

**EOIR/American Immigration Lawyers Association (AILA) Meeting  
November 3, 2011**

**EOIR Welcome**

EOIR welcomes AILA and hopes that this new streamlined meeting format will provide more interaction and good communication with less formality. EOIR is committed to listening and keeping communications open and always welcomes AILA's input.

**Introductions**

All attendees introduce themselves. (Round table seating)

**Questions and Answers**

**I. Ineffective Assistance of Counsel**

**QUESTION:** EOIR last indicated this proposed regulation<sup>1</sup> was "currently under review." Can you give us the status of the proposed regulation and an approximate time frame?

**EOIR RESPONSE:** With input from other Departmental components and the Department of Homeland Security (DHS), EOIR drafted a proposed regulation in response to *Compean*. EOIR is working with both internal and external agencies and is pushing hard within its limits. This can be a lengthy process because EOIR does not control the internal time lines of other agencies. The *Compean* regulation is one of EOIR's highest priorities. The rule is currently under review at the Department. Upon publication of the proposed regulation in the Federal Register, stakeholders will have an opportunity to provide comments during the notice and comment period.

**II. "Departure Bar" Regulations**

**QUESTION:** EOIR last indicated that a petition filed by the American Immigration Council to amend the Departure Bar regulations<sup>2</sup> was "currently under review." Can you give us the status of the petition? Is there a draft?

**EOIR RESPONSE:** The petition is currently under review at EOIR and the Department. We also need input from DHS. We will carefully consider any input we receive.

**III. Mental Incompetency Procedures**

**QUESTION:** EOIR last indicated it was "in the preliminary stages of drafting a regulation to implement procedures addressing the appearance of mentally incompetent aliens in proceedings before EOIR." Can you give us a status of the draft regulation?

**EOIR RESPONSE:** EOIR has drafted an Advance Notice of Proposed Rulemaking (ANPRM) to solicit input from the public. A proposed regulation on mental competency

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<sup>1</sup> A draft regulation referring to *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009).

<sup>2</sup> 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1).

issues in immigration proceedings is a priority for EOIR and the agency is moving as quickly as it can within the time constraints imposed by the regulatory process. The ANPRM is currently under review at the Department.

**QUESTION:** AILA members are pleased to see movement on this and are likely to have many comments. What other priority regulations are you working on?

**EOIR RESPONSE:** EOIR is working on the Recognition and Accreditation (R&A) regulation, free legal service provider list rule and the TVPRA<sup>3</sup> regulation. EOIR has prioritized the R&A rule because we want to alleviate immigration fraud and enhance the ability of legitimate organizations to assist immigrants. EOIR has been an active partner in the inter-agency anti-notario initiative, and encourages legitimate organizations to step up to provide authorized representatives.

#### **IV. Regulatory Review**

**QUESTION:** What role has EOIR played in DOJ's regulatory review process to date?

**EOIR RESPONSE:** Pursuant to the Department's Regulatory Review Plan, the Department established an internal working group to collaborate with rulemaking components to select rules for review, seek public comment, and recommend revisions as necessary. EOIR is a participant in the working group. During the first DOJ regulatory review, we expect to provide the Department with a proposed rule encompassing intended revisions to our regulations by Spring 2012. We are currently focusing on outdated and duplicative regulations. We anticipate multiple rounds of drafting and revisions before the regulation is cleared by the Department and OMB for publication. Upon publication, stakeholders will have an opportunity to provide comments.

#### **V. Asylum and EAD "Clocks"**

**QUESTION:** The EOIR Practice Manual<sup>4</sup> states that a defensive asylum application is filed in open court at a master calendar hearing, in contrast to the EOIR asylum regulations<sup>5</sup> which merely require that the application be "filed directly with the immigration court." What is the rationale behind the rule in the EOIR Practice Manual, which impacts the timely filing clock as well as the EAD clock?

**EOIR RESPONSE:** There are essentially two clocks: the asylum adjudications clock and the work authorization clock. The EOIR asylum adjudications clock tracks the timeline for adjudication of the asylum application and is used to determine whether we are meeting our statutory mandate to complete these cases within 180 days; its purpose is not to track employment authorization applications. Filing asylum applications in court

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<sup>3</sup> Referring to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, 122 Stat. 5074.

<sup>4</sup> EOIR Immigration Court Practice Manual at Chapter 3.1(b)(iii)(A) (Defensive Applications).

<sup>5</sup> See 8 C.F.R. § 1208.4(b)(3).

allows immigration judges to give advisories for knowingly filing a frivolous application at the time of filing, as required.

**QUESTION:** When making the decision to accept applications by mail or in court, what is considered complete?

**EOIR RESPONSE:** “Complete” is defined in the regulations. Immigration judges are not looking for every possible piece of paper to support the application in order to start the clock. EOIR will always consider a motion to advance a hearing; however, such a motion will not always be granted.

**QUESTION:** Attorneys express frustration with the 180 day clock. Can you explain the 180 day rule? When judges get close to 150 days they have to bump cases to fit the asylum cases in, affecting the backlog. Will EOIR allow a master calendar hearing to be advanced in order to file an asylum application?

**EOIR RESPONSE:** If it is an affirmative asylum application, the time begins to run from the original USCIS filing. If it is a defensive asylum application, the time begins to run when it is filed in open court with EOIR. The 150 day period is not of significance to EOIR as this refers to the timing of filing applications for Employment Authorization Documents (EAD). We encourage attorneys to work out “clock” issues with the judge on the record during the hearing. A party wishing to advance a case on the calendar may file a motion to advance.<sup>6</sup> Judges adjudicate motions to advance on a case-by-case basis. Additional guidance regarding the asylum adjudications clock will be available soon.

**QUESTION:** Would EOIR consider requiring, by OPPM, that immigration judges state on the record that the asylum clock has been stopped and/or the reason, and its effect on EAD eligibility?

**EOIR RESPONSE:** Additional guidance on the EOIR asylum adjudications clock is forthcoming.<sup>7</sup> Any questions regarding employment authorization should be directed to the Department of Homeland Security.

**QUESTION:** What is EOIR’s policy on restarting the clock after remand by the BIA or court of appeals? If the clock is going to be restarted, what date is the trigger date for the clock?

**EOIR RESPONSE:** When the Board of Immigration Appeals (Board) remands an asylum case to an immigration judge, the immigration judge does not restart or reset the asylum clock. Thus, if the immigration judge denied an asylum application on the day before 180 days, the clock would remain on that day while the case was on appeal and

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<sup>6</sup> See Chapter 5.10(b) (Motion to Advance) of the Immigration Court Practice Manual.

<sup>7</sup> Subsequent to the EOIR/AILA meeting, OPPM 11-02, titled *The Asylum Clock*, dated November 15, 2011, from Brian M. O’Leary, Chief Immigration Judge, to all Immigration Judges and court staff, was issued. It can be found at <http://www.justice.gov/eoir/efoia/ocij/oppm11/11-02.pdf>.

during any further proceedings.<sup>8</sup> 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.

We are aware that the asylum clock is a source of frustration. We are affirmatively addressing the “clock” issue. We are working hard with our USCIS counterparts and will issue an Operating Policies and Procedures Memorandum (OPPM) update that will address some of these issues. The OPPM will be issued soon.<sup>9</sup>

## **VI. Prosecutorial Discretion and Review**

**QUESTION:** Has there been any guidance to the immigration courts on how to handle cases in which an attorney requests prosecutorial discretion pursuant to the announcement?

**EOIR RESPONSE:** The decision whether to exercise prosecutorial discretion is made by DHS. Immigration judges will not be exercising prosecutorial discretion. Immigration judges were provided copies of the two DHS memoranda<sup>10</sup> and notified that they need not take any action on their own initiative regarding these memoranda. Judges continue to adjudicate cases based on the facts and circumstances of each case. The bottom line is that the priorities are detained and criminal cases. EOIR has been coordinating with DHS, but DHS is the driving force on this issue. We expect to hear from DHS soon and then EOIR will provide instructions to the immigration judges accordingly.

**QUESTION:** Were judges informed not to take action on these cases? Are there any blanket instructions?

**EOIR RESPONSE:** EOIR is awaiting further guidance; no blanket instructions were given.

**QUESTION:** Some jurisdictions are saying that under no circumstance should you grant a continuance for a DHS prosecutorial review.

**EOIR RESPONSE:** EOIR is not encouraging or discouraging actions on motions for continuance. Immigration judges should use normal good cause standards for continuances.

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<sup>8</sup> See INA §208(d)(5)(A)(iii).

<sup>9</sup> See Operating Policies and Procedures Memorandum (OPPM) 11-02, dated November 15, 2011, titled *The Asylum Clock*, from Brian M. O’Leary, Chief Immigration Judge, to all Immigration Judges and court staff.

<sup>10</sup> See Memorandum from John Morton to All Field Office Directors, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” dated June 17, 2011, and Memorandum from John Morton to All Field Office Directors, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,” dated June 17, 2011.

**QUESTION:** Is there a time frame?

**EOIR RESPONSE:** We've been meeting on this issue. There is no "working group" to review every single case as portrayed in the media. Immigration judges will not make the decision as to which cases fit within the Morton memo. Once decisions are made by leadership, the process will move forward. DOJ is very careful to maintain an adjudicatory firewall.

**QUESTION:** There are concerns that a review of cases between EOIR and DHS will be an ex parte communication. Have there been any discussions as to how the alien's representative will and can participate?

**EOIR RESPONSE:** EOIR will not be engaged in the review of individual cases. Questions as to how an attorney can participate should be directed to DHS.

**QUESTION:** If an attorney believes that a case falls within the parameters of the working group review or that an individual appears to be eligible for consideration of prosecutorial discretion, will EOIR entertain a request to hold the appeal in abeyance?

**EOIR RESPONSE:** Board Members adjudicate cases, including any requests to hold an appeal in abeyance, based on the facts and circumstances of each case. However, as the underlying issue in this instance involves an exercise of prosecutorial discretion, the alien, or representative, should work with DHS to explore the possibilities of DHS exercising prosecutorial discretion before the continuance motion is filed with the Board.

## **VII. Immigration Court Practice Manual**

**QUESTION:** Some court practices strictly adhere to the Immigration Court Practice Manual while others do not.

**EOIR RESPONSE:** We are not going to issue guidance on this. The Practice Manual gives immigration judges some discretionary authority in most areas.<sup>11</sup> There are local legal cultures that make courts run differently.

EOIR is always looking for tools to help the judges ensure fair and timely adjudications. These may involve the use of worksheets or other tools to assist the judge in adjudicating a case. However, if a party believes that an immigration judge is requiring something that is inconsistent with the Practice Manual, that party should bring this to the attention of the appropriate Assistant Chief Immigration Judge (ACIJ).

## **VIII. Laptops in the Courtroom**

**QUESTION:** The rules on the use of laptops and electronic equipment do not seem to be equally applied to each party. Can EOIR either instruct IJs to direct DHS not to use its laptops unless the respondent's attorney is also allowed to do so, or to communicate with

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<sup>11</sup> See Chapter 1.1 (Scope) of the Immigration Court Practice Manual.

facilities with which it contracts to allow private attorneys to have the same electronic privileges as DHS?

**EOIR RESPONSE:** With certain limitations, in any hearing before an immigration judge, parties may use laptop computers, electronic calendars, and other electronic devices commonly used to conduct business activities.<sup>12</sup> For hearings held in DHS detention facilities or federal, state, or local facilities, however, compliance with the facilities' security requirements is required.<sup>13</sup> DHS, not EOIR, contracts for space at detention facilities, and EOIR does not establish the rules for what may be brought into these facilities. We understand the argument, but we are not in control of security requirements in some of our environments. If you find locations where there are problems, please let us know and we will deal with it on an individual basis. Supply us with a list of courts that are at issue and we will work to try to resolve the problem.

Is the private bar seeing this issue frequently?

**AILA:** The issue is mostly at detention facilities.

## **IX. Visa Petition Proceedings**

**QUESTION:** Is there a vehicle by which the BIA would, in general, resume jurisdiction such as through a motion to reconsider in a USCIS visa petition matter that is well beyond a reasonable processing time?

**EOIR RESPONSE:** The Board does not have the authority to enforce adjudication timelines on the USCIS. In a case that has been remanded by the Board to the USCIS for further processing, the parties may contact USCIS for status and request adjudication of the matter.

## **X. Immigration Court Backlogs**

**QUESTION:** Are there efforts to address current disparities in immigration court dockets? If so, could you detail those efforts?

**EOIR RESPONSE:** This is a matter of court management. There are many factors involved. Budget and staffing are factors. The use of Video Conferencing (VTC) will help. Our highest priority is the detained docket. In some cases dockets are expanding greatly. At this time we do not have an answer. We will continue to work with ACIJs to be sure bond hearings are heard expeditiously.

We do not minimize the staffing shortage issue. However, a budget increase is not an option at this point. Our resources are flat right now and the caseloads are rising, which means we have to seek additional efficiencies in immigration court procedures. The prosecutorial discretion initiative could have an impact on our caseload and non-detained

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<sup>12</sup> See Chapter 4.13 (Electronic Devices) of the Immigration Court Practice Manual.

<sup>13</sup> See Chapter 4.14 (Access to Court) of the Immigration Court Practice Manual.

dockets could be affected as well. We can utilize VTC proceedings while maintaining due process.

#### **XI. Contested Issues in Master Calendar Hearings**

**QUESTION:** In situations where there are contested preliminary matters, apart from relief, that require a full evidentiary hearing, can EOIR instruct its courts to avoid imposing upon the respondent, over the objection of counsel, the burden of also preparing for any and all applications for relief at the same hearing and, instead, to schedule a second individual hearing on relief?

**EOIR RESPONSE:** EOIR does not plan on issuing guidance regarding this matter. This question raises issues that are best addressed on a case-by-case basis. If due process is the issue then practitioners should reserve that for appeal. Immigration judges are struggling to find calendar time and making their best efforts to be efficient. There are legitimate reasons as to why some issues are or are not heard at an individual hearing, including scheduling and fairness issues.

#### **XII. Adequacy of Evidentiary Showing at Bond Hearing**

**QUESTION:** How do we address judges asking for all evidence of removal at a bond hearing before they issue a bond?

**EOIR RESPONSE:** The possibility of obtaining relief is a legitimate factor to be considered in a bond inquiry. Whether you should be filing evidence concerning removal in a bond hearing should be determined on a case-by-case basis. If a party does not agree with an immigration judge's decision in the case, the party may appeal the decision to the Board of Immigration Appeals. EOIR does not currently plan to issue guidance regarding this matter.

#### **XIII. Appearance Issue**

**QUESTION:** If an attorney was retained for the bond hearing, but not the master calendar hearing, is that attorney the attorney of record? If so, would that attorney need to file a motion to withdraw?

**EOIR RESPONSE:** Yes. See the Immigration Court Practice Manual, Chapter 2. Are filing motions to withdraw a problem?

**AILA:** No, it is not a problem if you can get the alien out of detention, but it makes a difference where the case is heard. Some cases are transferred for a master calendar hearing and an attorney may not want to be counsel in another state.

#### **XIV. Original Signatures on Court Filings**

**QUESTION:** Would EOIR be willing to revise the Practice Manual,<sup>14</sup> to allow for the submission of a photocopied signature?

**EOIR RESPONSE:** EOIR does not currently plan to revise the Practice Manual. The purpose of requiring original signatures is to ensure compliance with Chapter 3.3(b) of the Immigration Court Practice Manual. The Practice Manual provides that an alien may retain more than one attorney at a time, allowing for local counsel to sign filings.<sup>15</sup> We are also working on enabling e-signatures down the line. The signature issue will be addressed when we move into electronic filing, though no such regulation is planned soon.

#### **Closing Remarks**

EOIR is distributing anti-immigration fraud notices and posting anti-notario fraud posters in its courts. Please look for this fraud information and help us spread the word. Thank you for meeting with us today. We appreciate the work you do because it assists us in doing our job more efficiently and effectively. It does make a difference. Thank you!

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<sup>14</sup> See Chapter 3.3(b) (Signatures) of the Immigration Court Practice Manual.

<sup>15</sup> See Chapter 2.3(e) (Multiple Representatives) of the Immigration Court Practice Manual.