AILA / San Francisco EOIR Liaison Questions for meeting on March 4, 2009

1. Can the Court provide AILA NorCal with an updated contact sheet for the Immigration Judges and their clerks? The most recent contact sheet we have is from March 1, 2007.

   Yes, the court will provide an updated copy as of January 2009, and will also post the updated list on the court website.

2. What is the status of cases that were previously assigned to Immigration Judge Proctor?

   The majority of Judge Proctor's caseload was assigned to incoming replacement Print Maggard. We are still awaiting a start date for Print Maggard.

3. What is the status of cases that were assigned to Immigration Judge Simpson, but which he did not complete prior to his retirement?

   Cases which were not completed by Judge Simpson and had previous testimony are now assigned to Judge Griswold. These cases have already been scheduled for master calendar hearings. Also, for efficiency purposes we are requesting transcripts of the previous hearings and those are being served on the parties.

   Any remanded cases that were before Judge Simpson will be randomly assigned to other judges.

4. Can you give an update on the status of the proposed amendment to the pro bono master calendar procedures? This amendment would allow pro bono attorneys (who have verified their status as a pro bono attorney with the San Francisco pro bono Attorney of the Day) to present their pro bono case ahead of non-pro bono cases at a master calendar, regardless of where their name appears on the Court's master calendar sign-in list. At the last liaison meeting, the Court stated that the amendment was acceptable but not yet implemented because of competing priority projects. When does the Court expect to implement this amendment?

   The proposal was discussed with the judges, and it was agreed that the court will implement this new procedure on April 1, 2009 for a period of six months, with one caveat, as described below. After the trial period, we will reassess the results and decide whether the procedure will be implemented on a permanent basis or not.

   <u>Caveat</u>: the judges have agreed to this proposal on the condition that any dispute in court as to whether an attorney is a pro bono attorney who can jump the line must be resolved among the attorneys themselves. The judges and court staff are <u>not</u> to be asked to resolve any such disputes and will not do so. Rather, if any disagreement arises, the court will simply revert to the next attorney on the list.

5. Recently attorneys for DHS have begun to bring their laptops to Court, and they are connected to their office network. Is it possible for members of the private bar to have an Internet connection from their laptops in Court also? AILA members have reported that in some hearings the Assistant Chief Counsel has clearly obtained information from the Internet during direct examination that is later used for cross-examination. If the Internet connection is being used by the Office of the Chief Counsel in this way it would be appropriate for the private bar to also have the ability to connect to the Internet.

Yes, according to Practice Manual Chapter 4.13, laptop computers are permitted to be used in the courtroom as long as they are in silent mode, any audio or video recording function is turned off, and they do not disrupt the hearing. Parties wishing to connect to the internet must provide their own connection via Wi-Fi or some other type of wireless system.

6. Does EOIR require the three most recent federal income tax returns for an affidavit of support? The new affidavit of support forms explicitly state that only the most recent year of federal income tax returns is necessary. If EOIR does require three years of tax returns, what is the authority to do so?

   EOIR does not have a policy requiring three years of tax returns. With regard to the number of tax returns, the San Francisco judges will generally not require more than is stated on the instructions for the I-864. According to those instructions, "You must provide either an IRS transcript or a photocopy from your own records of your Federal individual income tax return for the most recent tax year. If you believe additional returns may help you to establish your ability to maintain sufficient income, you may submit transcripts or photocopies of your Federal individual income tax returns for the three most recent years." Of course, the judge may require additional documentation in particular cases.

7. Does EOIR require medical exams submitted with an application for adjustment of status application to have occurred within one-year prior to the date of adjudication / final adjustment hearing? CIS accepts medical examinations so long as they have been completed within in one year of the filing of the medical examination with the agency. See Aytes Memorandum, January 7, 2008, re Extension of Validity of Medical Certifications on Form I-693, HQ 70/21.1.1-P. If EOIR's requirement is different from the CIS requirement, what authority is the EOIR using for this requirement? Please note that EOIR regulation at 8 C.F.R. § 1245.5 states: "the medical examination must have occurred not more than 1 year prior to the date of application for adjustment of status."

   The Office of Chief Counsel has informed us that from now on it will follow the practice or policy that CIS follows. A copy of the Aytes memo will be provided to the judges for reference in individual cases, as appropriate.

8. If both parties agree to a written order, in what situation could the appearance of the parties be waived to receive the order?

   The determination whether to waive a party's appearance is best left to adjudication on a case-by-case basis.

9. What are the case completion goals and which cases are subject to those goals? Do Immigration Judges have incentives to meet those goals, or consequences if they do not meet those goals?

   This is a question best addressed through the national AILA-EOIR liaison committee.

10. Now that the Court is using the digital recording system, what is the procedure for AILA members to listen to the recording of the hearing?

As a result of the conversion to digital audio recording (DAR) the Court now splits the cases into three groups: 1) cases recorded solely on audio tape, 2) cases recorded initially on audio tapes, with hearings held since 9/08 recorded on DAR, and 3) cases recorded solely on DAR. Parties with cases falling into groups 1 or 2 may still make arrangements to come to the court and listen to the audio tapes on a court recorder. Alternatively, they can request copies of the tapes be made by providing blank cassette tapes. For all DAR recordings (groups 2 and 3), the Court is unable to allow the parties to sit and listen to the DAR recordings at the court due to computer security issues. Instead a CD copy of the recorded hearing will be provided to the requesting party. Parties may request a copy of the CD and/or make arrangements to listen or have copies made of recorded audio taped proceedings via email to the sfropreview@usdoj.gov address or in person by filling out the File Review form located at the front counter. The Court will strive to meet all requests within a two-day window. Please refer to the Practice Manual, Chapter 1, Section 1.6.

11. For attorneys who are breast-feeding, will the Court provide a private space where the member can pump breast milk? If so, how should the member contact the Court to request use of this space?

Arrangements should be made through Maria Jauregui, Court Administrator or Scott McDaniel, Deputy Court Administrator. Requests for accommodations can be made via email or phone. Please submit your request at least two days prior to the date you will need the room.

Questions regarding the Practice Manual

12. The Immigration Court Practice Manual states that: "... The Immigration Judge may render an oral decision at the hearing's conclusion, or he or she may render an oral or written decision on a later date." ICPM § 4.16(g). If the decision is rendered on a later date, is there a policy regarding how long the Judge may take to issue the decision? If so, what is the policy?

OCIJ encourages judges to issue decisions promptly. When the decision is to be issued in writing, this is addressed in OPPM 93-1, Immigration Judge Decisions and Immigration Judge Orders.

13. What submissions must be consecutively numbered? Do all pages within all submissions need to be consecutively numbered? If not, what pages do not need to be numbered? Do motions need to be numbered consecutively to submissions of evidence?

We understand this is an area of confusion and the Practice Manual committee is currently reviewing the comments we have received. Meanwhile, attorneys should use their best judgment in following Chapter 3.3(c)(iii). Remember, however, that all pages of every exhibit should always be paginated.

14. Is there any further advice that the Court would like to give to our members about complying with the filing requirements of the Practice Manual? Are you seeing common or recurring filing mistakes, or practices that do not comply with the Practice Manual?

The Court notes that the parties have made vast improvements in filing documents in accordance with the rules outlined in the Practice Manual. Errors in filings are now

infrequent. We are happy to report that attorney compliance with the Practice Manual has had a positive impact on practice before the court. For example:

- *Court clerks can work more efficiently. For instance, the new proposed order has reduced the time clerks need to prepare orders for the judges.*
- *Documents are being routed more quickly and accurately thanks to the new cover page.*
- *Filings submitted to the Court are more organized – the pagination and tabs save time in court by helping everyone be on the same page quickly, and help the judges prepare efficiently for the hearings.*
- *We have had less confusion at the window about procedures, and no complaints about the differing procedures between different courts.*
- *When parties have questions, the court staff appreciate being able to refer the party to the relevant sections of the Practice Manual.*

There are three areas that still provide some trouble for attorneys filing with the court:

- *Motions to Substitute Counsel / E-28 (Chapter. 2.3(i))*
  Attorneys are reminded that at any time a respondent is already represented, and a new attorney wishes to enter the case, review the court's file, file a motion to reopen or recalendar, etc. a motion to substitute must accompany the E-28 and other motions being filed. Until the IJ has decided it is appropriate for the new attorney to substitute for the former attorney, the new attorney will not have access to the case. Attorneys should also make sure to familiarize themselves with the provisions on multiple representatives in Chapter 2.3(e), and appearances on behalf of another attorney in Chapter 2.3(j).

- *Pagination (Chapter 3.3 (F)(iii))*
  Attorneys are reminded that all filings with the Court must be paginated.

- *Proposed Orders (Chapter 5.2 (b))*
  Attorneys are reminded that every motion filed with the Court must be accompanied by a proposed order. We strongly urge you to use the sample proposed order included in Appendix Q of the Practice Manual, unless it simply does not fit the nature of your motion.

<u>Questions about the new EOIR Professional Conduct Rules and Procedures</u>

15. Has the local EOIR office received any training or guidance on how to implement the new rules?

EOIR provides on-going training on a national and local basis for our Immigration Judges for the effective performance of their jobs, and this will include training on the new regulations. With regard to the corps of adjudicating officials, training has already been provided and will be ongoing.

16. What outreach about the new rules will EOIR conduct at the local level with attorney organizations, stakeholder organizations, and state and local bar associations and state attorney discipline bodies?

This is a question best addressed through the national AILA-EOIR liaison committee.

17. From what other agencies will the EOIR in San Francisco draw the administrative law judges that will participate in the "corps of adjudicating officials" that will adjudicate disciplinary complaints?

OCIJ has selected adjudicating officials from judges within EOIR, including both Immigration Judges and an OCAHO judge. No adjudicating official will hear an attorney discipline case in which the practitioner has appeared before that adjudicating official's court.

Other topics:

18. A member has a client who entered the United States without inspection who filed an affirmative application for asylum. The application was referred to the Immigration Court as an expedited case, and the denial was not based on failure to file within one year. At least one IJ in San Francisco takes the position that the applicant has the burden of proving the application is filed within one year, and, until that is shown, the application is for withholding only. The IJ's interpretation of the posture of the application may or may not be correct, and at this time AILA is not taking a position on that issue. However, the question that we would like to raise with EOIR is how this determination affects the asylum clock. In this case, the attorney requested a fast-track hearing. The IJ refused to do so and set the matter to a regular hearing under a code that stopped the clock. This was done without giving the applicant an opportunity to provide evidence on the one-year issue in an expedited hearing.

    We believe that the proper course of action would be for the Judge to schedule a fast-track hearing, at least on the one-year issue. We believe that this may be a training issue that could be addressed through liaison.

    This question raises issues that are best addressed on an individual basis. If a party believes that the asylum clock was incorrectly stopped in a particular case, the first step is to try to resolve the issue locally with either the Immigration Judge or the Court Administrator and thereafter with the Assistant Chief Immigration Judge. If the case is on appeal to the Board of Immigration Appeals, the request should instead be addressed to the Office of the General Counsel.

19. In situations where a respondent has different avenues for relief but just one of them is likely to be dispositive of the case, some Immigration Judges require that all possible applications for relief be filed at the same time and one merits hearing be set for all applications. This is required even though the dispositive application may be the simplest application both to prepare and to present to the Court.

    To illustrate, a respondent has a referred application for asylum pending with the Court, but respondent is also eligible for renewal of Temporary Protected Status (TPS) application before the Court. The TPS application was denied because of failure to take fingerprints.

The client's first preference for relief is to renew his TPS application and, if approved, request administrative closure. It is the member attorney's position that the Immigration Judge's determination of the TPS application will require a determination of continuous physical presence and whether there are convictions that would bar relief. In this particular case the Government has not raised any other issues of ineligibility, such as persecutor of others.

It seems from AILA's perspective that it would serve judicial economy and save government resources (DOJ and DHS) to have an initial hearing on the TPS application and proceed with the case according to the outcome of that application. This certainly would save our client significant resources in paying for an attorney to prepare and present an application for asylum.

While some IJs proceed in this manner, others require the respondent to submit and prepare all applications for relief for a merits hearing on all applications. We believe this may be a training issue that could be addressed through liaison.

This question raises issues that are best addressed on a case-by-case basis and should therefore be raised before the judge in a particular case. The ACIJ for San Francisco will raise this as an item for discussion among the judges of the San Francisco court.

20. When removal is contested, some IJs require submission of all applications for relief prior to ruling on a motion to terminate.

It seems from AILA's perspective that it would serve judicial economy and save government resources (DOJ and DHS) to have an initial hearing on the issue of removability. Alternatively, some motions to terminate require determination of purely legal issues and the Immigration Judge could make a ruling on the briefs, and, only if the motion is denied, require filing of the applications for relief.

This certainly would save our client significant resources in paying the filing fee to U.S. Citizenship and Immigration Services, and for an attorney to prepare and present applications for relief prior to a determination of whether relief is necessary. As you know, an application for relief may cost as much as $2,365 in filing fees alone (245(i) adjustment).

This is of particular concern when the motion to terminate is based on a motion to suppress the contents of form I-213. While statements on an application for relief cannot be used to determine removability, it compromises the posture of the motion to suppress to require the respondent to submit the application for relief prior to ruling on removability.

We believe that this may be a training issue that could be addressed through liaison.

This question raises issues that are best addressed on a case-by-case basis and should therefore be raised before the judge in a particular case. The ACIJ for San Francisco will raise this as an item for discussion among the judges of the San Francisco court.