



**U. S. Department of Justice**

Executive Office for Immigration Review

*Office of the Chief Immigration Judge*

Chief Immigration Judge

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May 17, 2011

**MEMORANDUM**

TO: All Immigration Judges  
All Court Administrators  
All Attorney Advisors and Judicial Law Clerks  
All Immigration Court Staff

FROM: Brian M. O'Leary   
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 11-01:  
*Procedures on Handling Applications for Suspension/Cancellation Once Numbers  
are no Longer Available in a Fiscal Year*

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## **I. Introduction**

This Operating Policies and Procedures Memorandum (OPPM) supersedes and replaces OPPM 99-2. Under an interim regulation issued on September 30, 1998, 63 Fed. Reg. 52134-02, the Department of Justice eliminated the conditional grant process to implement the annual cap on grants of applications for suspension of deportation under former section 244(a) of the Immigration and Nationality Act (INA) (herein referred to as “suspension”) and cancellation of removal for nonpermanent residents pursuant to section 240A(b) of the INA (herein referred to as “cancellation” or “cancellation of removal”).<sup>1</sup> See section 240A(e) of the INA. The regulation created a process in which the Immigration Courts and the Board of Immigration Appeals (BIA) can decide suspension of deportation or cancellation of removal cases as long as numbers are available. Once numbers are no longer available in a fiscal year, Immigration Judges must, with some exceptions, reserve the decision in all suspension of deportation or cancellation of removal cases which are subject to the cap. See 8 C.F.R. § 1240.21(c).

## **II. Implementation of the Suspension/Cancellation Cap**

### **A. Reserving Decisions**

The Office of the Chief Immigration Judge will notify the Immigration Courts when 3,800 suspension/cancellation cases have been granted in a fiscal year. The date of this notification will be referred to as the “cut-off” date. As of the cut-off date, Immigration Judges must reserve their decision in any suspension/cancellation case that is subject to the cap. The exceptions to this procedure are applications which can pretermitted based on lack of statutory eligibility pursuant to 8 C.F.R. § 1240.21(c)(1) or which can be denied in the exercise of discretion pursuant to 8 C.F.R. § 1240.21(c)(2) because the alien will be granted asylum or adjustment of status.

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<sup>1</sup> This OPPM does not pertain to cancellation of removal for certain permanent residents pursuant to section 240A(a) of the INA.

## **B. Allocating the Remaining Fiscal Year Numbers**

Of the remaining fiscal year numbers, 90% will be allocated to the Immigration Courts. The remainder will be allocated to the BIA. After the cut-off date, the Office of the Chief Immigration Judge will allocate the remaining numbers based on the following order of priority:

Priority 1—Grants issued by Immigration Judges before the cut-off date that were not properly entered into the CASE system as suspension/cancellation grants but are subject to the cap.

Priority 2—Reserved decisions that occurred on or after the cut-off date. In this case, numbers will be issued based on the date and the time that the Immigration Judge reserved decision.

## **III. Handling Suspension/Cancellation Cases After the Cut-off Date**

### **A. Immigration Judge Role**

#### **1. Which Cases Must Be Reserved**

The regulations, at 8 C.F.R. § 1240.21(c)(1), provide that when the cap is reached in a fiscal year, any further decisions whether to grant or deny must be reserved until a number becomes available in a subsequent fiscal year. As of the cut-off date, Immigration Judges must reserve decision in any suspension/cancellation case, unless:

- a. The application can be premitted based on lack of statutory eligibility pursuant to 8 C.F.R. § 1240.21(c)(1);
- b. The application is denied in the exercise of discretion pursuant to 8 C.F.R. § 1240.21(c)(2) because the alien will be granted asylum or adjustment of status; or
- c. The alien is not subject to the annual cap under section 240A(e)(3) of the INA.

#### **2. Concurrent Applications for Relief**

If there is a concurrent pending application for any form of relief other than suspension/cancellation, the Immigration Judge must include this application as part of his or her reserved decision. If the Immigration Judge would deny a concurrent application for relief, but for the requirement to reserve decision, adjournment code “29” (concurrent application) must be entered.

If the Immigration Judge grants an alien’s application for asylum or adjustment of status, 8 C.F.R. § 1240.21(c)(2) mandates that the application for suspension or cancellation be denied as a matter of discretion, so the decision need not be reserved. *See* section III, A.1.b, above.

### **3. Note the Date and Time When the Record was Closed**

When the Immigration Judge closes the record and reserves decision, he or she shall note the date and time on the Immigration Judge worksheet. The Immigration Judge shall not reveal to the parties, either on the record or off, whether he or she is contemplating a grant or denial of the application(s). A copy of the worksheet must be sent by fax to the Office of the Chief Immigration Judge, attention: Chief Clerk. The fax number is (703) 305-1448.

### **4. Immigration Judge Procedures for Decisions After the Cut-off Date**

After closing the record, an Immigration Judge may:

- a. **Reserve Decision.** Immigration Judges may reserve decision without rendering a draft oral or written decision. In such cases, judges should be prepared to complete the case by the end of the current fiscal year (if a number becomes available) or at the beginning of the next fiscal year.
- b. **Render a Draft Oral Decision.** Immigration Judges may dictate a draft oral decision outside the presence of the parties. The draft oral decision must be recorded using a Sony 4-Track tape recorder and completed within 5 working days. Once the Immigration Judge has completed the draft oral decision, he or she must mark "draft decision" and the A-number on the tape(s) and then place the tape(s) into a separate green envelope for transmittal to the Office of the Chief Immigration Judge for transcription purposes.

Note: Do not record the draft oral decision using the Digital Audio Recording System.

- c. **Render a Draft Written Decision.** Immigration Judges may issue a draft written decision. If an Immigration Judge chooses to draft a written decision, it must be completed within 10 working days after the hearing. The judge must put the draft written decision in a green envelope marked "Draft Decision" and place the envelope on the left-hand side of the Record of Proceeding. The judge must also put the alien's A-number on the green envelope.

### **5. Issuing a Final Decision When a Number is Available**

If the Immigration Judge dictates a draft oral decision or prepares a draft written decision, upon receipt of the transcribed draft of the oral decision or completion of the written decision, he or she should review the draft decision as soon as possible. The Immigration Judge should make any appropriate changes. There will be a compact disk accompanying the transcribed draft oral decision. The Immigration Judge may make any changes to the draft oral decision on the compact disk. If the Immigration Judge is satisfied with the draft oral decision, he or she should make a

notation to this effect. The Immigration Judge should not sign or date the draft oral decision or written decision.

It is anticipated that after the cut-off date, the Office of the Chief Immigration Judge will notify the Immigration Courts regarding the allocation of the remaining current fiscal year numbers, especially as to the Priority 2 cases. On the date of that notification, Immigration Judges should issue as final the transcribed draft oral or written decision, or schedule a hearing to render an oral decision in any case in which the decision was reserved without preparation of a transcribed draft oral or written decision. Note: Decisions in those Priority 2 cases in which final decisions are not issued because numbers are no longer available in the current fiscal year cannot be issued prior to the beginning of the next fiscal year.

## **6. Scheduling Suspension/Cancellation Hearings**

Suspension of deportation or cancellation of removal cases shall not be rescheduled to an earlier date for the purposes of permitting an alien to have his or her case heard at a time when numbers may be available under the cap. Cases can be rescheduled for an earlier date if a legitimate docket management reason for advancing the hearing exists.

### **B. Court Administrator Role**

#### **1. Review Off-Calendar Reports Immediately After the Cut-off Date**

Court Administrators are responsible for determining whether there are any grants or denials of suspension/cancellation issued before the cut-off date which have not been entered into the CASE system (Priority 1 cases). The Court Administrator must obtain an off-calendar report and review the report to find those suspension/cancellation cases which were granted by the Immigration Judge before the cut-off date, but have not been entered into CASE. The Court Administrator must then obtain a copy of the Immigration Judge's decision and fax it to the Office of the Chief Immigration Judge, attention: Chief Clerk, (703) 305-1448, no later than 21 days following the cut-off date. The Office of the Chief Immigration Judge will ensure that the necessary CASE data is entered. The Court Administrator must also ensure that a sufficient number of Sony 4-Track recorders with microphones are operational and available for Immigration Judges to render draft oral decisions. Court Administrators should contact the Chief Clerk to obtain additional recorders.

#### **2. Remaining Current Fiscal Year Decisions**

The Office of the Chief Immigration Judge will allocate the numbers based on the date and time in which the Immigration Judge reserved the decision (Priority 2 cases). If the Office of the Chief Immigration Judge notifies the Court Administrator that a number is available in the current fiscal year, the Court Administrator must immediately contact the Immigration Judge and inform the judge that the judge must sign the transcribed oral or written decision by close of business on the date that the number becomes available. Similarly, if the judge reserved decision and did not prepare a draft oral or written decision, the judge must schedule a hearing to render an oral

decision by the close of business on the date that the number becomes available. The Office of the Chief Immigration Judge will notify the Immigration Courts in advance regarding the dates that the remaining numbers for the current fiscal year will be available.

The Court Administrator must notify the Chief Clerk that the decision was issued so that the Office of the Chief Immigration Judge may update CASE.

### **3. Processing Reserved Suspension/Cancellation Decisions**

#### **a. Entering Reserved Suspension/Cancellation Cases in CASE**

Once the cut-off date has been reached, Immigration Court personnel will be unable to enter an outright grant in the CASE system, unless the alien is exempt from the cap. In other words, the CASE data entry code "F" (suspension of deportation or cancellation of removal grant which is subject to the cap) can no longer be entered. The "G" data entry code (suspension of deportation or cancellation of removal grant which is not subject to the cap) may continue to be entered.

If an Immigration Judge reserves a suspension/cancellation case pursuant to this OPPM, enter the application decision code "R" (reserved decision) into CASE. If the Immigration Judge would deny a concurrent application for relief (such as asylum), enter adjournment code "29" (concurrent application) into CASE.

When the Immigration Judge closes the record and reserves decision, he or she must note the date and time that the decision was reserved on the Immigration Judge Worksheet. Following the hearing, support staff must check the worksheet to ensure that the A-number, date and time are correct, and send a copy of the worksheet by fax to the Chief Clerk, Office of the Chief Immigration Judge. The fax number is (703) 305-1448.

#### **b. Handling a Dictated Decision**

If an Immigration Judge elects to dictate an oral decision, the judge will dictate the oral decision outside of the presence of the parties within 5 working days after the hearing, using a Sony 4-Track tape recorder to draft the oral decision. The Immigration Judge will mark "draft decision" and the A-number on the tape(s) and place them in a separate green tape envelope. *See* section III, A. 4, above.

The Court Administrator must ensure that the Immigration Court has an adequate supply of green envelopes. When the Court Administrator or his or her designee receives the green tape envelope from the Immigration Judge, he or she must verify that the tape has the correct A-number and is marked "draft decision." In no case shall the dictated draft decision be released to the parties or to the public since it is not final.

**c. Forwarding of the Dictated Decision for Transcription**

The Court Administrator must establish a tracking system for dictated decisions. The Court Administrator or his or her designee must mail the tape(s) containing the draft decision to the Chief Clerk, Office of the Chief Immigration Judge. In turn, the Office of the Chief Immigration Judge will forward the tape(s) to the transcriber.

**d. Returning Transcribed Decisions to the Immigration Court**

The transcriber will send the transcribed decision and compact disk to the Office of the Chief Immigration Judge. The Office of the Chief Immigration Judge will, in turn, forward the decision with the compact disk to the Court Administrator. Upon receipt of the transcribed decision and the compact disk, the Court Administrator or his or her designee must:

- Insert the transcribed decision and the compact disk into a green envelope.
- Mark "Draft Decision" on the green envelope.
- Place the envelope on the left-hand side of the Record of Proceeding.
- Forward the Record of Proceedings to the Immigration Judge who rendered the decision.

**e. Handling a Written Decision**

If an Immigration Judge drafts a written decision, the judge will draft the decision within 10 working days after the hearing. When the Immigration Judge has completed the draft decision, the judge must put the draft decision into a green envelope and place the envelope on the left-hand side of the Record of Proceeding. The Immigration Judge must then provide a copy of the decision to the Court Administrator or his or her designee. The Court Administrator or his or her designee must immediately fax the decision to the Chief Clerk, Office of the Chief Immigration Judge. The fax number is (703) 305-1448.

**f. Completing the Reserved Decision**

Unless the Office of the Chief Immigration Judge notifies the Immigration Court that a number is available in the current fiscal year (*see* section III, B. 2, above), beginning October 1 of the next fiscal year, the Immigration Judge may sign and date the transcribed oral decision or written decision. Similarly, if the Immigration Judge reserved decision and chose not to prepare a draft oral or written decision, the judge may schedule a hearing to render the oral decision.

The Court Administrator or his or her designee is responsible for mailing the transcribed oral decision or written decision to the parties. Before the decision is mailed to the parties, the Court Administrator must ensure that court staff updates CASE.

#### **IV. Conclusion**

This OPPM provides guidance on handling applications for suspension of deportation and cancellation of removal once numbers are no longer available in a fiscal year. If you have any questions regarding this OPPM, please contact your Assistant Chief Immigration Judge or the Chief Clerk, Office of the Chief Immigration Judge.