



Department of Justice

STATEMENT OF
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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON
“IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE
IMMIGRATION COURT SYSTEM”

PRESENTED

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Introduction

Mr. Chairman, Senator Grassley, and other distinguished Members of the Committee, thank you for the opportunity to appear before you today to speak about the immigration court system. The Department is taking significant steps to further improve the immigration adjudication system, while managing more than 270,000 pending cases, the largest number the immigration court system has ever encountered.

As background, the Executive Office for Immigration Review (EOIR) administers the immigration court system, composed of both trial and appellate tribunals. The trial level consists of the immigration courts, which a Chief Immigration Judge oversees. Removal proceedings begin when the Department of Homeland Security (DHS) files with the immigration court a formal charging document, called a Notice to Appear (NTA), against an alien. EOIR's immigration judges must first decide whether the alien is removable from the United States based on the DHS charges and then whether the alien is eligible for and merits any relief or protection from removal. The immigration courts are high-volume tribunals that received more than 2.1 million matters, which include proceedings, bonds and motions, throughout the past six years. In Fiscal Year (FY) 2010, the courts received more than 325,326 proceedings, which are spread out among 268 immigration judges in 59 immigration courts. The Department has worked very hard to employ the resources Congress has provided to increase staffing and technology to handle this caseload in coming years.

The appellate level of EOIR is the Board of Immigration Appeals (BIA), which sits in Falls Church, Virginia. The BIA has nationwide jurisdiction and hears appeals of the decisions of immigration judges. The BIA is composed of 15 Board Members, supported by a staff of attorney advisers, and headed by a Chairman. Like the immigration courts, the BIA is a high-volume operation; in FY 2010, the BIA issued more than 33,000 decisions. In addition, the BIA issues binding precedent decisions interpreting complex areas of immigration law and procedure. Either the alien or DHS may file an appeal with the BIA. An alien who loses his or her appeal before the BIA may seek review of that decision in the federal courts. DHS, however, may not seek review of a BIA decision in federal court.

The vast majority of cases pending before an immigration judge today began with an enforcement action by DHS. Therefore, the immigration courts' caseloads are tied directly to DHS enforcement and detention activities. DHS determines both detention space allocations and the filing of charging documents (NTAs), and thus EOIR is in regular and continuing contact with DHS to anticipate and respond to caseload trends. This close coordination is important to allow our two departments to explore additional ways of handling the removal adjudication process more efficiently. This will ensure that we are focusing resources on the highest priority removal cases, those involving individuals with serious criminal convictions and others who pose a danger to our communities.

Pending Caseload

An issue of continuing public interest is EOIR's pending caseload. At the end of FY 2010, EOIR's immigration courts had 262,622 proceedings pending, marking an increase of more than 40,000 proceedings pending over the end of FY 2009. In the first half of FY 2011, that pending caseload grew by an additional 9,400. This caseload is directly tied to annual increases in cases filed in the immigration courts by DHS. In FY 2010, the immigration courts received 325,326 proceedings. By contrast, in FY 2007, proceedings received were 279,430.

The highest priority cases for EOIR are those involving detained aliens. These individuals are often detained by DHS because they have criminal convictions that may make them deportable from the United States. Others are detained because they pose a danger to the community or are a flight risk. Therefore, the efficient and timely adjudication of these detained cases are a high priority for EOIR, as well as for other immigration agencies. In June 2010, DHS announced its civil immigration enforcement priorities as they pertain to the apprehension, detention, and removal of aliens. Those priorities focus on national security, public safety, and border security. As DHS enforcement programs reach their full potential, EOIR is planning ahead and shifting resources to meet the anticipated corresponding increase in the agency's detained caseload.

EOIR anticipates that this emphasis on the removal of criminal aliens and others who pose a threat to public safety will continue as DHS programs such as Secure Communities continue to expand. There are no signs today of the case receipts slowing. In fact, due to the receipt of more than 200,000 matters during the first half of FY 2011, EOIR projects that the case receipts for this fiscal year will top 400,000. Of the case receipts so far this fiscal year, 41 percent are detained cases. Of the cases EOIR has completed in FY 2011, 43 percent were detained cases.

In a world of limited resources, the focus on placing a high priority on the adjudication of detained cases has implications for the non-detained side of the docket, including some cases initiated as a result of persons seeking asylum in the United States. EOIR, however, understands that its mission is the timely adjudication of all cases, detained and non-detained, and therefore continues to maintain goals for completing non-detained cases. These goals are based on both congressional mandate and EOIR management decisions.

Immigration judges – and all EOIR staff – understand the importance of asylum claims and we are working very hard to decide every case as quickly as possible while still giving appropriate time to consider all of the facts of these potentially life-changing cases. While we take seriously our responsibility to decide cases in an expeditious manner, the utmost priority for every type of case is ensuring that every fact is considered and every application of law is correct. To do otherwise would be in opposition to our mission of fair adjudication through uniform application of the Nation's immigration laws.

Hiring

A well functioning immigration court system begins with adequate resources. The Department and EOIR are fully committed to ensuring that the immigration courts have the appropriate number of immigration judges and support staff to make sure that the system operates efficiently, providing prompt adjudication of removal cases while giving each individual case the review that it merits. Since last year, the Department and EOIR have placed a great emphasis on the hiring of new immigration judges in order to address the rapidly rising caseloads caused by increased DHS enforcement.

Since 2008, the process by which EOIR hires immigration judges has changed substantially. Under the current process, EOIR places job opportunity announcements on the Department's website, and on the Office of Personnel Management's federal employment website, www.usajobs.gov. When EOIR advertises an immigration judge vacancy, the Department also notifies more than 120 well-established legal organizations. The multiple methods of announcing these important vacancies help ensure wide dissemination of the announcements to potential applicants with varied backgrounds and the strongest possible qualifications.

As a result of the screening and evaluation process, EOIR interviews the most highly rated candidates. Candidates are evaluated based on the candidate's temperament to serve as a judge, knowledge of the relevant law, experience handling complex legal issues, experience conducting administrative hearings, and knowledge of judicial practices and procedures. At the conclusion of the interviews, the EOIR Director and the Chief Immigration Judge identify the top candidates for each vacancy and they are referred to panels of senior Department officials for further evaluation and interviews. These panels make the final recommendations for selection by the Attorney General. The length of time from when a person applies for an immigration judge vacancy to when an appointed candidate enters on duty has been substantially reduced under the new process, from more than a year in some instances to a few months.

During FY 2010, and into the beginning of the second quarter of FY 2011, EOIR undertook a major hiring initiative that resulted in the hiring of more than 50 new immigration judges. While cut short due to budgetary restrictions on hiring and reduced by attrition, we were still able to net an increase of 36 immigration judges. The initiative involved the hiring of newly authorized immigration judges, which, when filled along with other vacancies, brought our immigration judge corps to a record high of 272 in December 2010. Normal attrition of approximately 10 immigration judges per year will decrease our corps as time goes on, and we are hopeful that Congress will approve President Obama's FY 2012 request for additional appropriations to allow us to continue our successful hiring initiative.

In addition, EOIR is focused on hiring judicial law clerks to assist the immigration judges. Law clerks are hired for two year terms. For FY 2010-11, the number of judicial law clerks in place is 86 and EOIR will be adding an additional 21 by

the beginning of FY 2012. These law clerks are critical to helping the immigration judges manage their large and complex caseloads.

Training

EOIR is proud of the new immigration judge hiring process. I believe, however, that it is not enough to hire the most qualified people – we must also be vigilant in providing new immigration judges with vigorous training before they hear their first case and in continuing to offer training to the entire corps. As such, EOIR established several new training initiatives and continues to work with resources available to ensure such maintenance.

In December 2009, EOIR added a new Assistant Chief Immigration Judge for training. This senior official is responsible for enhancing and maintaining adequate training programs for immigration judges and other court staff. To ensure that they are ready to hear cases fairly and promptly, EOIR now provides new immigration judges with six weeks of training. Further, they are assigned a mentor immigration judge to assist them throughout their first year on the bench. They are also required to take and pass an immigration law exam before they can begin adjudicating cases. A formalized review process is included as part of a new immigration judge's probationary period, which typically lasts two years. If performance issues arise, EOIR offers counseling, and additional training and mentoring before more formally disciplining an immigration judge.

EOIR also goes to great lengths to ensure that both new and experienced immigration judges receive continuing education. In addition to the new immigration judge training described above, EOIR held a legal training conference in the summers of 2009 and 2010. The week-long training conference was mandatory for immigration judges, members of the BIA, and BIA attorney advisors, and covered many substantive legal issues that come before the immigration courts, relating to asylum, criminal issues, bond proceedings, adjustment of status, and many other topics. The conference also covered topics ranging from handling immigration proceedings involving unaccompanied alien children and respondents with mental competency issues to combating immigration fraud and managing a courtroom.

Due to current budgetary restraints, EOIR is turning to its other established methods of training to ensure that we continue to bolster and fine-tune the immigration judges' knowledge.

Accountability

The Department of Justice expects not only legally correct decisions from its immigration judges and Board Members, but also the demeanor and temperament appropriate for delegates of the Attorney General. In March, EOIR released the Ethics and Professionalism Guide for Immigration Judges, which addresses important issues

such as judicial temperament, *ex parte* communications, and professional competence. The Guide will ultimately be a part of the revised EOIR Ethics Manual.

EOIR continues to monitor immigration judge performance through an official performance work plan and evaluation process, as well as EOIR's performance management program and the ACIJ's daily supervision of the courts. EOIR's website now houses a link to a summary of the complaint process, a flow chart and instructions for filing a complaint, and statistics related to the numbers and types of complaints filed and how they were resolved. EOIR remains committed to ensuring that any allegations of misconduct involving immigration judges are investigated and resolved, promptly and appropriately.

Board of Immigration Appeals

The BIA continues to enhance the quality of its decisions while still keeping up with the appellate caseload. One example is the BIA's use of affirmances without opinion (AWOs), which are controversial because they do not spell out the BIA's reasons for its decisions. In 2004, AWOs comprised more than 30 percent of the BIA's decisions. In the past few years the Board has steadily decreased the use of AWOs, to the point that, in March 2011, only two percent of the BIA's decisions were AWOs. At the same time, the BIA has improved the quality of its decisions by ensuring that they set forth the legal bases for the BIA's conclusions, to ensure that parties appearing before the BIA understand why the BIA made a particular decision.

Another mission of the BIA is to publish precedent decisions, which provide guidance to immigration judges and the parties in removal proceedings on the many complex legal issues that arise in these proceedings. The BIA has increasingly emphasized this part of its mandate, publishing more precedent decisions in the past four years than in any similar period since the late 1990s.

These changes at the BIA have been partially responsible for a welcome and declining caseload in the federal courts of appeals in the past three years. In both the 2009 and 2010 year-end reviews on the judiciary, Chief Justice Roberts reported that the workload in the regional courts of appeals declined, in part due to a decline in appeals of BIA decisions.

There are approximately 529 fewer appeals to the federal courts from decisions of the BIA now as compared to a year ago. The most significant decreases have been in the Second and Ninth Circuits, which traditionally have been the courts with the largest immigration caseloads. Overall, the number of BIA appeals going to the federal courts today are about half what they were at the high-water mark in 2005. In addition, the federal courts are affirming BIA decisions at a higher rate now. The percentage of BIA cases reversed by the courts declined from 17.5 percent in 2006 to 11.5 percent in 2010.

The federal court picture is complex, and there are various possible reasons for the decline in the federal courts' immigration caseload. These likely include legal and

procedural changes in the federal courts themselves. However, we believe that one reason for the decline is the changes at the BIA over the past few years outlined above, namely improvements in the clarity and quality of BIA decisions and the decline in the use of AWOs.

Other Initiatives

Legal Orientation Program

EOIR's Legal Orientation Program (LOP) provides information about immigration court proceedings to aliens in detention to help them make more informed and timely decisions about their cases, including assisting them in distinguishing between legitimate and meritless claims for relief from removal. The LOP helps to improve the efficiency of the immigration court and detention processes as well as access to basic legal services for aliens without legal representation. Starting in FY 2003 at six sites, the LOP has continued to expand and local non-governmental agencies are now carrying out the program at 27 sites across the country. In FY 2010, EOIR expanded the LOP to serve all detained aliens in the New York City area. The LOP now provides legal orientation, which includes legal information, self-help assistance, and pro bono referral, to over 60,000 detained aliens per year, amounting to roughly 50 percent of all detained aliens in removal proceedings.

The LOP is also being utilized for certain non-detained aliens who appear in immigration court. For example, last year EOIR launched a pilot program at the Miami Immigration Court. The program uses a local LOP contractor to provide LOP services to non-detained or released individuals with cases before the Miami Immigration Court who (1) have been unable to secure counsel after being given the opportunity to do so; and (2) the immigration judge believes do not understand the nature and purpose of the proceedings, such as those who might be mentally incompetent.

In October 2010, EOIR launched a program to provide legal orientation presentations to custodians of unaccompanied alien children. As authorized under the Trafficking Victims Protection Reauthorization Act of 2008, the purpose of this program is to inform the children's custodians of their responsibility to ensure the child's appearance at all immigration proceedings, as well as protecting the child from mistreatment, exploitation, and trafficking.

EOIR has been working with the Department of Health and Human Services, Office of Refugee Resettlement, and non-government partners to implement the LOP for the custodians program on a national scale. The program was initially implemented in four of the largest program sites, and was recently expanded to an additional nine sites, for a total of 13 sites that will potentially serve up to 75 percent of all custodians.

Digital Audio Recording

The technology available to assist the immigration courts and the BIA in carrying out their responsibilities has improved tremendously in the past few years. EOIR is using a Digital Audio Recording (DAR) system, which replaced the antiquated analog taping system in the immigration courts. DAR is a state-of-the-art recording system designed to achieve better quality and more easily accessible recordings of immigration court hearings. In August 2010, EOIR completed the installation of DAR, which is now in every immigration courtroom nationwide.

Fraud and Abuse

In 2007, EOIR established a Fraud and Abuse Program so that cases of immigration fraud and abuse can be referred to the appropriate investigative agencies for action. The Program's staff is on call to assist immigration court and BIA staff in identifying suspected fraud in immigration proceedings. An EOIR employee is able to refer identified cases to the Fraud Program staff, which reviews the information, conducts preliminary investigations, and forwards those cases with evidence of fraud to investigative agencies. The Fraud Program also receives referrals regarding improper activity by aliens, practitioners, and immigration consultants from many other sources, including the public.

Sanction Authority/Frivolous Filings

A draft EOIR civil money penalties proposed rule that relates to sanction authority in immigration proceedings is currently being developed by the agency. EOIR intends to submit this rule to the Office of Management and Budget for interagency review under Executive Order 12866 in the near future.

EOIR has, however, by way of a final rule effective January 20, 2009, expanded the grounds for disciplining attorneys and representatives who appear before immigration courts or the BIA. The rule also allows EOIR to sanction the parties and counsel for clearly defined categories of gross misconduct.

Budget

The Department continues to seek the resources necessary to hire additional immigration judges, BIA attorneys, and other staff, to provide them with sufficient training and tools and to continue pursuing other improvement measures that will benefit the immigration court system and the parties who appear before EOIR. For FY 2012, the President's budget includes \$329.8 million and 1,707 positions for EOIR, representing an increase of 125 positions (21 immigration judge teams and 10 Board of Immigration Appeals attorney positions). The resources the President requests are essential to our ongoing efforts to recruit, train, and equip top-quality immigration judges and court staff.

Conclusion

Mr. Chairman, Senator Grassley, and distinguished Committee Members, despite the rising caseload and budgetary restrictions that it faces, EOIR continues to make great strides. The EOIR staff – immigration judges, Board Members, attorney advisors, and support staff – are dedicated professionals who work every day to ensure efficient and fair immigration court proceedings, both at the trial and appellate levels. EOIR faces the demands of a large and increasing caseload, but, with Congress' continued support, the Department is confident that EOIR will effectively meet that challenge.

Thank you for your interest and for the opportunity to speak with you today. I am pleased to answer any questions you might have.