

AILA-EOIR LIAISON MEETING AGENDA QUESTIONS AND ANSWERS
October 28, 2009

I. REGULATORY ISSUES AND GENERAL EOIR ISSUES

1. On June 3, 2009, the Attorney General vacated *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (AG 2009), and directed EOIR to apply previously established standards regarding ineffective assistance of counsel (IAC) claims, pending further rulemaking. *See Compean II*, 25 I&N Dec. 1 (AG 2009).
 - a. What progress has EOIR made with undertaking rulemaking relating to IAC?
 - b. Will proposed regulations codify the current procedures as outlined by *Matter of Lozada*, 9 I&N Dec. 637 (BIA 1988) and *Matter of Assad*, 23 I&N Dec. 553 (BIA 2003), or will they further revise the handling of IAC claims to incorporate issues identified by the Circuit Courts (e.g., equitable tolling)?
 - c. What steps has EOIR taken to either solicit or incorporate comments from stakeholders regarding presentation and handling of IAC claims in this context?

RESPONSE: EOIR is in the process of drafting the proposed regulation with input from other Departmental components. Upon publication of the proposed rule in the Federal Register, all stakeholders will have an opportunity to provide comments on the proposed rule during the notice and comment period.

2. On September 25, 2008, the Attorney General remanded *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) for “reconsideration of the issues presented with respect to asylum claims related to domestic violence.” *See R-A- II*, 24 I&N Dec. 629 (BIA 2008).
 - a. Have all cases with domestic violence-related asylum claims previously held in abeyance at the Board been remanded for further proceedings?

RESPONSE: No.

- b. What guidance has been provided to the immigration courts with respect to how to proceed with these cases on remand?

RESPONSE: No guidance has been issued apart from the Attorney General’s decision.

- c. Does the Board plan to issue a precedent decision and or other guidance as to pending and future domestic violence-related asylum claims, and if so, when?

RESPONSE: The Board cannot comment on any pending matters.

3. On July 24, 2009, a group of community organizations, attorneys, mental health professionals, and physicians, including AILA, asked the Attorney General to make reasonable accommodations to ensure basic fairness for people with mental disabilities appearing before the immigration courts. The recommendations included (1) appointment of counsel for indigent people who have mental disabilities; (2) appointment of guardians *ad litem* to people who are found mentally incompetent; (3) enactment of regulations to standardize competency adjudications, as well as giving immigration judges the authority to provide reasonable accommodations; and (4) training immigration judges to recognize mental disabilities and make reasonable accommodations. Safeguarding due process also provides a substantial cost benefit by increasing efficiency in immigration courts and reducing detention costs. While it is clear that EOIR takes the issue seriously, it is unclear what steps, if any, are contemplated to improve the situation of mentally disabled respondents. *See* Nina Bernstein, "Immigrant Finds Path Out of Maze of Detention," September 11, 2009, *New York Times*, http://www.nytimes.com/2009/09/11/nyregion/11mental.html?_r=2&hp, quoting Matthew A. Miller ("Persons with mental disabilities face significant challenges in removal proceedings, and these cases also present substantial challenges for immigration courts. . . . We recognize our obligation in this area, and we will continue to review how we can improve our efforts to provide due process and reasonable accommodation.").

- a. Is EOIR currently considering any regulatory changes or other guidance related to representation of mentally disabled respondents appearing before the immigration courts?
- b. What efforts are already in place to identify and protect mentally disabled respondents currently appearing before EOIR?

RESPONSE: EOIR is committed to ensuring due process and fair treatment for all individuals in removal proceedings. EOIR is sensitive to the needs of vulnerable individuals, including respondents with mental disabilities, and works with the Department of Homeland Security to ensure fundamental fairness for all individuals in removal proceedings. EOIR is presently focusing on providing training to all appropriate EOIR legal staff on mental health issues in removal proceedings. For example, at the recent 2009 EOIR Legal Training Conference, Dr. Melissa Piasecki led a training session that specifically focused on handling cases involving individuals with mental disabilities. EOIR is continuing to work with Dr. Piasecki to develop standards of competence in removal proceedings. We are also working with the National Judicial College to develop training on dealing with diverse populations in removal proceedings. Also, one resource addressing competency issues that is available to EOIR's legal staff is the article "Incompetent Respondents in Removal Proceedings," published in the April 2009 edition of the *Immigration Law Advisor*. In addition, through EOIR's Legal Orientation and Pro Bono program, EOIR is

exploring how it might identify individuals with possible mental disabilities for referral to pro bono services.

4. Forms available on the EOIR website previously were “fillable,” but are now apparently static. This omission has caused some difficulties, especially as software vendors lag behind in updating forms (e.g., the new Form E-28) for their subscribers. Similarly, pro se applicants are prevented from preparing clear and legible forms electronically. Will EOIR consider revising or updating forms to be “fillable” as it previously did?

RESPONSE: EOIR is currently working on making these forms fillable and is planning to have them available on the Internet in November 2009.

5. While we understand that EOIR may find the information relevant in gathering statistics or case handling, the apparent requirement that counsel disclose whether they represent a respondent “pro bono” on the revised EOIR-28 (rev. July 2009) is causing much concern among attorneys. *See generally* OPPM at <http://www.usdoj.gov/eoir/efoia/ocij/oppm08/08-01.pdf> for Guidelines on Facilitating Pro Bono Representation.

- a. Although EOIR defines pro bono representation under 8 C.F.R. § 1003.62 for purposes of the free legal services list, do the same definitions apply for purposes of completing the new EOIR-28?

RESPONSE: Though pro bono is not defined under 8 C.F.R. § 1003.62, EOIR does define “pro bono representative” under OPPM 08-01 as “an attorney or other representative specified in 8 C.F.R. § 1292.1 who provides legal representation without any present or future expectation of remuneration from the respondent (other than filing fees and nominal costs). Uncompensated initial consultations or initial court appearances, with the ultimate intention or goal of compensation by the respondent, are contrary to the spirit of pro bono representation. While an attorney or representative may be regularly compensated by an employing firm or organization, representation should be provided solely and honestly for the public good.” This definition applies for the purpose of completing the new EOIR-28. *See* Operating Policies and Procedures Memorandum, Guidelines for Facilitating Pro Bono Legal Services (OPPM 08-01) available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm08/08-01.pdf>

- b. Many attorneys take so-called “low bono” and/or “slow bono” cases. Are these also considered pro bono for either purpose? Did EOIR take into account varying local bar definitions of pro bono and the resulting conflicts in interpretation that may arise?

RESPONSE: While attorneys who take so-called “low bono” cases (i.e. for a reduced attorney fee) provide a valued service for low income respondents, these

cases are not considered pro bono. In drafting OPPM 08-01, EOIR carefully examined local bar and ABA definitions of pro bono. *See* OPPM 08-01.

- c. Can EOIR clarify why identifying on the entry of appearance whether a case is represented pro bono in this manner is required and/or whether any alternative method for identifying such relevant information was explored? For example, would EOIR consider regular surveys of practitioners, or creating a separate means of obtaining such data, where the information is still collected at the time an appearance is entered, but perhaps not visible to the immigration judge or DHS personnel.

RESPONSE: Under OPPM 08-01, the particular needs of pro bono representatives who appear before the immigration courts should be taken into consideration. Judges are strongly encouraged to be flexible with pro bono representatives, particularly in the scheduling of hearings and in the setting of filing deadlines. For this reason, Immigration Judges are encouraged to ask representatives appearing pro bono to identify themselves as such.

OPPM 08-01 also recommends that pro bono representatives annotate the EOIR-28 to reflect pro bono representation. The check box on the back of the recently-revised EOIR-28 better serves this purpose. In addition, a new case identification code is now being implemented in the EOIR database to track pro bono representation.

OPPM 08-01 was issued in part as a result of the Attorney General's "Measures to Improve the Immigration Courts and Board of Immigration Appeals." Measure #22 directed EOIR to consider the formation of a committee to oversee the expansion and improvement of the agency's pro bono programs. In response, the EOIR Committee on Pro Bono was formed. The Committee met in November 2006, with representatives from AILA, various nonprofit organizations, bar associations, and private law firms, as well as with officials from other government agencies and the United Nations High Commissioner for Refugees. Notes from the meeting were widely disseminated for comment to organizations across the country, including AILA, as well as to all Immigration Judges and Court Administrators.

As a result, in August 2007, the EOIR Committee on Pro Bono presented its Recommendations to Expand and Improve EOIR's Pro Bono Programs at the 2007 Immigration Judges' Training Conference. One of the recommendations was to track pro bono cases, which: 1) allows courts to track pro bono cases for special scheduling; 2) enables EOIR to analyze data related to pro bono cases to determine the effectiveness of local efforts and identify areas of need; and 3) allows the court to verify which organizations/representatives on the List of Free Legal Services Providers and the Board Recognition and Accreditation Roster are providing pro bono services and at what level. *See* OPPM 08-01 and EOIR Fact Sheet, "EOIR to Expand and Improve Pro Bono Programs," November 15, 2007, available at <http://www.usdoj.gov/eoir/press/07/ProBonoEOIRExpandsImprove.pdf>.

- d. Some view the requirement as the forced disclosure of a fee arrangement and potentially in conflict with attorney-client privilege, especially where Form EOIR-28 no longer requires the respondent's signature. Similarly, in some circumstances, whether a client appears to be indigent may prejudice relief or even impact custody issues. Are there consequences to an attorney and/or respondent if counsel refuses to disclose financial arrangements with the respondent?

RESPONSE: The concerns raised with regard to potential conflicts with the attorney-client privilege are too broad and vague to support such a claim with regard to the information sought by the form. EOIR also notes that the definition of pro bono in OPPM 08-01 does not require that a respondent be indigent. The pro bono check box is intended to facilitate the implementation of OPPM 08-01 and assist the EOIR Committee on Pro Bono Recommendations to Expand and Improve EOIR's Pro Bono Programs. *See* OPPM 08-01 and EOIR Fact Sheet, "EOIR to Expand and Improve Pro Bono Programs," November 15, 2007.

6. The new professional responsibility regulations have now been in effect for several months.
 - a. Does EOIR have any statistics as to many attorneys have faced complaints filed by the Immigration Judges under the new regulations?
 - b. How were these complaints resolved?
 - c. Did any complaints involve "cross-complaints" against the immigration judges or DHS trial counsel?

RESPONSE: EOIR does not keep these statistics. Further, the Attorney Discipline Program is not regularly involved in complaints against Immigration Judges and EOIR does not maintain statistics on how many "cross-complaints" may have been filed.

II. IMMIGRATION COURT ISSUES

7. Although case law and internal EOIR guidance make it quite clear that the submission of Asylum Officer Assessments into the record is prohibited except in very limited circumstances, members report with some frequency that the practice persists. *See* OPPM 00-01at.13-14.
 - a. Will EOIR confirm that the OPPM is still in effect, and/or consider reminding immigration judges to exclude Asylum Officer assessments and notes from evidence?

RESPONSE: The relevant portion of OPPM 00-01, *Asylum Request Processing*, states as follows:

XII(C). Referring the Affirmative Application: If an affirmative asylum application is not granted by the Asylum Office and the alien is not in a legal status, the application, along with any supporting documents, will be referred to the Immigration Court by the INS Asylum Office at the time the charging document is filed. The copy of the application and supporting documents referred to the Court may not contain any annotation or other information of a deliberative nature regarding the application (other than administrative corrections to the application, as affirmed by the applicant's signature in Part H of the application). Aside from the application and supporting documents, only the ANSIR-generated INS Referral Sheet should be filed with the Court. Under no circumstances should any document containing reference to INS credibility findings be filed with the Court. If this does occur, the Court Administrator should promptly notify the INS to discontinue any such filings and return those documents to INS prior to filing the application in the ROP.

OPPM 00-01 addresses the documents the Asylum Office should not include when the asylum application is initially referred to the Immigration Court. Once proceedings are underway, the Immigration Judge determines on a case-by-case basis what additional evidence to admit into the record. This OPPM does not preclude the Immigration Judge from admitting evidence into the record once the proceeding is underway. If a party believes that an Immigration Judge has improperly admitted evidence into the record, this argument may be appropriately raised on appeal to the Board.

b. In cases where the assessment nonetheless has been inappropriately included does the BIA continue to hold that it is reversible error for the IJ to admit the assessment into evidence?

RESPONSE: The Board judges each case on its own merit. If evidence was improperly admitted, the matter should be raised on appeal.

8. The fraud/misrepresentation waivers found at INA § 237(a)(1)(H) (in removal proceedings) and former INA §241(f) (for respondents in deportation proceedings) are available only before the immigration court. These applications are not waivers of inadmissibility under INA § 212, and under the regulations, there is no form for applying for these waivers. Attorneys have reported, however, that some immigration judges will refuse to consider such an application for relief unless the respondent files Form I-601 (accompanied by a \$545 filing fee). Form I-601 is an application for a waiver of inadmissibility grounds. *See, e.g.,* 8 C.F.R. § 103.7(b)(1); "Instruction for I-601, Application for Waiver of Grounds of Inadmissibility," <http://www.uscis.gov/files/form/I-601instr.pdf>. AILA understands that respondents

will need to have biometrics taken, but Form I-601 is neither required nor related to this form of relief.

- a. Please confirm that there is neither application form nor fee (other than standard biometrics fees) for a § 237(a)(1)(H) or §241(f) waiver.

RESPONSE: EOIR concurs that the instructions for the DHS Form I-601 do not specifically designate the use of this application for fraud/misrepresentation waivers under INA § 237(a)(1)(H) in removal proceedings and under INA § 241(f) in deportation proceedings.

- b. AILA requests EOIR to consider providing guidance to the immigration judges on the proper procedure for respondents applying for a waiver under either section, that a copy of these instructions be posted on EOIR's website under the Forms Listing, and/or appropriate revisions be made to the ICPM to clarify the application form and process.

RESPONSE: EOIR does not currently plan to give Immigration Judges special guidance regarding this issue. If a party disagrees with a particular determination in a case, the party may appeal that determination to the Board. Further, if AILA believes that certain Immigration Judges have adopted an inappropriate policy regarding applications for waivers under either of these sections, AILA is welcome to raise the issue in local liaison with the appropriate Assistant Chief Immigration Judge.

9. For certain detained cases, AILA members note that the availability of initial hearing information via the EOIR 800# system is irregular in some jurisdictions. While the issue appears primarily to involve notice of initial bond hearings, in some cases the omission has been reported to continue for the first few scheduled master hearings. While some local court administrators have called attorneys to notify them of hearings which will take place in fewer than three days (given that written notice would be unlikely to reach counsel), it appears that there is a problem with how—or when—information is entered into the system, creating a significant risk that proper notice will not be received.
 - a. What is the procedure for entering respondent information, including bond and other hearing dates, into the 800# system?

RESPONSE: The Automatic Status query system (EOIR 800# system) does not contain information regarding bond hearings. See Chapter 1.7(c) of the Immigration Court Practice Manual. The caller will get a message stating that s/he should call the local immigration court to obtain bond hearing information. Other court hearing information is available when the court enters the hearing information into EOIR's database.

- b. If a local court is not properly or timely entering hearing information, how should our members resolve the problem?

RESPONSE: Immigration Courts expeditiously enter case information into EOIR’s Case Access System. If a party has a question regarding the date of a bond or other type of hearing, the party should contact the Immigration Court.

- c. Is there any formal policy or guidance as to how the court should notify the attorney of record where written notice of hearing may be unlikely to reach counsel prior to a scheduled hearing?

RESPONSE: No. If there are concerns that attorneys are not receiving notice of hearing dates in this situation, these concerns are properly raised with the appropriate Court Administrator. As AILA notes, some Court Administrators will call attorneys to notify them of hearings which will take place in fewer than three days.

10. EOIR has repeatedly—and publicly—stressed that individual case completion statistics are not an indicator of performance in IJ evaluations and furthermore, should not provide the basis for denial of an otherwise meritorious request for a continuance or other resetting. *See, e.g.,* EOIR Open Forum, AILA Annual Conference, June 2009. Many federal courts of appeals have validated this approach, finding reversible error where an IJ denied a continuance with reference to case completion guidelines, where the basis for delay was beyond the control of the respondent. *See, e.g., Ahmed v. Holder*, ---F.3d---, 2009 WL 1773144 (9th Cir. Jun 24, 2009); *Hashmi v. Attorney General*, 531 F.3d 256 (3d Cir. 2008); *Rajah v. Mukasey*, 544 F.3d 449 (2d Cir. 2008); *Haswanee v. U.S. Att’y Gen.*, 471 F.3d 1212, 1217-19 (11th Cir. 2006). Many IJs, however, still deny continuances on the ground that they need to meet the case completion goals, and it appears that many IJs still perceive that their professional evaluation will be affected by case completion statistics.

- a. Is EOIR aware of this perception and continuing errors by IJs and, if so, has EOIR has undertaken any training or other guidance to prevent similar mistakes by IJs in the future?

RESPONSE: The decision whether to grant a motion to continue is made on a case-by-case basis by the Immigration Judge in accordance with 8 C.F.R. § 1003.29. This regulation provides that “[t]he Immigration Judge may grant a motion for continuance for good cause shown.” In *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), the Board provided guidance for adjudicating motions to continue. With respect to case completion goals, the Board stated that “[c]ompliance with [these goals] . . . is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances.”

- b. Given the significant increase in enforcement activity by ICE—and the corresponding substantial increase in docket volume, how is the evaluation of IJs and court staff being affected, if at all?

RESPONSE: Evaluations are based on the criteria contained in performance work plans.

11. While the Board has a clearly stated policy for handling motions for emergency stays of removal, there appears to be no corresponding procedure for such motions filed before the immigration courts.
 - a. Is there any guidance in place for the handling and processing of motions for emergency stays filed before the immigration courts?
 - b. If no formal procedures exist, would EOIR consider drafting appropriate guidance to standardize such procedures, including providing a comprehensive reference for inclusion in the ICPM?

RESPONSE: The Immigration Court Practice Manual Chapter 8 (Stays) outlines the instances in which orders of removal are automatically stayed and provides guidance for requesting discretionary stays. If a motion is filed with a request for a discretionary stay, the motion and the request for a stay are immediately given to the Immigration Judge.

12. In reference to past AILA inquiries regarding the lack of a formal record or transcript in bond matters, EOIR has previously stated that the truncated procedures were designed to accelerate the bond appeals process, if one is taken. Unfortunately, the issues relating to being unable to review a true record appear to be of greater and more immediate concern: for example, where new counsel is considering a motion for bond reconsideration, understanding what information was—or was not presented, is critical in both preparing the motion, as well as providing relevant information in a new bond hearing. Relying on a pro se respondent’s recollection or even prior counsel’s notes is frequently inadequate to review what might have occurred. Similarly, where the case may have been reset before a different IJ, there is no basis to determine how the prior decision was reached.
 - a. Given that DAR likely makes it easier and more cost effective to record bond hearings, while still keep them “separate” from the case in chief, would EOIR consider revisiting its policy of not recording bond hearings?

RESPONSE: EOIR does not plan to change its policy at this time.

- b. While including a bond “record” in any subsequent ROP might not be mandated, would EOIR consider allowing counsel to move for preparation of the transcript if relevant to an appeal of the case in chief?

RESPONSE: No. The regulation provides that custody proceedings must be kept separate and apart from, and must form no part of, removal proceedings. See 8 C.F.R. § 1003.19(d). The evidentiary burdens in bond and removal proceeding differ and the evidence presented in the less formal bond proceeding should not taint the adjudication of charges of removability or eligibility for relief. See *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

13. USCIS takes the position that placing an individual in removal proceedings will not, in and of itself, toll the accrual of unlawful presence. *See, e.g.*, USCIS AFM 40.9. Of particular concern is the situation where a noncitizen is referred for proceedings on an alleged status violation, whose status might expire while the matter is pending before the court. The AFM holds that the noncitizen will accrue unlawful presence after the expiration of the I-94, even though the individual is in proceedings, and clearly not free to leave. The AFM reasons that this is consistent with *Halibi*, as the alien could offer to “settle” the removal proceeding by agreeing to leave the U.S. no later than the date of the expiration in return for dismissal of the charge of having violated status. Without commenting on the likelihood of being able to arrange such a settlement, especially in light of the increasing volume most courts, AILA members are concerned their clients may be forced to abandon a challenge to removability simply because of lengthy dockets.

- a. Will EOIR consider providing guidance to the immigration courts to favor expediting setting of matters—either as prove-up hearings or abbreviated merits—to allow respondents who are facing a time limit on their ability to challenge their removability to have a meaningful opportunity to respond to DHS charges?

RESPONSE: EOIR does not currently plan to provide special guidance to the Immigration Judges regarding this issue. However, a party in the situation described above may file a written motion to advance a hearing date. Such motions are adjudicated by the Immigration Judge on a case-by-case basis. See Immigration Court Practice Manual Chapter 5.10(b) (Motion to advance).

- b. Alternatively, where the docket might not allow, will EOIR consider suggesting that IJs set scheduling conferences or some other deadline for DHS to either prove up charges or confer with respondent’s counsel to discuss resolution of charges and/or settlement of a case where the unlawful presence clock is “ticking?”

RESPONSE: A party may request a pre-hearing conference with the other party and the Immigration Judge to discuss these issues. See Immigration Court Practice Manual Chapter 4.18(a) (Pre-hearing conferences). If a pre-hearing conference is not held, the parties may still confer in order to discuss these issues. The parties may also file a pre-hearing statement even if the Immigration Judge has not ordered them to do so. See Immigration Court Practice Manual Chapter 4.18(b) (Pre-hearing statements).

14. When USCIS denies an application for Adjustment of Status (filed on Form I-485), the regulations provide that most individuals may renew the application in removal proceedings. *See* 8 CFR Section 1245.2(a)(5)(ii). Where an applicant is “renewing” an application, the court should require only a copy of the initial filing, with proof that the appropriate fee was previously paid to USCIS. Members report that some immigration judges are requiring respondents to submit a second filing fee to the Texas Service Center before they will accept the I-485 as being properly filed; in other circumstances, the

immigration judge is requiring that the biometrics fee be paid a second time. A related question arises where an adjustment of status is denied, but renewed on a different basis after proceedings have been initiated (e.g., a marriage-based adjustment is denied before USCIS, but renewed in immigration court on the basis of an approved I-360 VAWA Self-Petition). Failure to resubmit the application as directed may have severe consequences, including potentially abandoning a claim for relief or even the possibility of disciplinary actions against the attorney; for many respondents, the prospect of having to pay an additional \$1010 fee may put the application out of reach.

- a. Will EOIR consider providing guidance to the immigration judges regarding the regulatory scheme with regard to renewal of adjustment applications before EOIR?

RESPONSE: EOIR does not currently plan to provide special guidance to Immigration Judges regarding how to interpret this regulation. Immigration Judges interpret regulations in the context of particular cases. Therefore, this issue is best addressed before an Immigration Judge in a particular case. If a party disagrees with an Immigration Judge's decision in a case, the party may appeal that decision to the Board.

- b. Will EOIR clarify whether payment of an additional \$80 biometrics fee is necessary, where it has already been paid as part of the initial fee?

RESPONSE: The biometrics fee is under the control and purview of the Department of Homeland Security, and the Immigration Judge cannot waive this fee. *See* Immigration Court Practice Manual Chapter 3.4(c) (Application fees). Accordingly, this question is best addressed to DHS.

15. For detained cases, AILA understands that current EOIR procedures require that bond hearings be set within three business days after the filing of a written request for a bond redetermination hearing, even where a Notice to Appear has not yet been filed with the local court. Unfortunately, AILA has received reports that despite the receipt of written motions for bond hearings, some courts have refused to schedule bond hearings until ICE has filed the Notice to Appear with the court. Further, there appears to be some confusion as to what documents—even without an NTA—are required by the immigration court, in order to set a matter for a bond hearing.

- a. Will EOIR clarify whether the original three-day guidance remains in effect?

RESPONSE: EOIR endeavors to schedule bond hearings within three business days after a bond redetermination request is filed. This is an internal, aspirational goal for the agency, however, and does not require the scheduling of a bond hearing by any given date.

- b. Will EOIR clarify what documentation, if any, is required to set a matter for a hearing on bond, once a bond eligible noncitizen has been taken into ICE custody within a particular court's jurisdiction?

RESPONSE: EOIR concurs that a charging document need not be filed in order for an Immigration Court to schedule a bond hearing. See 8 C.F.R. § 1003.14(a). The requirements for requesting a bond hearing are outlined in the Immigration Court Practice Manual Chapter 9.3(c) (Requesting a bond hearing). If a party has concerns regarding the setting of a bond hearing, these concerns are properly raised with the Court Administrator or appropriate Assistant Chief Immigration Judge.

16. AILA commends and appreciates EOIR's efforts in protecting the confidentiality of VAWA applicants, however, we continue to receive reports that cause concern regarding the mandatory confidentiality requirement under the controlling statute. See IIRIRA §384(a)(2). Specifically, AILA members report that some IJs require respondents to file "background" information on approved I-360 VAWA Self-Petitions, including the underlying application. Some practitioners have attempted to comply by (unsuccessfully) requesting that any protected material be accepted only under seal.

- a. Has EOIR provided any guidance to immigration judges regarding the propriety of requiring respondents to submit protected material related to an approved VAWA self-petition for applicants proceeding with adjustment before the court?

RESPONSE: EOIR has not provided such guidance to the Immigration Judges and does not currently plan on doing so. IIRIRA § 384(a)(2) provides that Department of Justice employees shall not "permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under" one of several sections of the Immigration and Nationality Act, if the applicant "has been battered or subjected to extreme cruelty." Therefore, IIRIRA § 384(a)(2) only bars the disclosure of protected information to individuals who are not DOJ employees. Given that proceedings involving VAWA applicants are closed to the public unless the applicant requests that the proceedings be open, see 8 C.F.R. § 1003.27(c), it is not a violation of IIRIRA § 384(a)(2) for an Immigration Judge to receive evidence relating to an I-360 petition.

- b. For any VAWA-related materials submitted by a respondent or DHS, what steps does EOIR take to ensure that the materials are protected from future disclosure through FOIA or other access of to the court's file?

RESPONSE: OPJM 97-7, *Procedures For Identifying Potential Battered Spouse/Battered Child Cases*, sets out the procedures for ensuring that information related to battered spouses and children is not disclosed to the public.

First, the OPPM states that questions about cases involving battered spouses or children are “referred directly to the Court Administrator.”

If the Immigration Court receives a question concerning a battered spouse or child, “[t]he Court Administrator will be responsible for reviewing the file and assuring that any information disclosed has either been waived by the party [under 8 C.F.R. § 1003.27(c)] or is only given to one of the statutorily permissible parties—a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau or Agency purposes.”

Finally, “[i]f a statutorily permissible party requests information from or requests to review an ROP in which public access is restricted, the Court Administrator must request that individual to send the request by facsimile on the agency letterhead and state the purpose for the request.”

Under FOIA, “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” are exempted from disclosure. 5 U.S.C. § 552(b)(6). EOIR has determined that all record of proceedings (ROP) material are such “similar files,” the disclosure of which constitutes a “clearly unwarranted invasion of personal privacy,” and does not allow third parties FOIA access to such ROP materials, absent the written authorization of the individual to whom this ROP relates.

- c. What guidance has EOIR provided to clarify to immigration judges that they do not have the ability to readjudicate or review the validity of an approved I-360 petition?

RESPONSE: EOIR has not provided any such guidance and does not currently plan on doing so. This question raises issues that are best addressed on a case-by-case basis and should therefore be raised before the Immigration Judge in a particular case. If a party disagrees with an Immigration Judge’s ruling on this matter, the party may appeal the ruling to the Board.

- d. Has EOIR investigated any violations of IIRIRA 384 and/or has EOIR had to discipline any staff, including immigration judges, for violations of the confidentiality provisions?

RESPONSE: EOIR is not aware of any such violations. If a party believes that an Immigration Judge or any court staff has improperly disclosed information relating to a case involving a VAWA applicant, the party should raise the issue with the appropriate Assistant Chief Immigration Judge.

- e. What type of training does EOIR provide to IJ's regarding the confidentiality requirements regarding VAWA petitioners?

RESPONSE: EOIR’s new Immigration Judge Training does address the confidentiality provisions regarding VAWA. In addition, at the recent 2009 EOIR Legal Training Conference, there was a session on VAWA that included information on the confidentiality provisions.

17. AILA is concerned about the misuse of the free services list as provided to respondents and posted on the EOIR website. Specifically, it appears that private, “for profit” attorneys have been inappropriately included on the list, simply by claiming that they will consider pro bono and low fee work, though the majority of their practice appears to be based on normal and customary fees for those they deem not to be indigent. *See* 8 CFR 1003.61. While the regulations clearly contemplate that private attorneys may qualify as appropriate service providers, these abuses are clearly not in line with the spirit of the regulation. *See* 8 CFR 1003.62(d). Further, by including these practitioners, EOIR is in the position of unwittingly endorsing a de facto referral list by presenting the providers list in court and encouraging respondents to contact the attorneys on that list.

Under the current regulation any attorney who provides free legal services to indigent aliens or who is willing to represent indigent aliens in immigration proceedings pro bono, without receiving any direct remuneration from indigent aliens in immigration proceedings” may be included, although the attorney may be regularly compensated by the firm or organization with which he or she is associated. Furthermore, if these regulations are to be read literally, the only organizations that should appear as “free legal providers” are those that do not charge any fee for legal representation. The EOIR website states that “some of these organizations may also charge a nominal fee for legal services to certain low income individuals,” however, it should be noted that language is not found anywhere in the governing regulation.

- a. Will EOIR review the contradictory language on its “free legal providers” list published on the website and in court lists which state that “a nominal fee for legal services may be charged” and provide guidance on what constitutes a “nominal fee” for such representation?

RESPONSE: The current regulations provide that an attorney or organization must provide free legal services to indigent aliens in order to be placed on the List of Free Legal Service Providers. 8 C.F.R. §§ 1003.62, 1003.63. The language to which AILA refers on EOIR’s list states: “Some of these organizations may also charge a nominal fee for legal services to certain low income individuals.” (Emphasis added.) EOIR believes that this language does not contradict the regulation. Rather, the language indicates that an attorney or organization providing free legal services might also provide such services at reduced or nominal fees in some instances. EOIR does not currently plan to provide guidance regarding this issue. However, EOIR invites AILA to provide suggested language regarding reduced or nominal fees for consideration.

- b. Will EOIR review its current policies for including private attorneys under 8 CFR 1003.62(d) to avoid respondents potentially being misled and/or turning the legal

service providers into a referral list benefiting private attorneys whose focus is for-profit representation?

RESPONSE: EOIR shares AILA's concerns that the List of Free Legal Service Providers not be used as a form of free advertising for anyone who is not a true pro bono attorney. EOIR would welcome input from AILA on ways to improve the effectiveness and accuracy of the List of Free Legal Service Providers. The current regulations permit the Chief Immigration Judge to remove an organization or attorney who fails to meet the regulatory qualifications. *See* 8 C.F.R. § 1003.65(a). If a party believes that an attorney or organization no longer meets the regulatory requirements, the Court Administrator or appropriate Assistant Chief Immigration Judge should be notified. If appropriate, the Court Administrator or Assistant Chief Immigration Judge will forward the complaint to the Office of the Chief Immigration Judge for further investigation and potential removal from the list pursuant to 8 C.F.R. § 1003.65(a).

c. Will EOIR take steps to insure that the information published on the website is accurate and identical to that being provided in court?

RESPONSE: EOIR invites AILA members to inform it of any discrepancies between the online lists and the lists provided in the Immigration Courts. If a party is aware of any discrepancies, he or she needs to contact the Court Administrator or appropriate Assistant Chief Immigration Judge.

III. BIA ISSUES

18. With the *sua sponte* reopening of *Matter of S-E-G-* and the recent Seventh Circuit decision, *Gatimi v. Holder*, 2009 U.S. App. LEXIS 18718 (7th Cir. 2009), is the Board reconsidering the "social visibility" requirement set forth in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006)?

RESPONSE: The Board cannot comment on any pending matters.

19. AILA remains concerned about the interaction between ICE's receipt of a final order of removal from the BIA and their rapid execution thereof (often within a matter of a few days), well before Board's decision is received via mail by counsel or respondent. This raises fundamental due process and fairness concerns, particularly because the Board has held that it does not have jurisdiction over a motion to reopen or reconsider under 8 C.F.R. 1003.3(d) once an individual has been physically removed from the U.S. *See Matter of Armendariz*, 24 I&N Dec. 646 (BIA 2008).

a. What independent access, if any, does ICE have to Board decision information?

RESPONSE: ICE does not receive decision information before it is available through the EOIR 1-800 number. ICE has an interface with limited BIA data where

the decision information is fed from the same data source as the EOIR 1-800 number. ICE has agreed that neither ICE-DRO, nor any other component of DHS, shall base enforcement decisions in individual cases solely on such EOIR data. ICE Appellate Counsel also receives a hard copy of the decision two business days after the date of the decision.

- b. What information, if any, do the BIA clerks provide to ICE regarding decision information? For example, does DHS have any direct lines of communication to the Clerk's Office that differ from access that private attorneys or respondents enjoy?

RESPONSE: ICE and private attorneys or respondents are able to communicate with Clerk's Office employees by calling the (703) 605-1007 number or appearing at the public window. ICE and private attorneys or respondents receive the same information from the Clerk's Office.

- c. Does ICE have the ability to obtain copies of any BIA orders on the date of issue directly from the BIA's Clerk's Office?

RESPONSE: On the rare occasion that ICE requests a copy of a Board order, the Clerk's Office may provide a copy and a copy is faxed to opposing counsel on the same day.

- d. When is the I-800 system updated with a merits decision on appeal?

RESPONSE: Case appeal decisions and motions to reopen filed at the Board level are provided via the 1-800 system. The 1-800 system is updated with that information as soon as it is entered into EOIR's database.

20. In many instances, a different attorney will represent a respondent on appeal before the Board of Immigration Appeals or in the context of a motion to reopen or reconsider. In order to effectively represent such clients, new counsel must review the Record of Proceedings ("ROP"). However, the ability of many AILA members to adequately represent their clients before the Board is being limited because of apparent FOIA backlogs: requests that previously were processed within a month are now not received until several months have passed.

- a. Are there any procedures in place that allows for expedited EOIR FOIA?
- b. If so, what are the standards and procedures? If an initial request for expedited EOIR FOIA request is denied, who should be contacted for further review? If no expedite standards are in place, would EOIR consider implementing necessary standards and procedures for expedited request for EOIR FOIA?

RESPONSE: EOIR notes that the prescribed process for obtaining copies of the record of proceedings are provided by the regulations at 8 C.F.R. §§ 292.4(b) and [1292.4\(b\)](#). See 8 C.F.R. § 103.10; see also [Immigration Court Practice Manual Chapter 12](#) (Freedom of Information Act) and the [Board of Immigration Appeals Practice Manual Chapter 13](#) (Freedom of Information Act). In addition, the regulations at [28 C.F.R. § 16.5\(d\)](#) prescribe the process and standards for expedited consideration of Freedom of Information Act (FOIA) requests. The process for considering an appeal from the denial of expedited processing is detailed at [28 C.F.R. § 16.9](#). EOIR notes that you may appeal an adverse determination denying your request, in any respect, to the [Office of Information Policy](#) (OIP) (previously known as the Office of Information and Privacy), U.S. Department of Justice, 1425 New York Ave., N.W., #11050, Washington, D.C. 20530. This is the most current address information for OIP, as opposed to the address listed at 28 C.F.R. § 16.9.

21. Members report that there is regularly a significant delay—often more than a year, if not actually several years—between the filing of an I-130 appeal and when USCIS provides the ROP on the visa petition to the BIA for adjudication. USCIS does not serve a copy of the record the appellant, nor is there any notice of when the record is provided, leaving the appellant blind as to when the matter is being considered, as well as what information is actually before the Board. For aliens in proceedings, the matter is especially pressing, and the immigration court cannot be relied on to grant indefinite continuances. The current processing scheme creates the odd situation that the Board may have both the alien’s appeal in removal, as well as the pending visa petition proceedings, yet the cases cannot be consolidated nor is the adjudication of one appeal given any consideration in the adjudication of the other appeal. Prejudice to the respondent, petitioner and frankly, even ICE and EOIR, is apparent. While the procedure places shared responsibility on the Board and USCIS for I-130 appeals, the current lack of specific, enforceable rules and procedures places the petitioner/appellants at a great disadvantage.

a. Has EOIR attempted to liaise with USCIS to resolve this acknowledged problem, and if not, would EOIR agree to do so?

RESPONSE: EOIR consistently strives to adjudicate cases with efficiency and with the best information available to the adjudicators. In this regard, EOIR has reached out to different offices in the Department of Homeland Security, including United States Citizenship and Immigration Services, to better coordinate the receipt and return of records of proceedings in appeals and motions regarding decisions of DHS officers. EOIR will continue to communicate with DHS to address this concern.

b. At what point in the process is the BIA notified that there is a pending visa petition appeal?

RESPONSE: EOIR and DHS do not have common case tracking systems, thus the Board is not generally aware that an appeal or a motion has been filed in a DHS/CIS

matter until the record of proceedings in that case reaches the Board. When the Board receives a record from DHS, the Clerk's Office enters the matter into EOIR's database. EOIR does not have access to USCIS databases containing information on visa petitions. Once the Clerk's Office enters the case in EOIR's database, the Board issues a filing receipt to the parties so that the parties are aware that the matter is now at the Board and ready for adjudication. Where it is evident from a removal matter that a visa petition appeal may have been filed, in certain circumstances, the Clerk's Office may make an inquiry to USCIS, with service on all parties, to request the record in a visa petition case. However, this is not a usual practice as the Board may not know which Service Center, Field Office, or District Office has jurisdiction over the case; nor does the Board know if the case has been forwarded to the corresponding Office of Chief Counsel to prepare a record of proceedings and a brief.

- c. Does the Board have any authority to direct the parties to submit a brief or transfer the record to the Board by a certain date?

RESPONSE: The Board does not have the power to order DHS to transfer a record of proceedings to the Board within a certain amount of time, nor does the Board have authority to enforce such an order. The regulations at 8 C.F.R. § 1003.5 provide that a record of proceeding shall be sent to the Board promptly, but the regulations do not set a deadline by which DHS must transmit the record to the Board. In appropriate cases, where a record of proceedings reaches the Board after an inordinately long period of time, the Board may remand the record to DHS to allow the parties to update the file with relevant information regarding the benefit sought. This is appropriate in cases where the passage of time might make a difference in the Director's decision, for example, where the parties have now been married for a longer period of time and presumably will have more evidence to present of marital bona fides. If there is a statutory ineligibility, the record would not be remanded as no point would be served.

- d. Does the Board have the authority to sanction an attorney, or recommend sanctions with the appropriate authority, if an attorney fails to comply with the regulations or Board Practice Manual in visa petition appeals?

RESPONSE: Any practitioner (as defined in 8 C.F.R. § 1003.101(b)) who practices before either the Board or the Immigration Court is subject to disciplinary sanctions when it is in the public interest to impose such sanctions. *See* 8 C.F.R. § 1003.101(a). The regulations provide a non-exclusive list of 21 grounds for which it is deemed to be in the public interest to impose discipline. *See* 8 C.F.R. §§ 1003.101-102. A practitioner must avoid violating those enumerated rules of professional conduct anytime the practitioner practices before the Board, regardless of the subject matter involved in the representation. A failure or refusal of a practitioner to comply with the regulations related to the Board's jurisdiction in visa matters or with the Board Practice Manual does not, itself, mean that disciplinary sanctions will be imposed.

However, the EOIR Disciplinary Counsel will evaluate any such conduct in light of the 21 enumerated grounds for discipline to determine if the failure to comply with the regulations or the Board Practice Manual requirements in visa cases implicates a ground for which disciplinary sanctions could be imposed. For example, a failure to comply with the regulations or the Board Practice Manual could result in representation that is not competent, diligent, or prompt, or in conduct that is prejudicial to the administration of justice. *See* 8 C.F.R. § 1003.102(n), (o), (q), as established by 73 Fed. Reg. 76,914, 76,923 (December 18, 2008) (to be codified at 8 C.F.R. pts. 1001, 1003, 1292).

Board members and staff have the authority to file complaints with the EOIR Disciplinary Counsel when they believe that a practitioner has engaged in misconduct before the Board or the Immigration Courts. *See* 8 C.F.R. § 1003.104(a); Board Practice Manual Chapter 11.5(a) (Discipline of Practitioners). The Board has the authority to issue an order imposing disciplinary sanctions (i.e., expulsion or suspension from practice, or public or private censure) after the EOIR Disciplinary Counsel has filed a Notice of Intent to Discipline and the proper regulatory procedures have been followed. *See* 8 C.F.R. §§ 1003.101, 1003.105-106.

- e. If USCIS fails to comply with the regulations and/or Practice Manual concerning the submission of briefs, does the Board have the authority to strike USCIS's brief?

RESPONSE: The Board may in its discretion accept or refuse to consider a brief where appropriate under the regulations.

- 22. The regulations state that jurisdiction vests with the BIA upon the filing of an appeal. *See* 8 CFR 1003.1(b)(5); BIA Practice Manual 9.2 and 9.3. While the regulations do require the appeal to be filed with USCIS, with jurisdiction vesting with the BIA upon the filing of the appeal, the BIA would have the power to regulate processing of the appeal, including transmission of the ROP. There is no regulation that would prohibit this type of process, and arguably EOIR control of the process would put USCIS more in compliance with the 21 day briefing rule, etc. as opposed to letting the case languish for years.

- a. Would the BIA consider implementing a process to accelerate the submission of the ROP, such as allowing lawyers to file with the BIA a Motion for an Order Directing the Transmission of the File? In the motion the lawyer could include proof of the appeal filing?

RESPONSE: The regulations do not authorize the Board to compel DHS to provide a record of proceedings to the Board within a certain amount of time; nor does the Board have authority to enforce such a process. Attorneys may write to USCIS and request transmission of the appeal to the Board.

- b. Would the Board consider creating a mechanism whereby petitioner/appellants can bring a delayed visa petition appeal to the Board's attention, such as where the delay has prevented an alien from applying for relief from removal, an Immigration Judge has denied a motion for a continuance, and the case is also on appeal to the Board, or where an alien might age out, or where the delay has the potential to significantly harm the petitioner, beneficiary, or their families?

RESPONSE: As stated above, the Board works to facilitate coordination among government agencies to transfer information and files in matters pending before it, but the Board does not have the authority to enforce timelines for sending the record to the Board.

IV ICPM ISSUES

23. Does the Chief Immigration Judge anticipate any additional updates to the Immigration Court Practice Manual? If yes, will the Chief Immigration Judge allow AILA and other organizations the opportunity to comment on the changes before they are implemented?

RESPONSE: The Immigration Court Practice Manual has been updated regularly since it was published in February 2008. Those updates have been based in large part on valuable suggestions from AILA members. The Office of the Chief Immigration Judge looks forward to continuing its liaison with AILA regarding the Practice Manual.

24. Where IJs are not following the ICPM, how should AILA advise its members to proceed? Should counsel comply with the ICPM in case a visiting IJ hears the case, or should counsel follow the IJ's order on documentation submission?

RESPONSE: The requirements set forth in the Immigration Court Practice Manual are binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case. See Chapter 1.1(b) (Purpose). Therefore, the Practice Manual does not limit the Immigration Judge's authority to give specific instructions in particular cases. In such instances, parties should follow the Immigration Judge's order. If an AILA member believes that an Immigration Judge is imposing an across-the-board requirement that is in variance with the Immigration Court Practice Manual, this should be brought to the attention of the appropriate Assistant Chief Immigration Judge.

25. The ICPM both encourages and requires a robust motions practice for myriad situations, however members report that decision on motions are not issued in a timely manner. Many languish until shortly before the merits hearing or other deadline, despite the fact that the motions were submitted far in advance of the hearing. In some instances Judges pass the decision on to counsel orally, through their clerks, leaving counsel without concrete evidence that a motion was denied or granted, much less the basis for the decision. The delay in adjudicating motions makes effectively representing clients in

immigration court extremely difficult, and in many instances causes cases to be remain on the courts' docket unnecessarily and for extended periods of time.

- a. Has EOIR provided any guidance to the Immigration Judges regarding the timely adjudication of written motions?

RESPONSE: Under EOIR's case completion goals, motions to reopen and motions to reconsider are to be decided within 60 days of receipt. These are internal, aspirational goals for the agency, and do not dictate the completion of any given case by any given date.

With respect to other written motions, EOIR encourages Immigration Judges to rule on motions promptly. However, even with timely motions, it is not always possible for Immigration Judges to rule in advance of hearings as, in reviewing the motion, the Immigration Judge may identify facts or legal issues that need to be developed further. Where a party has submitted a written motion, the party may contact the Immigration Judge's clerk to inquire whether the Immigration Judge has ruled on the motion.

- b. Assuming that the heart of this issue is sufficient time for immigration judges to review pending motions, would EOIR consider instructing and/or allowing Immigration Judges to set aside a portion of their weekly calendar to rule on pending motions?

RESPONSE: Immigration Judges do have "administrative time" each week which can be used, among other things, to adjudicate motions.

26. During previous liaison meetings, EOIR has described the Immigration Court Practice Manual ("ICPM") as a "shield," not a "sword," i.e., intended as a safeguard and not as a tool for punishment. While it is true that the ICPM has standardized many effective practices, in some instances it is being relied on to reject filings with de minimus errors. Often, the rejection itself is untimely, causing filing deadlines to be missed. Errors include rejection for not using the updated EOIR-28 days after it was published; failure to attach a proposed order (when they are rarely, if ever, relied on by the court), rejected exhibits as too "voluminous," indicating they should be bound in separate volumes (where there is no guidance as to what the appropriate size might be); rejection of a time-sensitive motion to change venue for failure to include the respondent's name and A# in the integrated certificate of service.

- a. Will EOIR consider reiterating guidance to the clerks to accept filings where the errors are not necessarily substantive, and/or give the filing party an opportunity to correct the error rather than rejecting the filing?

RESPONSE: Immigration Courts use uniform rejection notices nationwide. Filings are only rejected for certain specified errors. The rejection notice informs the party of the

reason for the rejection. The rejection policy was reviewed with the Court Administrators at their recent national training conference.

If a party believes a submission was improperly rejected, this may be brought to the attention of the Court Administrator, as well as the appropriate Assistant Chief Immigration Judge, as necessary.

- b. Alternatively, is it possible to instruct the clerk's to provide same day notification—via facsimile, phone or email—to attorneys whose submissions are being rejected so that counsel may attempt to immediately correct any deficiency without waiting for the submission to be returned?

RESPONSE: The Immigration Court Practice Manual includes specific guidance on how to correct a defective filing. *See* Immigration Court Practice Manual Chapter 3.1(d) (Defective filings).

V. ASYLUM CLOCK ISSUES

27. The asylum clock continues to be problematic in many jurisdictions. AILA has alerted EOIR to problems related to the asylum clock on numerous occasions in the past. While some immigration courts have resolved recurrent clock problems, problems persist at other courts. Specific examples of both problematic and resolved cases are as follows:

- a. Court Administrators at the Baltimore and Arlington Immigration Courts have refused to correct asylum clock information that was entered incorrectly, stating that it is “impossible” to restart or correct the asylum clock. The problem persisted even after the Immigration Judge issued an order on the record that the clock, if stopped, should be restarted.

RESPONSE: If a party is unable to resolve the problem with the Court Administrator, the party is welcome to raise it with the appropriate Assistant Chief Immigration Judge. The party should provide the ACIJ with the A-numbers for the cases in question and an explanation as to why the party believes the clock is incorrect.

- b. Some San Diego Immigration Judges stop the asylum clock at Master Calendar hearings, even in cases when respondent's counsel accepts the first available hearing date. The clock is not restarted.

RESPONSE: Questions regarding the asylum clock are highly fact-specific. If a party believes there is a problem with administration of the asylum clock, the party should follow the procedure described in question 28(a) below.

- c. As an example of useful practices, we note that the Court Administrator at the New York City Immigration Court accepts emails from attorneys regarding asylum clock issues and cooperates in fixing clock problems. When the system is still not updated to reflect the correct asylum clock information, the Court Administrator sends emails to attorneys confirming that the system reflects incorrect asylum clock information. The Administrator then specifies how many days the asylum application has been pending, and adds a comment to forward a copy of the email to the Service Center to issue an EAD for the attorney's client.

RESPONSE: EOIR appreciates the positive feedback regarding the New York Immigration Court.

28. As a result of erroneously stopped asylum clocks (see #27 above), many respondents continue to receive EAD denials and are unable to work (or even obtain basic identification in many states) for long periods of time as they pursue their asylum cases. Therefore, AILA would appreciate EOIR's response to the following:

- a. It appears that many asylum clock problems are caused by the lack of clear instructions or directives to immigration courts. Although OPPM 05-07 provides a list of adjournment codes that stop the asylum clock, it does not provide uniform instructions about how to apply the codes. Therefore, AILA requests that OPPM 05-07 be updated to include clear instructions about stopping and restarting the asylum clock based on the adjournment codes. These instructions should also clearly explain the role of the Immigration Judge and the Court Administrator. For example, the guidance could indicate under what circumstances a Court Administrator would restart the clock, e.g, after receiving an order to that effect from the Immigration Judge.

RESPONSE: EOIR does not currently plan to update OPPM 05-07 to include special guidance regarding the asylum clock. However, if a party believes there is a problem with the asylum clock in an individual case and that case is pending before an Immigration Judge, the first step is to try to resolve the issue locally. If the concern arises during a hearing, it should be addressed to the Immigration Judge. If the concern arises after a hearing, it should be addressed to the Court Administrator. If necessary, the question may also be raised with the Assistant Chief Immigration Judge having jurisdiction over the particular court. For cases that are pending before the Board, asylum clock questions should be directed to the attention of the Office of General Counsel (OGC), which works with OCIJ to respond appropriately to the clock inquiry.

- b. AILA requests that EOIR revise the current policy that stops the clock—and will not restart it—even when a case is remanded by the BIA to the immigration court. Often cited by EOIR, section 208(d)(5)(A)(iii) does not support EOIR's position on remanded cases. This provision describes the timeline for adjudication of the asylum application, not work authorization. Work authorization is addressed separately in the statute. Further, after remand, a case is no longer on appeal and there is no final order. Although the EAD clock stops upon the denial of an

asylum application, with no order denying asylum in effect, there is no bar to applying for work authorization. One final practical consideration is that often when a case is remanded, the first Master Calendar hearing is not scheduled for several months. During this entire period, an asylum application is not able to apply for work authorization. AILA suggests that, upon remand, EOIR should treat the clock as never having stopped. The time should be recalculated from the date of the first order denying asylum. The IJ should "credit" all the time that elapsed since the original order denying asylum. In the alternative, EOIR should restart the clock upon remand.

RESPONSE: As AILA points out, EOIR's "clock" is premised on INA § 208(d)(5)(A)(iii), which describes the timeline for adjudication of the asylum application, not work authorization. That "clock" stops once the asylum application has been adjudicated. As the Department of Homeland Security, rather than EOIR, is responsible for adjudicating applications for work authorization, questions regarding eligibility for work authorization after remand should be addressed to DHS.