also be publishing a final rule making technical amendments to EOIR's regulations governing the discipline of immigration practitioners.[5] Lastly, information regarding EOIR's pending rulemakings can be found on the Unified Agenda, which is available online at http://www.reginfo.gov. EOIR welcomes and encourages AILA to continue to provide comments on EOIR's pending rulemakings.

II. Asylum – EAD

AILA QUESTION: AILA thanks EOIR and Judge O'Leary for issuing OPPM 11-02, The Asylum Clock (November 15, 2011). It is our hope that the OPPM will provide clarification to the courts and USCIS on the purpose of the "clock" maintained by EOIR and provide needed clarification on starting and stopping the clock. Since the OPPM 11-02 was issued, have court administrators and/or EOIR personnel in Falls Church noticed any change in the number or type of "clock" problems raised by asylum applicants and their representatives?

EOIR RESPONSE: EOIR will defer comment on the effect of OPPM 11-02 due to ongoing asylum clock litigation.

[3] See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, 122 Stat. 5074 (TVPRA).

[4] See Forwarding of Asylum Applications to the Department of State, 76 Fed. Reg. 67099 (Oct. 31, 2011).

[5] See Reorganization of Regulations on the Adjudication of Department of Homeland Security Practitioner Disciplinary Cases, 77 Fed. Reg. 2011 (Jan. 13, 2012).

III. Prosecutorial Discretion & Review of Pending Removal Matters

AILA BACKGROUND: At our fall 2011 liaison meeting, EOIR stated that there was no EOIR-issued guidance or instructions regarding how judges or courts should proceed with cases where a respondent requests prosecutorial discretion or where prosecutorial discretion is granted.

AILA QUESTION: Has EOIR issued any guidance or instructions to date?

EOIR RESPONSE: EOIR has provided information to the Immigration Judges regarding DHS's exercise of prosecutorial discretion and instructed the Immigration Judges to use hearing time made available through the exercise of prosecutorial discretion for high priority cases.

In late December 2011, pilot programs were initiated in Denver and Baltimore. This process involved essentially the temporary closing of non-detained dockets in those courts. The next phase will begin on April 23, 2012, and will involve additional immigration courts. These additional pilot programs will operate in immigration courts in the following cities: Orlando, Seattle, New Orleans and Detroit. There were several challenges and as a result, we learned many lessons. Closing down the courts has a high price for aliens. Therefore, this time, the immigration courts will be closed for two weeks instead of five weeks. Finally, other pilot programs will be tested in the following cities: New York in May, San Francisco in June, and LA in July. EOIR will give notice when the courts will be closed. The public meeting notices will be issued early next week for the next phase involving smaller courts.

AILA QUESTION: Is EOIR keeping statistics regarding administrative closure and/or other relief granted under the prosecutorial discretion initiative, such as termination of proceedings? If so, will those numbers be shared?

EOIR RESPONSE: Prosecutorial discretion is a DHS initiative, and for that reason, all statistics are provided by DHS. EOIR is keeping internal statistics. It should be noted that prosecutorial discretion is a lengthy process that will not result in any great numbers of closures at a particular point in time. DHS must make a decision, conduct background checks, and contact the representatives. The representatives must, in turn, contact their clients, and prepare a written joint motion that will ultimately be acted upon by the judge. EOIR is not releasing statistics now. DHS will issue statistics later in the year.

AILA QUESTION: Are statistics available on administrative closure pilot program cities (Baltimore and Denver)? Was there an increase in administrative closure in these two cities?

EOIR RESPONSE: There have been administrative closures in those two cites due to prosecutorial discretion. DHS has released some statistics as to how many cases they were considering, but has not released data on how many motions for administrative closure they have filed.

AILA QUESTION: What, if any changes has EOIR made since the prosecutorial discretion initiative, including the pilot program began?

EOIR RESPONSE: EOIR has not made any changes beyond participation in the pilot programs in Denver and Baltimore. EOIR has entertained motions to advance calendars, and will be piloting special master calendars in Denver for *pro se* aliens. The Immigration Judges and the Board will adjudicate the motions on a case-by-case basis, and will process the motions in the normal course of business.

AILA QUESTION: In order to effectuate the pilot programs in Denver and Baltimore, EOIR cleared the non-detained dockets in the Denver and Baltimore immigration courts by rescheduling non-detained hearings between December 4, 2011 and January 13, 2012. Will EOIR be rescheduling hearings in any other immigration court to facilitate the review of cases for grants of prosecutorial discretion?

EOIR RESPONSE: A lot of thought has to be given to this issue. The last phase of the pilot program consisted of a six-week suspension in two non-detained dockets. The next phase will begin on April 23, 2012. Suspending non-detained dockets presents a huge challenge. This time, the smaller courts will have a two week suspension of non-detained cases so that DHS can review its case load. The larger courts will have a five-week partial non-detained docket suspension. We think this is a good compromise – a more careful, and feasible approach – than full docket suspensions. We are hoping to complete these suspensions- in July.

AILA COMMENT: It would help our *pro bono* clinics if you could get us notice as quickly as you get it so that the attorneys have time to prepare.

EOIR RESPONSE: The notices will go out soon and public notices are coming as early as next week, April 14, 2012, for the smaller courts.

AILA QUESTION: AILA members report that unless an application has already been filed with the court prior to administrative closure, respondents will have to file a motion to recalendar the case in order to submit an application for relief (such as EOIR-42B), in order to be eligible for work authorization. Once the case is back on the docket, there is no indication whether it will proceed or be administratively closed again. In light of the prosecutorial discretion initiative, has EOIR made any changes as to how cases are coded when they are administratively closed that would impact the respondent's eligibility for work authorization?

EOIR RESPONSE: EOIR has no jurisdiction over work authorization. When an Immigration Judge administratively closes a case, there is no pending adjudicative work or actions that need to be done. Because an administratively closed case is not an active case, the only vehicle to filing pleadings is to move to re-calendar, thereby, making the case active again.

AILA COMMENT: *Pro se* respondents whose cases are administratively closed before they have the opportunity to submit an application for relief cannot get a work permit. In the alternative, they would have to decline administrative closure, submit an application for relief, and face removal proceedings. AILA believes there needs to be more dialogue about how individuals who are eligible for administrative closure, especially pro se individuals, can submit applications for relief.

AILA QUESTION: Does EOIR know the number of cases that were granted administrative closure following ICE's review of removal cases pending before the BIA?

EOIR RESPONSE: No, we do not have those numbers, yet.

IV. Immigration Court Practice Manual (ICPM)

AILA BACKGROUND: The Immigration Court Practice Manual (ICPM) grew out of a need for and a desire for uniformity of practice and procedures in immigration court. AILA members report that some courts and/or judges are setting specific or exceptional requirements for court filings. At previous liaison meetings, EOIR stated that it will not issue guidance on adherence to the practice manual. The setting of exceptional requirements by a court or judge can be extremely detrimental to the respondent and thus we are raising it again.

For example, attorneys report that a San Diego judge limits court filings, including all pretrial statements and supporting documents, to 100 pages. This limit is not published on the San Diego court's website, in the ICPM, or on the EOIR website. Thus, the submission of a diligent attorney, who is in compliance with the ICPM, but who is unaware of this requirement (perhaps because he/she does not regularly practice before the San Diego court) would be rejected. Likewise, if a matter commences with a judge who does not enforce a page limitation, but is transferred to the judge who does, the submission would be rejected.

The ICPM discourages compound motions (Chapter 5.4). However, there is no per se prohibition on compound motions. Several courts have adopted a rule to reject all compound motions. There appears to be no authority for this arbitrary rule and it could prove problematic when time sensitive motions are rejected.

While AILA supports the development of procedures that will increase the efficiency of the courts while protecting due process, we request that this matter be revisited due to the inefficiencies exceptional rules create.

AILA QUESTION: Could EOIR please instruct courts to follow the ICPM and not adopt rules that are not available to outside practitioners or the public?

EOIR RESPONSE: The ICPM is intended to be applied in a uniform manner nationwide. If AILA believes that an Immigration Judge's or a local court's practice is inconsistent with the ICPM, the issue is best addressed with the appropriate Assistant Chief Immigration Judge (ACIJ). AILA should provide the ACIJ with specific examples, including A numbers. However, the ICPM does not limit the discretion of the Immigration Judges to depart from the provisions of the ICPM on a case-by-case basis.

AILA QUESTION: Limiting court filings to 100 pages can leave clients at a disadvantage, especially in asylum cases where they may have to prove country conditions. The respondents should be allowed to submit whatever they feel is necessary to prove their case. The Immigration Judge can then decide what to eliminate. What recourse is there when pleadings are rejected for too many pages or compound motions? Would you consider notifying respondents as opposed to rejecting pleadings?

EOIR RESPONSE: We will look at this matter.

V. Laptops in the Courtroom

AILA QUESTION: At our fall 2011 meeting, we discussed the issue of DHS attorneys being permitted to have laptops in the courtroom, while private attorneys are prohibited from having laptops. Attached is a list of courts and their laptop policies. As discussed, we are concerned that this disparity creates an unfair advantage for DHS attorneys. Can EOIR reach out to each court or the landlords to resolve this problem?

EOIR RESPONSE: For hearings held in DHS detention facilities or federal, state, or local facilities, compliance with the facilities' security requirements is required. DHS, not EOIR, contracts for space at detention facilities, and EOIR does not establish the rules for what may be brought into these facilities. We understand the argument, but we are not in control of security requirements in some of our environments. We will look into this matter. EOIR will not make any promises and matters are decided on a case-by-case basis.

AILA QUESTION: Will EOIR prevent trial attorneys from bringing laptops in the courtroom if private attorneys are not able to bring laptops into the same courtroom? This disparity violates due process rights.

EOIR RESPONSE: We appreciate the due process argument. Thank you for recently providing a list of courts where this has been of concern. We will look at the list and consider. However, we are making no promises.

VI. Released On Recognizance

AILA QUESTION: Historically, the BIA has recognized an IJ's authority to release an individual on his or her own recognizance, where that individual was detained under INA §236(a) or its predecessor statute. During an AILA-EOIR liaison meeting in April 1998, EOIR expressly confirmed the authority of IJs to release on recognizance (see http://www.aila.org/content/default.aspx?docid=3744). However, some immigration judges (IJs) have stated that they do not have this authority. This inconsistency has generated considerable confusion among practitioners and in immigration courts. What is EOIR's policy regarding the authority of Immigration Judges to release detainees on their own recognizance?

EOIR RESPONSE: EOIR does not have a policy regarding the authority of Immigration Judges to release detainees on their own recognizance. Immigration Judges interpret the immigration law within the context of specific cases. If a party does not agree with an Immigration Judge's decision regarding a custody re-determination, the party may appeal that decision to the Board.

AILA QUESTION: How can you make judges more aware of their authority to release on recognizance?

EOIR RESPONSE: There is not much we can do, as this is a policy issue. The legal question will probably have to be litigated. The BIA has not tackled it. Currently, these issues are pending before the Board.

VII. Voluntary Departure

AILA BACKGROUND: When a respondent accepts voluntary departure, written warnings are provided to the respondent with the order, however, in most courts, the warnings are only provided in English. Given the importance of understanding voluntary departure and the consequences of failing to comply, it is extremely important that the warnings are also provided in Spanish.

AILA QUESTION: Would EOIR make available a Spanish version of the voluntary departure (VD) warnings?

EOIR RESPONSE: EOIR is constrained by the fact that there are over 300 languages spoken in immigration court. It is important to observe that EOIR provides an interpreter in every hearing in which the respondent indicates that English is not his or her best language. Thus, if a respondent has any questions in regard to these warnings, the respondent may address such questions to the court

through the interpreter, and the immigration judge will explain, with the explanation duly interpreted to the respondent.

AILA QUESTION: Would EOIR include the date the voluntary departure period expires with the information provided by the 1-800 number?

EOIR RESPONSE: EOIR does not currently intend to change the 1-800 number to reflect the date that the voluntary departure expires. The 1-800 number is designed to reflect only the most basic information about the case.

AILA COMMENT: *Pro se* clients don't always clearly understand the interpreter during the hearing. Adding the date of the voluntary departure seems equivalent to giving out the removal date. And, it would help us to give proper advice to our clients.

EOIR RESPONSE: We are not planning any changes at this time.

VIII. Subpoenas

AILA BACKGROUND: 8 CFR §1003.35(b)(6) reads:

> *Invoking aid of court*. If a witness neglects or refuses to appear and testify as directed by the subpoena served upon him or her in accordance with the provisions of this section, the Immigration Judge issuing the subpoena shall request the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and to request such court to issue an order requiring the witness to appear and testify and to produce the books, papers or documents designated in the subpoena.

AILA QUESTION: Have Immigration Judges received any instructions or training on the steps necessary to comply with 8 CFR §1003.35(b)(6)?

EOIR RESPONSE: Is there a particular reason why AILA is raising this matter? Immigration Judges have received instruction on their authority to issue subpoenas under the pertinent regulations. The Office of the General Counsel (OGC) is the component that is responsible for the enforcement of subpoenas. The judges generally go through their ACIJ. The ACIJ will direct them to OGC. We can train on the authority issue, but enforcement of the subpoena is handled by the U.S. Attorney's office.

AILA QUESTION: Absent specific instructions and training on this provision, IJs appear to be understandably reluctant to follow the mandate of 8 CFR §1003.35(b)(6), which damages the interests of respondents who need enforceable subpoenas. If no instructions or training have been provided in the past, would EOIR provide such guidance in the future?

EOIR RESPONSE: OCIJ does not intend to issue any special guidance regarding subpoenas. This type of situation is handled individually on a case-by-case basis with the Immigration Judge. For information regarding the issuance of subpoenas, see Chapter 4.20 of the ICPM.

IX. Telephonic Testimony

AILA BACKGROUND: Members report that some judges require respondents to arrange for their expert witnesses to appear at the consulate with acceptable identification, and then require respondents to use a pre-paid telephone card to call the consulate from the court in order to accept the testimony. The judges would not allow the witness to testify if they could not testify from the consulate. We have also received reports that the consulates often charge extremely high fees to make the arrangements, which, when combined with the costs the witnesses must sometimes bear in traveling to the consulate, have prevented witnesses from testifying altogether.

AILA QUESTION: What is EOIR's policy on allowing witnesses who are outside of the country to testify telephonically?

EOIR RESPONSE: OCIJ does not have a policy regarding allowing witnesses who are outside the country to testify telephonically.

AILA QUESTION: If there is not set protocol for handling these situations, would EOIR consider establishing a protocol?

EOIR RESPONSE: OCIJ does not intend to establish a protocol regarding this matter. This type of situation is handled individually on a case-by-case basis with the Immigration Judge. For information regarding telephonic testimony, see Chapter 4.15(o)(iii) of the ICPM.

X. Notices of Appearance / Limited Appearances

AILA BACKGROUND: The issue of limited appearances has been raised by AILA at past liaison meetings. Limited appearances are permitted under Rule 1.2(c) of the Model Rules of Professional Conduct, and encourage pro bono participation and provide greater flexibility for attorneys and clients to agree on the scope of representation based on the client's needs and resources. At the April 2011 meeting, EOIR indicated that it was considering issuing guidance on limited representation. In addition, at the November 2011 liaison meeting, EOIR confirmed, that under Chapter 2 of the ICPM, an attorney who is retained for a bond hearing, but not a master hearing, would be required to file a motion to withdraw in order to be released of his or her obligation to represent the respondent at a master calendar hearing. We believe, however, that this position is at odds with 8 CFR §1003.19(d), which provides that the IJ's consideration of a

custody matter or bond request "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding." *See also*, *Matter of Vargas-Lopez*, A099-577-393, 2009 WL 4639868 (2009) (the BIA agreed with the IJ "that it was not appropriate to admit documents from bond proceedings in removal proceedings").

AILA QUESTION: Given that bond hearings are entirely separate from removal proceedings, would EOIR reconsider its position on limited appearances and revise the ICPM to permit an attorney to limit his or her representation to a respondent's bond proceeding at the outset, without having to file a motion to withdraw? Has EOIR given further consideration to the issuance of guidance on limited appearances?

AILA COMMENT/CONCERN: Cases can lose *pro bono* assistance, especially in detained cases. We could get a lot more representation of detained people if after handling the bond issue, an attorney was not locked to the case.

EOIR RESPONSE: EOIR is considering the issue. EOIR is currently considering limited appearances. EOIR appreciates AILA's feedback regarding when limited appearances should be allowed.

EOIR has been actively considering whether, for purposes of representation, bond proceedings could be considered separate proceedings from an underlying removal proceeding. In general, "under the regulations, there is no 'limited' appearance of counsel in immigration proceedings;" the precedent decisions in the *Matter of Velasquez* and the *Matter of N-K- & V-S-* may present challenges.[6]

Since, there is Board precedent on this issue, EOIR is considering whether to amend the regulations so that practitioners who enter an appearance for a bond hearing will only be considered the practitioner of record until the bond proceeding has concluded. There is no easy fix for this. It will probably have to go through the regulatory process. EOIR is looking for solutions that would be beneficial to everyone.

[6] See *Matter of Velasquez*, 19 I&N Dec. 377, 384 (1986). Specifically, the Board has applied this holding to a case involving an attorney who appeared for a bond hearing but then failed to appear at a hearing related to the removal proceeding. See *Matter of N-K- & V-S-*, 21 I&N Dec. 879 (BIA 1997). In that case, an attorney submitted a notice of entry of appearance form (Form EOIR-28) and indicated on it that it was "submitted in connection with bond-only, and expires in 14 days." *Id*. at 881, n. 1. However, the Board did not consider the attorney's representation to be completed with the bond hearing. *Id*. at 881.