

**American Immigration Lawyers Association
EOIR Fall 2014 Liaison Meeting
October 23, 2014 - Minutes**

1. **Update on Hiring Immigration Judges.** Please provide a current time line for the hiring of new Immigration Judges (IJ), both permanent and temporary. At which immigration courts will the new judges be posted?

EOIR Response: It usually takes 10 months to bring on an IJ. EOIR is pleased to announce that there are currently 25 full-time IJ selections in the hiring process or starting after January 2015. EOIR expects two new IJs to begin working in November 2014 – one in Salt Lake City and one in New Orleans. EOIR expects the additional 23 IJs to be working by the spring of 2015. Placement for the 23 IJs who are currently in the hiring process are as follows: 1 in New Orleans, 5 in San Francisco, 3 in Las Vegas, 3 in Newark, 3 in Houston, 2 in New York, 2 in Los Angeles, 2 in Memphis, 1 in Buffalo, and 1 in Salt Lake City. Positions for the 2015 fiscal year have not yet been identified, but EOIR hopes to announce additional hires in FY 2015.

As of this date, EOIR has not hired any temporary IJs and EOIR does not have any specific information as of yet regarding where or when the temporary IJs will be hired.

2. **EOIR Computer System Failure.** We understand the tremendous impact the [hardware failure](#) and system outages that EOIR experienced in April and May 2014 had on EOIR operations, and appreciate the time and resources which were expended to resolve the ensuing problems.¹ However, we note that the EOIR hotline continues to state that information in the system may not be fully updated, and attorneys are concerned that case information was either lost or remains inaccessible because of the outage.

- a. Please provide an update on status of the system failure. Is any data still inaccessible? Was any data lost?

EOIR Response: The computer system has been fully restored to its pre-failure condition. No data was lost and all of the data is accessible. However, EOIR is continuing to work to make the systems more robust. Additionally, attorneys should be able to rely on the information on the EOIR hotline as of the date of the meeting.

- b. Has this situation had any lasting effect on responses to FOIA requests?

EOIR Response: After the hardware failure, response times to FOIA requests were severely impacted and there was a considerable backlog in the 2nd quarter of the fiscal year. However, at this time, responses to pending FOIA requests are mostly caught up and EOIR is back on its normal processing times.

¹ *EOIR Electronic Databases Functional Again (Updated 5/19/14)*, AILA Doc. No. 14041847 (posted 4/14/14), available at <http://www.aila.org/content/default.aspx?docid=48258>.

- c. What is the current processing time for FOIA requests?

EOIR Response: EOIR currently responds to FOIA requests within 21 days on average.

- 3. **E-Registry.** AILA members have reported receiving notifications that their e-Registry accounts will be frozen due to inactivity. Attorneys were not aware that there was a minimal amount of activity required in order to maintain their registration, and the notifications have raised several questions about e-Registry.

- a. How often must attorneys log in to keep their registration current?

EOIR Response: Logging on to the e-Registry account once a year will keep an account current.

- b. Is logging in enough, or must attorneys also file forms through e-Registry to keep the account current?

EOIR Response: Logging in at least once a year is enough.

- c. What are the repercussions of an attorney's account being suspended and how does an attorney get his or her account reactivated after it has been suspended?

EOIR Response: By logging into their accounts annually, attorneys will prevent their account from being suspended. If an account is suspended or deactivated, the attorney can simply click the "contact us" link to get a temporary password. It is important to note that the e-Registry number assigned to an attorney during the initial registration period will never change, so you will not lose your EOIR ID if your account is deactivated. Also, if attorneys have ongoing problems with a deactivated account, they can request assistance by contacting eregistration.info@usdoj.gov. The e-mail address can also be found on EOIR's website by clicking on the "contact us" icon.

- d. Can EOIR disseminate this information publicly and post information about re-registering on its website?

EOIR Response: EOIR will make every effort to notify attorneys of issues with registration and we are currently in the process of adding an FAQ to the website which will address many of these issues.

- e. Please provide an update on EOIR's efforts to update e-Registry to allow changes of attorney addresses, rather than just adding new addresses.

EOIR Response: EOIR anticipates adding the ability to change office addresses, delete old addresses, and cancel e-filings if EOIR has not yet processed the form to the system in the 2nd quarter of FY2015.

- f. AILA members report that filing a new EOIR-28 through e-Registry and checking the box, “new address” produces inconsistent results in updating the attorney address information in the e-Registry system.
 - i. Does EOIR view this as a technology issue, a training issue, or other type of issue?
 - ii. What steps has EOIR taken to address the problem and what is the anticipated timeframe for resolution?
 - iii. Can EOIR please remind all clerks to check attorney addresses when EOIR 28s are submitted?

EOIR Response: EOIR anticipates that the new enhancements to the e-Registry system will correct these issues. Currently, EOIR systems contain a “drop down” list from which court personnel MUST choose the attorney address; the court personnel can no longer manually enter an address. That means that attorneys should put a new address in the e-Registry system so that it appears in the list for the court personnel to use. Beginning in the spring of 2015, attorneys will be able to delete old addresses from their profile, so court staff will not be able to choose the old address. EOIR anticipates that these changes will eliminate these problems.

4. Priority Docket

On July 9, 2014 EOIR released a [press release](#) announcing expedited dockets for recent border crossers.² An accompanying [fact sheet](#) noted that the expedited docket would include unaccompanied children, families held in detention, families who are on “alternatives to detention,” and other detained cases involving individuals who recently crossed the southwest border.³ While we welcome the information provided in the September 10, 2014, EOIR memorandum, “[Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities](#),” some questions remain.⁴

- a. What is the definition of “recent border crosser?” Is there a particular cut-off date for a person to be considered a recent border crosser?

EOIR Response: The Department of Homeland Security (DHS) defines a recent border crosser as anyone who crossed the U.S. border without inspection on or after May 1, 2014. EOIR does not have any input on how DHS defines a recent border crosser.

- b. Who decides whether a respondent is designated as a “recent border crosser?”

² *EOIR Announcement of New Priorities to Address Migrants Crossing into the U.S.*, AILA Doc. No. 14070941 (posted 7/9/14), available at <http://www.aila.org/content/default.aspx?docid=49247>.

³ *EOIR Factsheet on New Priorities to Address Migrants Crossing into the U.S.*, AILA Doc. No. 14070942 (posted 7/9/14), available at <http://www.aila.org/content/default.aspx?docid=49248>.

⁴ *Docketing Practices Relating to Unaccompanied Children in Light of New Priorities*, AILA Doc. No. 14093045 (posted 9/30/14), available at <http://www.aila.org/content/default.aspx?docid=50250>.

EOIR Response: See response to question “a” above. DHS indicates that an individual is a recent border crosser by marking the upper right-hand corner of the Notice to Appear (NTA).

- c. Please confirm that a respondent has the opportunity to file a motion to move a case from the priority docket to the regular docket and that the immigration judge has the power to move a case from the priority docket to the regular docket.

EOIR Response: There is no special docket for cases involving recent border crossers. The only difference between a case involving certain recent border crossers and a regular non-detained docket is the timing for the first master calendar hearing. EOIR will schedule the first master calendar hearing for all UACs within 21 days of DHS filing the NTA and for all families with children within 28 days of the NTA’s filing. After the initial master calendar hearing, these cases will be treated the same as all other non-detained cases, except that dockets are being adjusted so that judges can schedule individual calendar hearings for priority cases appropriately, irrespective if docket time is available on that date. For example, if an IJ continues the individual hearing on a priority case to a date when another hearing for a non-priority case is scheduled, the priority case will take precedence and the non-priority case may need to be rescheduled. IJs can continue the case to the appropriate time.

- d. Are children or other border crossers who arrived and/or were issued a Notice to Appear before the summer of 2014 being placed on the expedited docket or having their hearings moved up?

EOIR Response: EOIR does not make an independent judgment on what cases should be prioritized.

- e. Will EOIR please provide public statistics on the effect of the expedited dockets on the case backlogs at each court?

EOIR Response: In order to provide a response to this question, EOIR encourages AILA to request specific information from our Office of Public Affairs.

- f. What guidance have immigration judges or court staff received since June, 2014 regarding the scheduling of initial master calendar hearings, subsequent master calendar hearings, and individual hearings for unaccompanied children?

EOIR Response: See the September 10, 2014 memo from Chief Judge O’Leary referred to in footnote 4 of the agenda. See response to “part c” above for further information on scheduling of the initial master calendar hearing.

- g. Has EOIR instituted any case completion goals for juvenile cases, or any of the “recent border crosser” docket cases?

EOIR Response: No. EOIR does not anticipate instituting any completion goals for these cases.

- h. While the September 10, 2014 memorandum provides docketing guidance relating to UACs, what guidance or direction has been provided on continuances and docketing for other recent border crossers?

EOIR Response: Cases involving adults with children who DHS releases on alternatives to detention are scheduled for a first master calendar hearing within 28 days of the filing of the NTA. Regarding continuances, see the general guidance provided to Immigration Judges in OPPM 13-01, Continuances and Administrative Closure.

- i. In Absentia Orders. AILA is concerned by reports of in absentia orders issued at initial master calendar hearings for juveniles and UACs. Reports included cases where there was almost no advance notice of the hearing and cases where the NTA was filed in the wrong location. Has EOIR provided guidance to IJs on the issuance of in absentia orders for children/recent border crossers who do not show up for their first master hearing? If so what is the guidance?

EOIR Response: At this time, EOIR has not issued any guidance to IJs on these issues. IJs determine whether to issue an in absentia order in priority cases on a case-by-case basis in accordance with the applicable law and regulations. DHS has also instituted a policy to hold NTAs for 60 days or until the child is reunited with family members in order to determine the correct jurisdiction.

- j. INA §240(b)(5) notes that DHS must establish notice was provided “by clear, unequivocal, and convincing evidence” before issuing an in absentia order. HHS and DHS may move UACs to different addresses several times before releasing children to a guardian, which may cause notice of a hearing to be delayed or sent to the wrong location. In cases where DHS shows that notice was not provided until a short time before a respondent’s hearing date or cases where notice was provided to a previous address, will EOIR encourage judges to consider a continuance to prevent ordering individuals removed who may have received little or no notice of the hearing?

EOIR Response: EOIR has not issued any guidance to IJs on these issues. Immigration Judges determine whether to issue in absentia orders on a case-by-case basis in accordance with the applicable law and regulations.

- 5. Juveniles – Unaccompanied Minors.** According to the [September 10, 2014 memorandum](#),⁵ “Docketing Practices Relating to Unaccompanied Children cases in Light of the New Priorities,” immigration judges are given broad discretion to utilize continuances or administrative closure in Special Immigrant Juvenile (SIJ) cases to allow sufficient time for state or juvenile court proceedings to take place and/or adjudication of the I-360 petition by

⁵ *Docketing Practices Relating to Unaccompanied Children in Light of New Priorities*, AILA Doc. No. 14093045 (posted 9/30/14), available at <http://www.aila.org/content/default.aspx?docid=50250>.

USCIS. Are immigration judges also permitted to terminate proceedings, either at the time the state court makes the necessary dependency findings or after the I-360 is approved?

EOIR Response: EOIR does not issue advisory opinions.

- a. If AILA members are able to negotiate agreements with OCC in individual cases to join in motions to terminate or administratively close proceedings where juveniles are prima facie eligible for SIJ/U or T visa relief (i.e., where the IJ would not have jurisdiction over the application) are there situations where EOIR might refuse to administratively close or terminate?

EOIR Response: EOIR does not issue advisory opinions and has not issued specific guidance to IJs on this issue. EOIR encourages AILA members to work out issues with DHS. These matters are determined by IJs on a case-by-case basis.

6. Family Detention

In July 2014, ICE began detaining women and children in remote Artesia, New Mexico. Artesia is more than three hours from El Paso and Albuquerque. None of the legal services organizations on the EOIR pro bono list are able to provide direct representation to Artesia detainees. Over the past few months, hundreds of AILA members have descended upon Artesia to provide pro bono representation to detainees as they navigate their way through the credible fear and bond processes, as well as in full merits hearings before the immigration court.

Since its inception, systematic due process violations have plagued Artesia, including lack of notice to respondents and attorneys, inadequate video hearing technology, confusing and inadequate filing procedures, and clearly erroneous legal determinations. We appreciate EOIR's willingness to engage in an ongoing dialogue with AILA and other stakeholders regarding these issues and appreciate the steps that have been taken to improve the process, including assigning the Artesia docket to immigration judges in Denver. However, we remain concerned that due to the very nature of the expedited procedures and insufficient resources, the families detained at Artesia, as well as those detained at Karnes, Berks, and those soon to be detained at the new facility in Dilley, will be removed without the benefit of full due process protections.

- a. What guidance has EOIR issued since June 2014 on handling immigration cases originating at the Artesia, NM hearing location, including guidance or policies related to processing negative credible fear determinations, providing notice to attorneys or respondents, setting bonds, granting continuances, lengths of continuances, etc.?

EOIR Response: Artesia was considered a hearing location, and not a court. On December 18, 2014, the DHS closed the Artesia facility. Accordingly, EOIR is no longer hearing Artesia cases.

- b. Has EOIR instituted any case completion goals for cases that originate in Artesia or other cases that originate in family detention facilities?

EOIR Response: No. See above response regarding closure of the Artesia facility.

- c. What steps is EOIR taking to bring the VTC technology in the Artesia courtroom in line with the VTC technology in other courtrooms?

EOIR Response: See above response regarding closure of the Artesia facility.

7. Non-LPR Cancellation of Removal

- a. **Post-trial Evidence.** In non-LPR cancellation of removal cases where there has been a final merits hearing and where the record has been closed in accordance with OPPM 12-01,⁶ what is the process for reopening the record to file new evidence?

EOIR Response: There is no specific process to reopen the record of proceedings in these cases; attorneys should file motions in accordance with the Immigration Court Practice Manual. IJs rule on all such motions on a case-by-case basis.

- b. **Age-out of the Qualifying Relative Child.** Under *Matter of Isidro*, 25 I&N Dec. 829 (BIA 2012), a child who ages out may no longer serve as a qualifying relative for cancellation purposes. As a result, in some cases, particularly those where the child is the only qualifying relative, relief will be completely eliminated. Unlike situations where the qualifying relative suddenly dies, the date a child will age-out is known and can be predicted well in advance of the age-out date. Will EOIR consider revising OPPM 12-01 to allow judges to prioritize cases where it is clear that the qualifying relative will age-out if the case is put into the queue pending issuance of a visa number?

EOIR Response: EOIR understands the issue raised in this question and will take this under consideration.

8. **Mentally Incompetent Respondents.** AILA applauds the [April 22, 2013 DOJ and DHS announcement](#)⁷ of a nationwide policy for unrepresented detainees with serious mental disorders, and the release of EOIR's [Phase I Guidance](#)⁸ on the implementation of its plan to provide protections for these detainees. We appreciate EOIR's continuing work on the issue and we look forward to the full implementation of the policy. The Phase I Guidance states that EOIR will provide a qualified legal representative to any detained, unrepresented alien in

⁶ *Procedures on Handling Applications for Suspension/Cancellation in Non-Detained Cases Once Numbers are no Longer Available in a Fiscal Year* (February 3, 2012), available at <http://www.aila.org/content/fileviewer.aspx?docid=43942&linkid=260018>.

⁷ *DOJ/DHS Announce Safeguards for Immigration Detainees with Serious Mental Conditions*, AILA Doc. No. 13042253 (posted 4/22/13), available at <http://www.aila.org/content/default.aspx?docid=44125>.

⁸ *EOIR Publishes "Phase I Guidance" Regarding Protections for Detained, Unrepresented Aliens Who May Be Mentally Incompetent*, AILA Doc. No. 13123160 (posted 1/2/14), available at <http://www.aila.org/content/default.aspx?docid=46907>.

a removal or custody redetermination proceeding found to be incompetent to represent him or herself.

At the [December 12, 2013 AILA/EOIR liaison meeting](#),⁹ EOIR informed AILA that it was currently providing representation to such detainees in Washington, California, and Arizona, and that other locations would be added on a rolling basis, starting with Miami, Denver, Houston, and El Paso.

- a. Please provide an update on the roll-out plan. What other cities have been added? Does EOIR have a target date for the completion of the rollout?

EOIR Response: EOIR has not added any cities to the current locations as of this date.

- b. In how many cases has counsel been provided to date? Please provide those numbers by detainee location.

EOIR Response: As of January 26, 2015, under the National Qualified Representative Program (“NQRP”), EOIR had assigned Qualified Representatives in 280 total cases across the following facilities: Adelanto, Orange County (Theo Lacy Facility and James Musick Facility), CCA San Diego, San Francisco, Eloy, Florence, and Tacoma NWDC.

Also at the December 12, 2013 meeting, EOIR indicated that it is working with current LOP providers to identify and select qualified representatives to take on these cases.

- c. Could EOIR share the criteria in selecting those representatives?

EOIR Response: Qualified Representatives who participate in the NQRP are selected by the Vera Institute of Justice, a GSA contractor who has contracts with NGOs and a few law firms to provide Qualified Representatives. Priority is given to nonprofit organizations. Vera looks at a number of different factors, including the organization’s demonstrated experience in detained removal defense and working with people with mental disabilities, its capacity to connect clients to community-based mental health resources and otherwise to provide holistic services, and its ability to provide NQRP services in a cost-effective manner.

- d. Is there a mechanism through which interested attorneys can make themselves available to EOIR for these cases?

EOIR Response: The NQRP, at present, is meeting capacity with its Qualified Representative Providers. Interested parties may contact the Vera Institute of Justice for more information about how Vera selects Qualified Representatives.

⁹ See *AILA/EOIR Liaison Meeting Minutes (12/12/13)*, AILA Doc. No. 14031743 (posted 03/17/14), available at <http://www.aila.org/content/default.aspx?docid=47818>.

- e. If an attorney is appointed to represent a detainee under these circumstances, will the government pay that attorney a fee for the legal services?

EOIR Response: Yes, where the government orders the provision of a Qualified Representative, the government pays for the services provided by the Qualified Representative.

- 9. EOIR Pre-Trial Pilot Program.** In the past year, EOIR launched a pre-hearing pilot project to encourage parties to resolve as many issues as possible prior to individual hearings.¹⁰ We understand that the pre-trial pilot program has been expanded to additional courts. Please provide a current list of the courts utilizing the pre-trial pilot program. Does EOIR view the pilot program as a success thus far? What pros and cons have been revealed? Has there been a noticeable reduction in case backlogs in those courts?

EOIR Response: On balance, the pilot program has been a success. For example, there has been an increase in stipulations, which has resulted in shorter, more efficient hearings and better use of court time. While most of the results were very positive, there was also an increase in the time required by court personnel to manage dockets. The Pilot has been implemented in the Bloomington Immigration Court and expanded to the following courts: Denver, El Paso, and Omaha. At this time, EOIR continues to review this program.

- 10. Credible Fear Procedures in the UDSM.** 8 CFR § 1003.42(a) requires DHS to file a copy of the Asylum Officer's written record of determination with Form I-863, Notice of Referral to Immigration Judge when the alien has requested review of an adverse credible fear finding.¹¹ INA § 235(b)(1)(B)(iii)(II) defines the written record of determination as "a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of such facts, the alien has not established a credible fear of persecution." It goes on to note that a "copy of the officer's interview notes shall be attached to the written summary."¹²

The Uniform Docketing System Manual (*UDSM*) lists the documents that comprise the written record of determination as follows: Form I-863; Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867AB); Notice of Expedited Removal (Form I-860); Record of Negative Credible Fear Finding and Request for Review

¹⁰ See *AILA/EOIR Liaison Meeting Minutes (4/10/14)*, AILA Doc. No. 14082243 (posted 8/22/14), available at <http://www.aila.org/content/default.aspx?docid=49873>; *AILA/EOIR Liaison Meeting Minutes (12/12/13)*, AILA Doc. No. 14031743 (posted 3/17/14), available at <http://www.aila.org/content/default.aspx?docid=47818>.

¹¹ 8 CFR § 1003.42(a) ("Jurisdiction for an Immigration Judge to review an adverse credible fear finding by an asylum officer pursuant to § 235(b)(1)(B) of the Act shall commence with the filing by the Service of Form I-863, Notice of Referral to Immigration Judge. The Service *shall also file* with the notice of referral *a copy of the written record of determination* as defined in § 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.") (emphasis added).

¹² Additionally, 8 CFR § 1208.30(g)(2)(ii) states "The record of the negative credible fear determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based *shall be provided to the immigration judge* with the negative determination." 8 CFR § 208.30(g)(2)(ii) (emphasis added).

by Immigration Judge (Form I-869); and Record of Determination/Credible Fear Worksheet (DHS APSO Form E).¹³ However, the UDSM states, “The I-863 can still be accepted even if it is not accompanied by the I-860, I-869 or the DHS APSO Form.”¹⁴ Will EOIR amend the *UDSM* at X-4 to reflect that clerks may not docket or schedule a credible fear review hearing until the complete “written record of proceeding” has been filed with the immigration court as required by the statute and regulations?

EOIR Response: EOIR will review this issue further.

11. Physical Restraints and Civilian Clothing for Detained Respondents in Hearings. AILA members report that respondents who are subject to ambulatory physical restraints by ERO or who are assigned jump suits indicating a “high risk” custody classification can be unfairly prejudiced by such attire when they appear at bond hearings or merits hearings. Pursuant to the settlement agreement in *De Abadia-Peixoto v. U.S. Dept. of Homeland Security*, No. 3:11-cv-4001 RS (N.D. Cal. Jan. 30, 2014), ICE has agreed to not restrain detained respondents at bond or merits hearings in the San Francisco court.

Physical restraints impact respondents’ ability to interact with counsel, to raise their hands to be sworn, and to interact physically with their surroundings as may be necessary. Similarly, physical restraints impact how they may be viewed by the judge and can therefore have a prejudicial impact on the case. EOIR has security guards at most, if not all, immigration courts. To the extent a court or facility has security staff in place, will EOIR consider implementing a nationwide policy similar to that which was agreed to in *De Abadia-Peixoto*?

EOIR Response: EOIR does not have control over physical restraints for detained respondents and cannot comment on an issue not within its control. The security of respondents is the sole responsibility of DHS.

¹³ See *UDSM* at I-5.

¹⁴ See *UDSM* at X-4.

OCAHO Agenda:

Opening Remarks:

AILA: A lot of these questions are ones we have had before, but they keep coming up because of priorities from our constituents. We are hopeful that continued talks will help us meet in the middle. More dialogue leads to more solutions.

OCAHO: We have made a number of changes in response to AILA's requests, but we do have some legal and ethical constraints on what we are able to do.

Questions:

- 1. Please provide an update on the status of the hiring and training of new OCAHO judges.**

OCAHO Response: A contingent offer has been extended to a new Administrative Law Judge (ALJ). After the new ALJ enters on duty, the ALJ will receive substantive and on-the-job training, as well as the statutorily required anti-discrimination training. I am currently not at liberty to disclose the name of the new ALJ, but we will announce it once we have clearance.

AILA: What is the plan for the division of cases?

OCAHO: We have not decided yet, but it is something we are considering; currently, we are focused on the onboarding process.

- 2. An index of CAHO decisions separate and apart from ALJ OCAHO decisions would be very welcome. Would OCAHO consider posting a separate index on the EOIR website?**

OCAHO Response: We agree that demarcating Chief Administrative Hearing Officer (CAHO) decisions separately from ALJ decisions in OCAHO's index of decisions would be useful. We are in the process of considering how best to do this on the EOIR website. We are also continuously evaluating our other public case research tools (including our Cumulative Topical Index) to explore possible improvements, and we welcome AILA's continued suggestions and ideas toward this end. We are issuing two new CAHO decisions which will be published shortly.

AILA: Are they A or B decisions?

OCAHO: They are [Section 274] A decisions, as there is no CAHO review of Section 274B cases.

3. In light of the decisions issued in the past year relating to employer compliance and verification, what are the most important issues (emerging or otherwise) that employers should be aware of?

OCAHO Response: OCAHO cannot issue advisory opinions or give legal advice. This question would be better addressed to U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement (ICE), and/or the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC).

AILA: Are there any new issues you see arising?

OCAHO: As an adjudicator, I cannot really comment on emerging legal issues, but I encourage AILA to contact ICE and/or OSC, because as prosecutorial agencies they would be in a better position to discuss those issues.

AILA: What is your caseload looking like?

OCAHO: Our caseload is holding steady and is relatively the same as it was in 2013, with a slight increase in B cases.

AILA: It seems like the issuance of published decisions has decreased?

OCAHO: There was a marked increase in completions in Fiscal Year 2013 and there are a number of published decisions coming out soon.

Burlington Finance Center

4. Please describe the circumstances, if any, as to when the Burlington Finance Center and [sic] alter/amend OCAHO fines.

OCAHO Response: OCAHO cannot issue advisory opinions. Issues regarding alteration or amendment of OCAHO fines are dealt with on a case-by-case basis. Questions related to the Burlington Finance Center should be addressed to ICE.

5. If an employer wishes to negotiate a payment plan, must that be done through the Burlington Finance Center or are there alternative means?

OCAHO Response: OCAHO cannot issue advisory opinions. Issues regarding payment plans in specific instances are dealt with on a case-by-case basis. Questions related to the Burlington Finance Center and payment plans outside the adjudicatory context should be addressed to ICE.

AILA: Since fines may be discussed by the parties during multiple stages of the case (before the Notice of Intent to Fine (NIF), after the NIF, and both before and after the order), there is a little confusion as to when negotiations can and cannot be done. Are there any specific rules for when a fine can be negotiated?

OCAHO: Within the adjudicatory context, fines are handled on a case-by-case basis. The Administrative Law Judge often encourages agreements between the parties on payment plans. We cannot speak for ICE and how the Burlington Finance Center handles negotiations on fines and/or payment plans.

Alternate Dispute Resolution (ADR)

6. Are separate dispute resolution proceedings (arbitration or mediation) permissible in Section 274a or 274b proceedings before or in lieu of a hearing before an OCAHO judge? DOJ is very supportive of ADR.

OCAHO Response: OCAHO is always amenable to parties' efforts to resolve disputes in a case. OCAHO does not currently have a process or funding for formal mediation or arbitration proceedings. However, a process for referral to a "settlement ALJ" could be possible once the new ALJ enters on duty, caseload and resources permitting.

AILA: Sometimes the only issue in a case is the amount of the fine, whether the employer can pay, and how they are going to pay. There was an ADR pilot program that was successful in federal court. Would this be of interest?

OCAHO: Absolutely. We are very supportive of ADR and are open to looking into it. AILA is welcome to forward information about other ADR programs to us.

Review of Agency Guidance

7. AILA notes that agencies publish guidance that sometimes conflicts with that of other agencies relating to employment verification and workplace discrimination. Understandably, this creates confusion for employers and the general public. Will OCAHO consider a review of other agencies' guidance prior to publication?

OCAHO Response: No. OCAHO is careful not to discuss with the U.S. Department of Homeland Security (DHS) or OSC specific legal issues that could arise in cases, in order to avoid any appearance of *ex parte* communications. As mentioned previously, OCAHO does not issue advisory opinions; instead, it addresses specific substantive legal issues solely through its written decisions on a case-by-case basis.

Request for Publication

8. Within the past couple of years, OSC has sent correspondence to OCAHO requesting publication of at least four previously unpublished non-precedent orders, as well as some issued in prior years (see attached).

- a. Can OCAHO confirm if other requests were made, and if so, when and for publication of which orders?
- b. If any such requests have resulted in publication, and hence precedent, can these publications please be identified?

OCAHO Response: To our knowledge, requests for publication have been made by OSC in two cases in recent years. OSC requested publication of unpublished orders in *United States v. Rose Acre Farms*, OCAHO no. 12B00088. OCAHO declined to publish the *Rose Acre Farms* orders. OSC also requested publication of two documents in *United States v. Life Generations Healthcare*, OCAHO Case No. 11B00136. The first request was for publication of an interlocutory order resolving several pending motions. OCAHO declined to publish the order in response to this request. The second request was for publication of the final decision, *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227 (2014). OCAHO had already published this decision on its own initiative by the time it received the request for publication. Thus, no requests by OSC for publication have yet resulted in publication of a precedent decision.

- c. Please explain the process for requesting publication of an unpublished decision, including any limitations on who may request publication.
- d. What criteria or factors does OCAHO consider when deciding whether to grant a request to publish?

OCAHO Response: Requests for publication may be made to OCAHO in accordance with the procedural rules governing motions and requests in 28 C.F.R. Part 68. As with any other case-related documents and filings, a copy of such request must be simultaneously served on all other parties in the case. The decision to publish a given order will be made on a case-by-case basis. As a general matter, OCAHO continues to follow its revised publication policy, as articulated at previous AILA Liaison Meetings, and publishes all substantive decisions and orders, whether interlocutory or final.

AILA: Are you going to do any retro-active publishing of decisions that were previously issued?

OCAHO: No, we do not plan on going back to publish old decisions.

AILA: What guidance can we give our members when OSC makes a request for publication?

OCAHO: We review requests for publication under our publication policy, but do not necessarily publish decisions in response to those requests.

9. Access to OCAHO Pleadings

a. Will OCAHO publish notice of all hearings, meeting, etc. for all cases?

OCAHO Response: In response to AILA's previous request, OCAHO now publishes all notices of public hearings scheduled in OCAHO's cases. Accordingly, OCAHO posted a Notice of Hearing on its website for its last scheduled hearing and then posted another notice when that hearing was canceled. We plan to continue this practice.

b. Will OCAHO provide access to all pleadings in cases without the need of a FOIA?

OCAHO Response: As an administrative agency, OCAHO's systems of records are subject to the Privacy Act. Generally, this restricts our ability to disclose publicly certain privacy-protected information, such as Social Security numbers, alien numbers, or confidential personnel or medical information. This also limits OCAHO's ability to provide full public access to its docket and requires Freedom of Information Act (FOIA) screening to redact information exempt from disclosure.

AILA: We are hoping to work together to resolve issues with the FOIA process. If it takes a year to get the requested information through the FOIA process, that information is no longer relevant.

OGC: The average processing time for a FOIA request for a single case is 18 days. Larger FOIA requests (for example, for 10 years of records) will take longer.

AILA: OSC will sometimes selectively share unpublished orders, but private attorneys do not know the context of those orders without access to the other pleadings.

OCAHO: We are now including the names of the parties' attorneys on our published decisions. Perhaps you can reach out to those attorneys for additional information or documents.

c. May a party rely on orders and decisions not published, and if not, what actions does OCAHO take against a party whose argument is based on unpublished decisions?

OCAHO Response: No, only published decisions are precedential; thus, only published decisions may be relied upon by parties in OCAHO cases. The action(s) OCAHO might take against a party whose argument is based on unpublished decisions is determined on a case-by-case basis.

Closing Remarks:

OCAHO: Our e-filing pilot is underway and we are sending out invitations in every case and encouraging participation. We are exploring options for a permanent electronic filing program and are excited to be moving forward with this initiative.

AILA: We are sure some of the same questions will continue to re-surface, but we appreciate your openness.

OCAHO: We understand your concerns and do not take them lightly.