Immigration Court Proceedings 101

Presented by the
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Judicial Division

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This publication accompanies the audio program entitled "Immigration Court Proceedings 101" broadcast on June 17, 2020 (event code: JD2006ICP).

TABLE OF CONTENTS

CONTINUING LEGAL EDUCATION

Immigration Court Proceedings 101

Wednesday, June 17, 2020 | 1:00 pm Eastern

Sponsored by the ABA Judicial Division

ABA

THE PREMIER SOURCE FOR CLE

Immigration Court Proceedings 101

The Panel

- Elizabeth (Betty) Stevens, Attorney, Fairfax, VA
- Lisa Green, Attorney, Denver, Colorado
- Camila Palmer, Attorney, Denver, Colorado
- Christina Fiflis, Attorney, Denver, Colorado
- Hon. Mimi Tsankov, National Association of Immigration Judges

Objectives

- Become familiar with general sources of substantive Immigration Law
- Identify and distinguish between various types of Immigration Court proceedings
- Explain the general rules of the Immigration Court
- Understand practitioner and Immigration Court logistics
- Develop tools to prepare to represent individuals before the Immigration Court

Overview of Immigration Practice

Immigration Law:

- Citizenship Law
- Asylum Law
- Labor and Commercial Law
- Constitutional Law
- Civil Rights Law
- Family Law
- Administrative Law - Rules and Regs
- Litigation
- Criminal Law

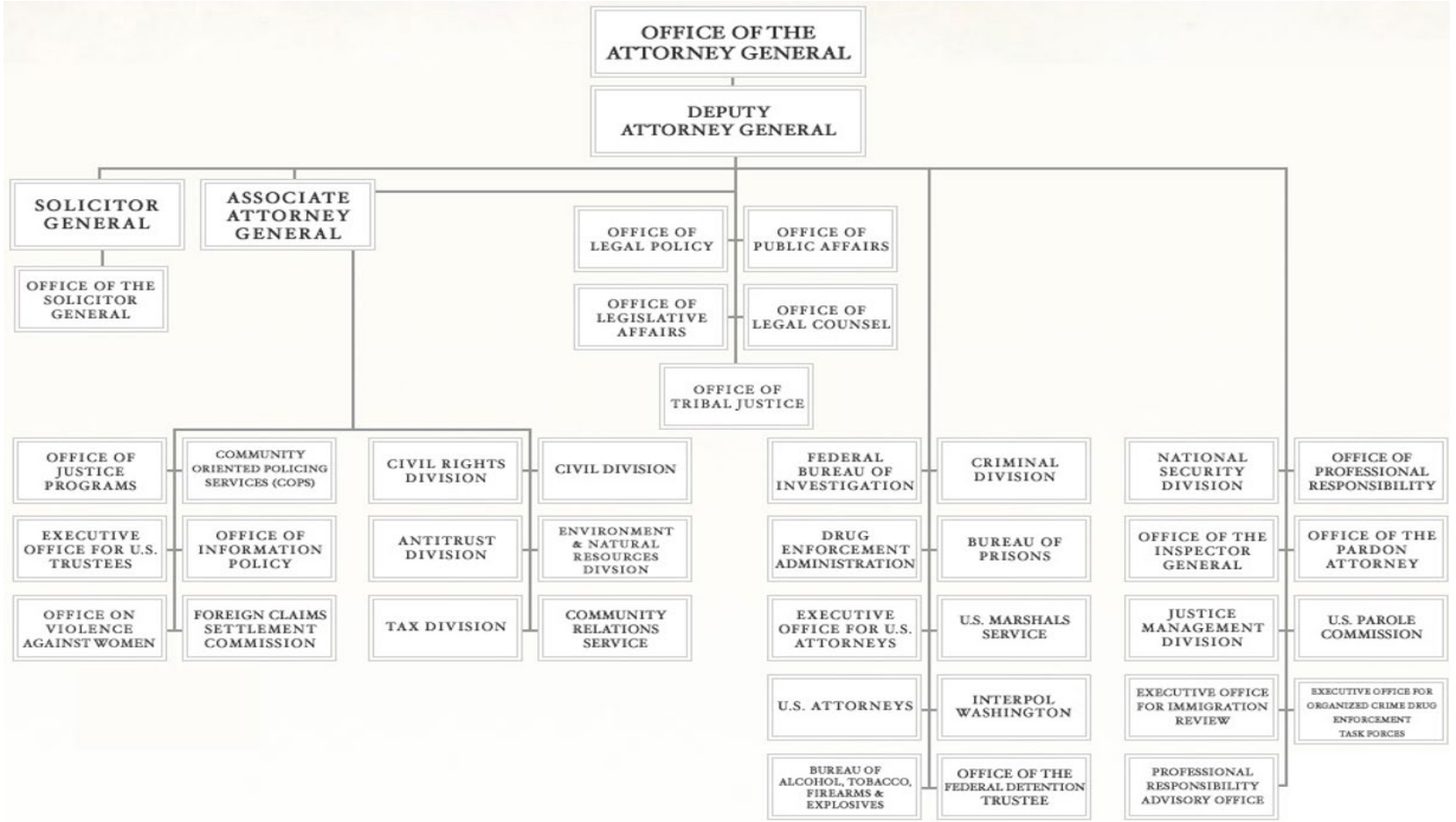
Immigration System Structure

DOJ: AG/Deputy AG; EOIR-Immigration Judges/Courts; Office of Immigration Litigation (OIL)

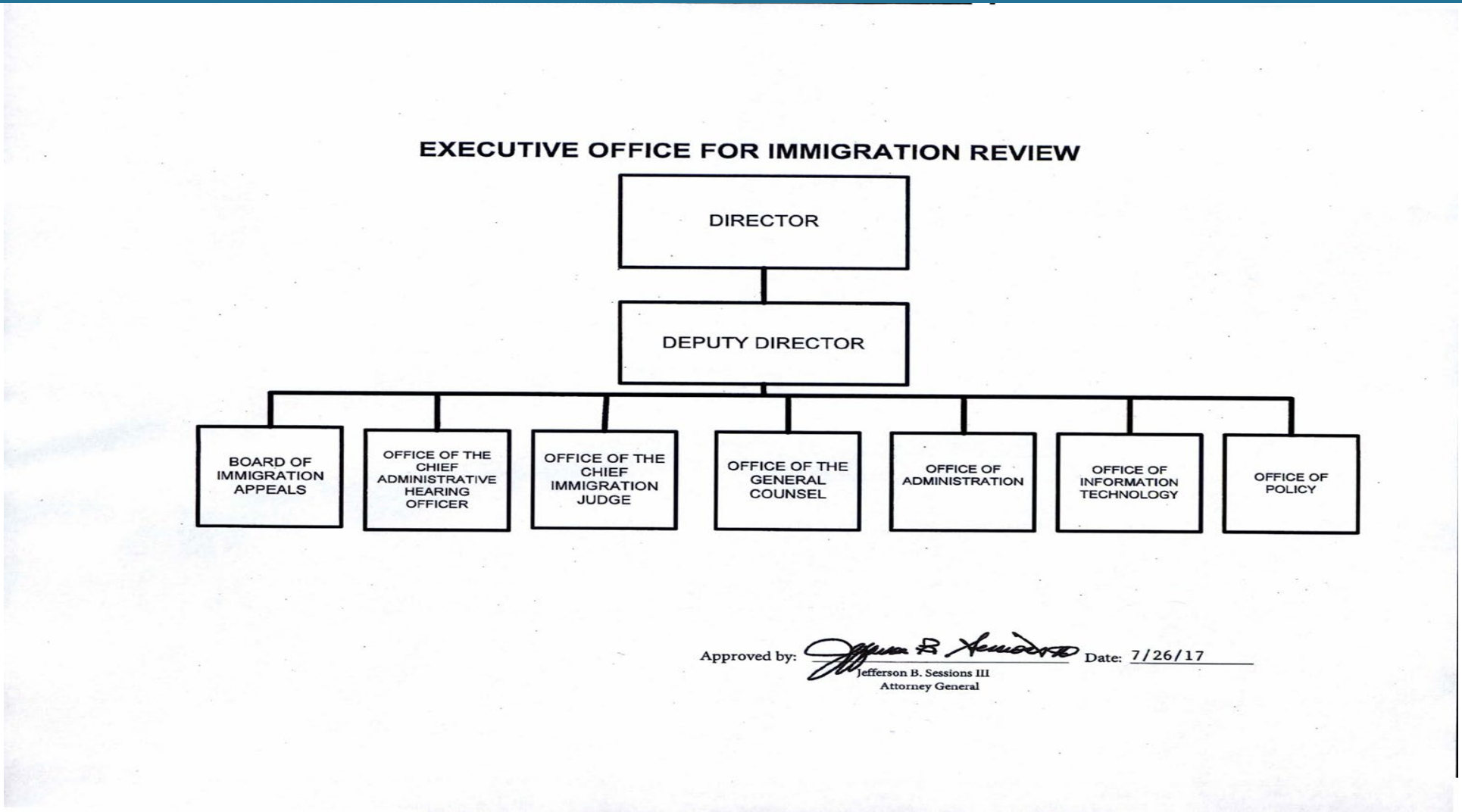
DHS: Six operational components with regulatory responsibilities:

- U.S. Citizenship and Immigration Services (USCIS)
- U.S. Coast Guard (Coast Guard)
- U.S. Customs and Border Protection (CBP)
- Federal Emergency Management Agency (FEMA)
- U.S. Immigration and Customs Enforcement (ICE)
- Transportation Security Administration (TSA)

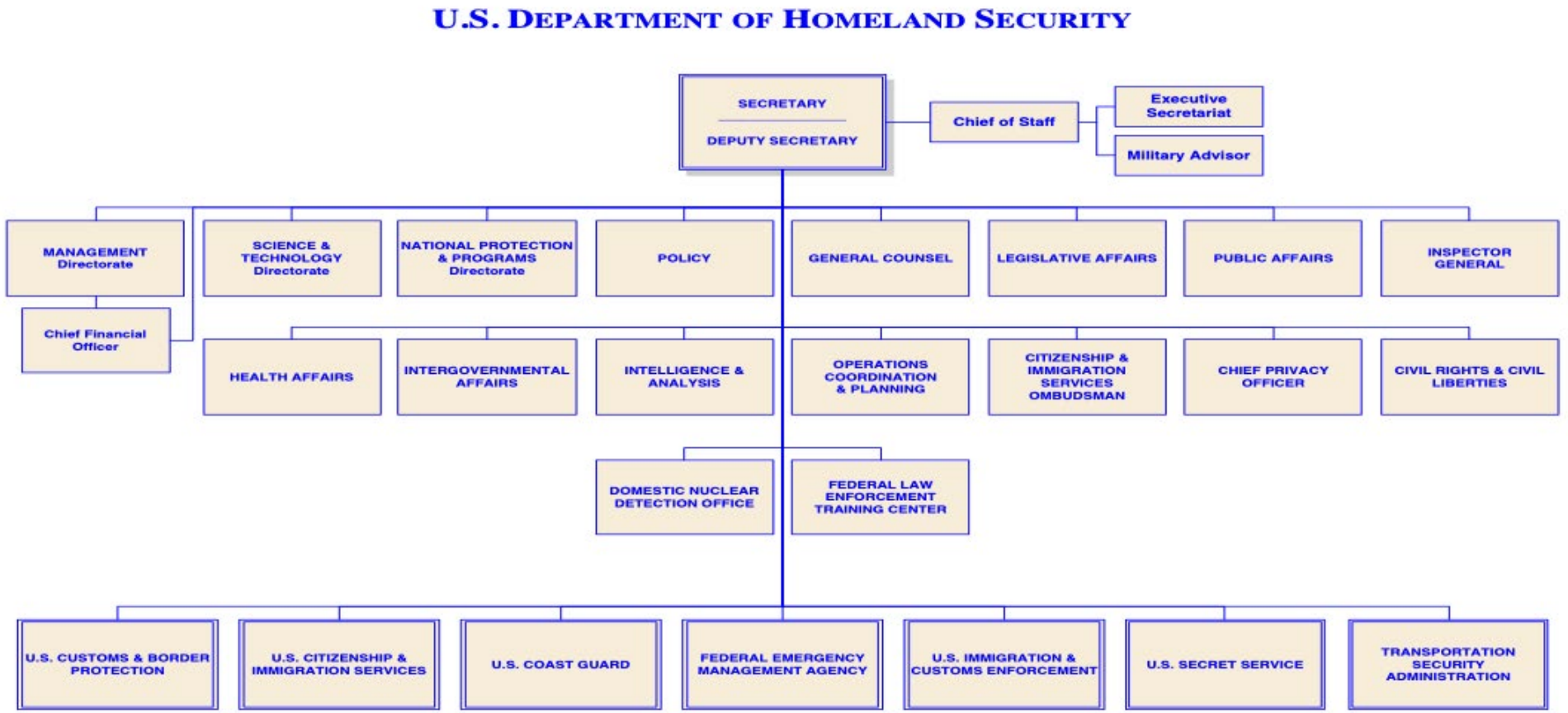
Office of the Attorney General



Executive Office for Immigration Review



DHS Organizational Chart



DHS Immigration Responsibilities

CBP: First call on who may be admitted into the United States; border security

USCIS: adjudicates benefit requests, including naturalization, immigrant and non-immigrant petitions, asylum, adjustment and change of status

ICE: investigations, workplace enforcement, detention and removal operations, represents DHS in immigration court proceedings

Other Agency Roles

Department of State:

- Citizenship (passports, reports of Birth Abroad)
- Immigrant and Non-Immigrant Visas

Health and Human Services:

- Refugee Programs
- Juvenile Programs

Department of Labor:

- Labor Certifications

Immigration Courts

More than 460 immigration judges located in over 58 locations throughout the United States

Who's in the individual court?: Immigration Judge; clerk; translator; ICE attorney; respondent

Both ICE and Respondent may appeal to Board of Immigration Appeals

If appeal remains pending for more than 6 months, EOIR Director/OLP may decide appeal

Only Respondent may appeal to the numbered circuit with jurisdiction over the location of the hearing

Sources of Immigration Law and General Guidance

Administrative Law Regime + Power to Detain and Deport (INA Sections 212 & 237)

Immigration and Nationality Act, codified in Title 8, United Stated Code

8 C.F.R., Aliens and Nationality

Sections 6, 20, 22, 28. 42 C.F.R.

Board of Immigration Appeals (B.I.A.); Administrative Appeals Office

Circuit Court decisions / SCOTUS

Internal Agency Policy and Guidance (Memos)

Executive Orders

EOIR Practice Manual /Unpublished BIA decisions

Local practices

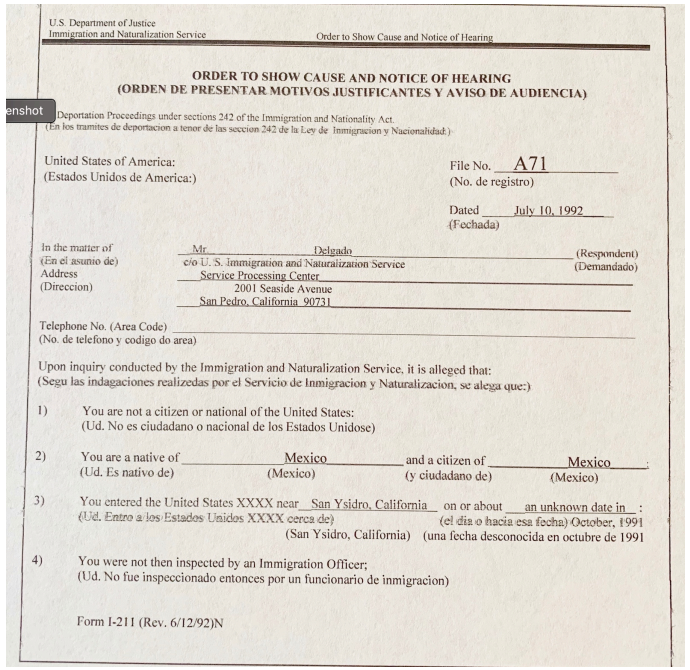
Introduction to Master Calendar Hearings

What is a Master Calendar Hearing, and how did I get here?

The Master Calendar Hearing is a preliminary hearing (much like an "arraignment" in the context of criminal court).

1. A Notice to Appear ("NTA" or charging document) is served on a respondent by DHS and a copy is served on the Immigration Court.
2. The Immigration Court mails a Notice of Hearing to the respondent (or the respondent's attorney, if a **EOIR-28**, Notice of Entry of Appearance has been filed).
3. The respondent appears in court for an open hearing, with 20-30 other respondents.

Charging document: NTA



U.S. Department of Justice
Immigration and Naturalization Service — Order to Show Cause and Notice of Hearing

ORDER TO SHOW CAUSE AND NOTICE OF HEARING
(ORDEN DE PRESENTAR MOTIVOS JUSTIFICANTES Y AVISO DE AUDIENCIA)

Deportation Proceedings under sections 242 of the Immigration and Nationality Act.
(En los tramites de deportacion a tenor de las seccion 242 de la Ley de Inmigracion y Nacionalidad.)

United States of America:
(Estados Unidos de America:)

File No. A71
(No. de registro)

Dated July 10, 1992
(Fechada)

In the matter of (En el asunto de): Mr. Delgado (Respondent) (Demandado)
Address (Direccion): c/o U. S. Immigration and Naturalization Service
Service Processing Center
2001 Seaside Avenue
San Pedro, California 90731

Telephone No. (Area Code) (No. de telefono y codigo do area)

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:
(Segu las indagaciones realizedas por el Servicio de Inmigracion y Naturalizacion, se alega que:)

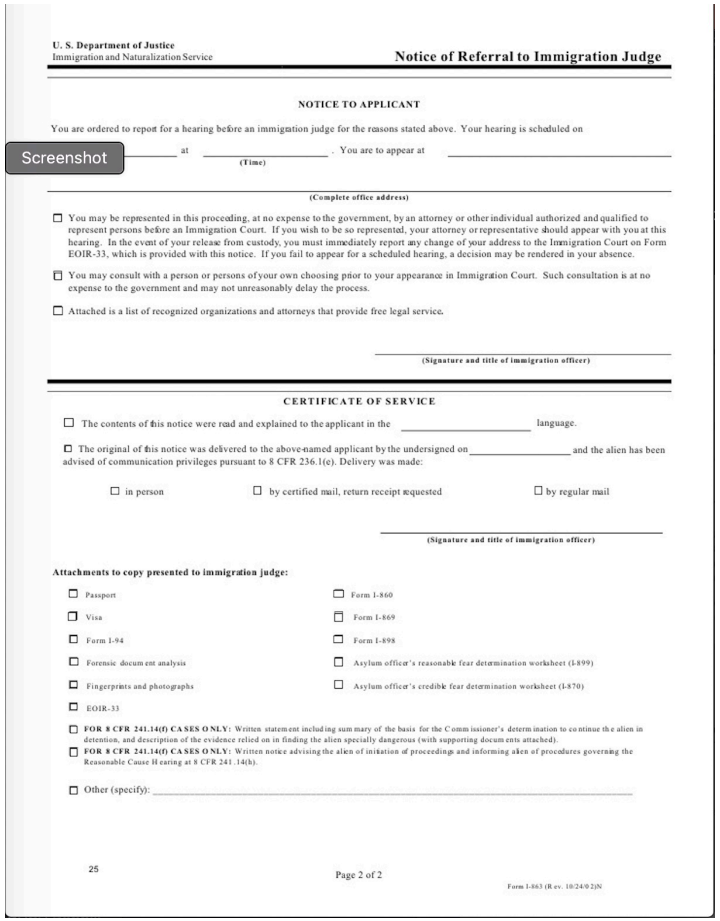
1) You are not a citizen or national of the United States:
(Ud. No es ciudadano o nacional de los Estados Unidose)

2) You are a native of Mexico (Mexico) and a citizen of Mexico (Mexico):
(Ud. Es nativo de) (y ciudadano de)

3) You entered the United States XXXX near San Ysidro, California on or about an unknown date in :
(Ud. Entro a los Estados Unidos XXXX cerca de) (San Ysidro, California) (el dia o hacia esa fecha) October, 1991 (una fecha desconocida en octubre de 1991)

4) You were not then inspected by an Immigration Officer;
(Ud. No fue inspeccionado entonces por un funcionario de inmigracion)

Form I-211 (Rev. 6/12/92)N



Screenshot

U. S. Department of Justice
Immigration and Naturalization Service — **Notice of Referral to Immigration Judge**

NOTICE TO APPLICANT

You are ordered to report for a hearing before an immigration judge for the reasons stated above. Your hearing is scheduled on _____ at _____ (Time). You are to appear at _____ (Complete office address).

☐ You may be represented in this proceeding, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before an Immigration Court. If you wish to be so represented, your attorney or representative should appear with you at this hearing. In the event of your release from custody, you must immediately report any change of your address to the Immigration Court on Form EOIR-33, which is provided with this notice. If you fail to appear for a scheduled hearing, a decision may be rendered in your absence.

☐ You may consult with a person or persons of your own choosing prior to your appearance in Immigration Court. Such consultation is at no expense to the government and may not unreasonably delay the process.

☐ Attached is a list of recognized organizations and attorneys that provide free legal service.

_____ (Signature and title of immigration officer)

CERTIFICATE OF SERVICE

☐ The contents of this notice were read and explained to the applicant in the _____ language.

☐ The original of this notice was delivered to the above-named applicant by the undersigned on _____ and the alien has been advised of communication privileges pursuant to 8 CFR 236.1(e). Delivery was made:

☐ in person ☐ by certified mail, return receipt requested ☐ by regular mail

_____ (Signature and title of immigration officer)

Attachments to copy presented to immigration judge:

☐ Passport ☐ Form I-860
☐ Visa ☐ Form I-869
☐ Form I-94 ☐ Form I-898
☐ Forensic document analysis ☐ Asylum officer's reasonable fear determination worksheet (I-899)
☐ Fingerprints and photographs ☐ Asylum officer's credible fear determination worksheet (I-870)
☐ EOIR-33

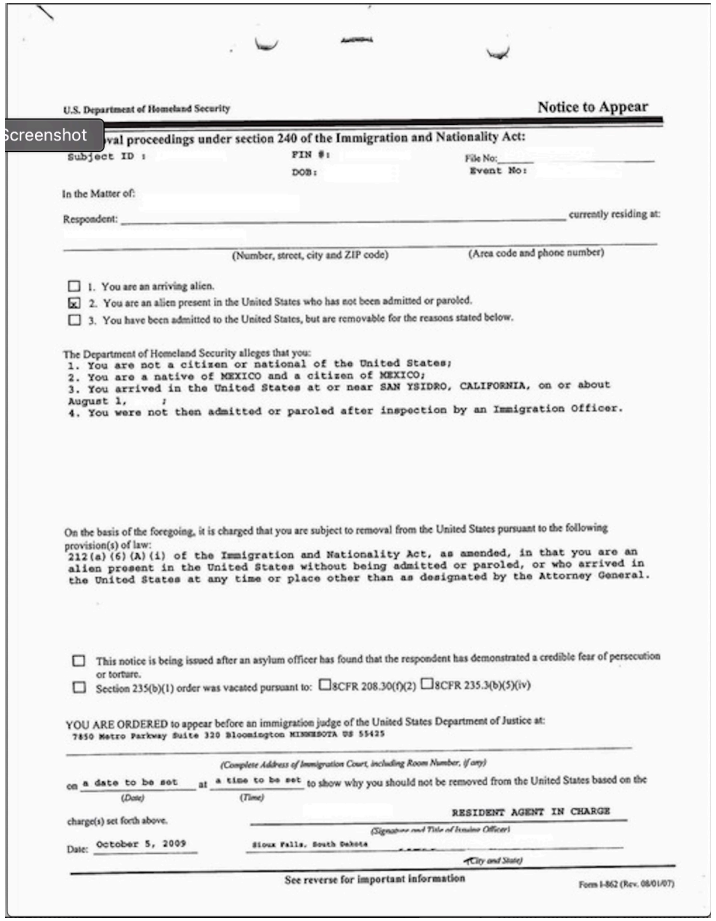
☐ **FOR 8 CFR 241.14(f) CASES ONLY:** Written statement including summary of the basis for the Commissioner's determination to continue the alien in detention, and description of the evidence relied on in finding the alien specially dangerous (with supporting documents attached).
☐ **FOR 8 CFR 241.14(f) CASES ONLY:** Written notice advising the alien of initiation of proceedings and informing alien of procedures governing the Reasonable Cause Hearing at 8 CFR 241.14(h).

☐ Other (specify): _____

25

Page 2 of 2

Form I-863 (Rev. 10/24/02)N



Screenshot

U.S. Department of Homeland Security — **Notice to Appear**

...val proceedings under section 240 of the Immigration and Nationality Act:

Subject ID : FIN #: File No:
DOB: Event No:

In the Matter of:

Respondent: _____ currently residing at:

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.
☒ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:
1. You are not a citizen or national of the United States;
2. You are a native of MEXICO and a citizen of MEXICO;
3. You arrived in the United States at or near SAN YSIDRO, CALIFORNIA, on or about August 1, ;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:
212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
7850 Metro Parkway Suite 320 Bloomington MINNESOTA US 55425
(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set (Date) at a time to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

RESIDENT AGENT IN CHARGE
(Signature and Title of Issuing Officer)

Date: October 5, 2009
Sioux Falls, South Dakota
(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

Notice To Appear ("NTA")

- Charging Document that commences removal proceedings (INA § 239(a))
- Specific Requirements for NTAs set forth at INA § 239; 8 CFR §§ 239.2, 1003.20, 1239.2.
- NTA MUST STATE DATE, TIME AND PLACE OF HEARING: *Pereira v. Sessions,* 585 US _____ (2018).
- DUE PROCESS!
  - Information contained in the allegations obtained in violation of due process?
  - Motions to Suppress?
  - Motions to Terminate?

Preliminary Matters at a Master Calendar Hearing

AT THE FIRST MC HEARING: (discussed in more detail below)

- Entry of Appearance (electronic v. paper filings)
- Pleadings: Allegations (admit or deny) and Charges (concede or deny)
- INA 212 v. 237
- Filing Applications for Relief or Setting of Filing Deadlines
- Scheduling of another MC Hearing or Final Merits Hearing (or "Individual Hearing") with filing deadlines.

Overview of Forms of Relief

- Asylum, Withholding of Removal and Relief under the UN Convention of Torture ("CAT") – Form I-589
- Cancellation of Removal – Forms EOIR-42A or EOIR 42B
    - LPR Cancellation
    - Non-LPR Cancellation
- Adjustment of Status – Form I-485
- Waivers – Forms I-212 or I-601 (or no form?)
- Voluntary Departure
    - Pre-conclusion
    - Post-conclusion

Pre- Hearing Motions

- Motion to Continue
- Motion to Suppress
- Motion for Telephonic Appearance
- Motion for Substitution of Counsel
- Motion to Withdraw as Counsel
- Motion to Withdraw and Amend Pleadings
- Motion to Consolidate
- Motion to Change Venue

Introduction to Bond Hearings

When can you request a Bond Hearing?

- Before the NTA has been served on the Court
- Before the first hearing
- At the hearing

Initial Bond Determination

- Initial bond determination is made by the ICE Office of Detention and Removal with jurisdiction over the place of arrest. 8 C.F.R. § 236.1(d)
- May also be released on own recognizance or under supervision
- Minimum bond issued by court is $1,500; no maximum amount
- May seek bond redetermination before the Court

Bond Eligibility

THOSE NOT ELIGIBLE FOR BOND:

- Arriving Aliens (*see* NTA)
- Subject to Mandatory Detention INA 236(c)
- Subject to final orders of removal (in Reinstatement Proceedings)

CONTESTING MANDATORY DETENTION & BOND ELIGIBILITY THROUGH *JOSEPH* HEARING

- *Matter of Joseph*, 22 I&N Dec. 3387 (BIA 1999)

AND EVEN WHEN THE COURT GRANTS BOND:

- ICE may seek emergency stay from BIA regarding any bond order. 8 C.F.R. 1003.19(i)(l).

Bond Eligibility

PRESENTING A CASE FOR LOW or NO BOND:

- Your client is not a flight risk
- Your client is not a danger to the community or has been rehabilitated
- Your client is eligible for some form of relief

Logistics of Posting a Bond

- Advise obligor (person posting) about how and where to post the bond
  - Payment made to ICE
  - Payment must be made by someone in the U.S. legally
- Prepare client for the logistics of their release
- If you are not continuing with the case past the bond hearing, advise client of next steps and any deadlines
  - Motion to Change Venue
  - Motion to Withdraw
  - New EOIR-28, Entry of Appearance

The Status of the Status Docket

WHAT IS A STATUS DOCKET AND HOW CAN I GET ONE?

- Status docket is a place setting for certain types of case that do not require immediate adjudication by an immigration judge.
  - i.e. waiting on a decision from USCIS that is required before the IJ can render their decision
- An alternative to Administrative Closure after *Matter of Castro-Tum* (27 I&N Dec. 271 (A.G. 2018).
- In 2019, the Courts were constrained by OPPM 19-13 (Aug. 2019), limiting the cases that could be placed on a status docket.

Special Dockets

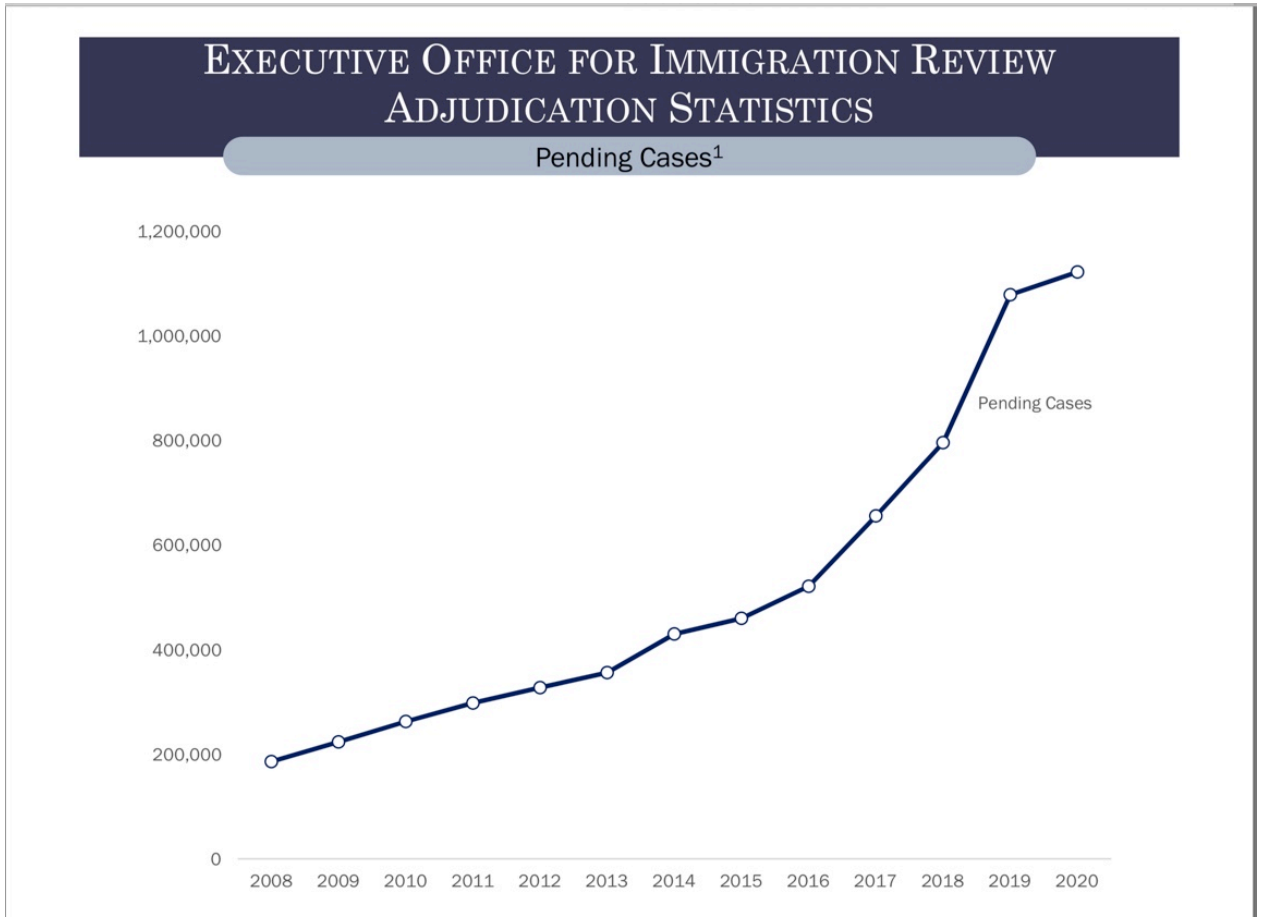
Juvenile Docket

- Age appropriate setting for minors
- Now applies to any case involving an unmarried individual under the age of 18, not just unaccompanied alien children ("UAC")
  - See OPPM 17-03 (Dec. 2017)

Family Unit ("FAMU") Docket

- Expedited docket created in Nov. 2018 for families placed in proceedings
- Individual Hearing must be scheduled within one year of arrival

Introduction to Merits Hearings



WHO WILL BE IN THE COURTROOM AND OTHER PRELIMINARIES

- Who will be in the courtroom?
  - Immigration Judge; clerk; certified interpreter; ICE attorney; Respondent
- Where is the court? When is the hearing?
  - http://www.justice.gov/eoir/
  - Immigration Court Information System: #1-800-898-7180
- Who is representing DHS?
    - http://www.ice.gov/about/district_offices.htm
- If your client is detained, how do you locate a detainee and how do you contact ICE?
  - Online Detainee Locator System: https://locator.ice.gov/odls/homePage.do
  - http://www.ice.gov/about/dro/contact.htm

OVERVIEW OF INDIVIDUAL (MERITS) HEARINGS

- Evidentiary hearings on contested matters, or merits hearings
- Challenging removability
- Application(s) for relief-sworn to in court
- Prior to hearing: Submission of applications, exhibits, motions, witness list, briefs in compliance with court orders and Immigration Court Practice Manual;
- Pre-Hearing Conferences and Conferrals Between the Parties
  - Narrow issues, obtain stipulations, simplify proceedings
- Marking of exhibits and rulings on evidence
- Presentation of testimony of witnesses and evidence,
- Opening/Closing statements
- Decision of the Immigration Judge (oral or written)
- Reservation of appeal

MANNER AND RECORD OF PROCEEDINGS INA § 240(b)(2); 8 CFR § 1003.25(c))

- Detained v. Non-Detained
- In person
- By video conference
- By telephone conference (evidentiary hearings on the merits may only be by telephone with consent)
- Record of Proceedings/Recordings of Hearings
- May be off-the-record discussions, which are summarized on the record by the IJ
- Interpreters are provided at government expense for Individual Hearings
- Can be ordered removed in absentia for failure to attend even one hearing
- Rules of evidence and procedure are relaxed in immigration proceedings
- During hearing, always keep in mind the Record

Pre-Hearing Preparation

- Confirm eligibility for relief (can be multiple forms) and update applications if necessary
- Review R.O.P., court scheduling orders, filing deadlines
- Submit FOIA requests and FBI checks if not already done/Update Fingerprints/Med exams?
- Retain expert witnesses and/or expert reports-schedule interviews, set deadlines for reports and witness preparation
- Identify lay witnesses and schedule interviews
- Assemble evidence establishing eligibility for relief
- Prepare and File Pre- Hearing Submission/Trial Notebooks
- DHS conferral? Telephonic testimony? Pre hg conferences/Motions?

AT HEARING

- Initial matters: Confer again with DHS before going on the record
- Give the Judge your road map for the hearing
- Sequestration of witnesses/order of witnesses
- Mark up of exhibits ; rulings on evidence: Pay attention-: Judges don't conduct their hearings identically
- Openings/Closings: Purposes for each
- Confirm when on and off the record
- Testimony: Respondent/Lay and expert witnesses
- Direct/Cross/Redirect
- Shifting Burdens of Proof/Offers of Proof
- Decision of the Immigration Judge

POST HEARING

- APPEALS: After reserving appeal, a Notice of Appeal must be filed within 30 days to BIA.
- MOTIONS TO RECONSIDER: Request that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked; File within 30 days of the entry of the final administrative order: Only 1 permitted
- MOTIONS TO REOPEN: Also only 1 permitted; File within 90 days, unless an exception applies: e.g., changed country conditions; ineffective assistance of counsel, in absentia order
- Client's next steps following decision or in event of reserved deision

The Immigration Court

- The Immigration Courts suffer from an inherent structural flaw
  - Housed within the Department of Justice
  - Same Agency charged with prosecuting immigration cases in federal courts.
  - The Attorney General controls the jurisprudence, docket management, and even the terms of employment of immigration judges.

The Immigration Court

- Congress has so far failed to rectify the situation and create a new system that is truly independent.
- Our judicial system has made it vulnerable to the extreme policies of the Attorney General.

The Immigration Court

- One such policy is the imposition of numerical quotas to measure the performance of immigration judges.
- The quotas compromise the integrity of the court, undermine due process, and add to the court's backlog, which now exceeds 1,000,000 cases. In other words, the quotas are unethical, unfair, and inefficient.
- Article I advocacy

The Immigration Court

- Interpreter Concerns
  - Cases often rescheduled due to lack of interpretation
- Use of VTC
  - Technical issues
- Holding hearings during a pandemic
  - telephonic hearings

For more information

- Hon. Mimi Tsankov, mimi.tsankov@gmail.com
- Camila Palmer, Camila.Palmer@eahimmigration.com

Questions?

All attendees can submit questions via the Q&A feature on the webinar interface

PRESENTATION NOTES AND FAST FACTS ADDENDUM
Immigration Court Proceedings 06/17/2020*

❖ **PRIMARY GOVERNMENT PLAYERS**

1. U.S. DEPARTMENT OF JUSTICE

EOIR: Executive Office for Immigration Review/Office of the Chief Immigration Judge
Immigration Courts/Judges
Office of Immigration Litigation (OIL)
Board of Immigration Appeals (BIA)
Both ICE and Respondent may appeal to Board of Immigration Appeals-

Attorney General

2. U.S. DEPARTMENT OF HOMELAND SECURITY DHS

Six (6) operational components with regulatory responsibilities:

U.S. Citizenship and Immigration Services (USCIS)

USCIS adjudicates benefit requests, including naturalization, immigrant and non-immigrant petitions, asylum, adjustment and change of status
Some forms of relief in immigration court require a USCIS approved petition before the immigration judge can assume jurisdiction

USCIS Administrative Appeals Office (AAO)

U.S. Coast Guard

U.S. Customs and Border Protection (CBP)

Border security; decides whether an applicant for admission may be admitted into the U.S.

U.S. Immigration and Customs Enforcement (ICE)

Responsible for investigations, workplace enforcement, detention and removal operations,

Represents DHS in immigration court proceedings
OPLA: https://www.ice.gov/opla. Government counsel is sometimes referred to as the "TA" (trial attorney) or as "counsel for the department".

"The Office of the Principal Legal Advisor (OPLA) is the largest legal program in DHS, with over 1,100 attorneys and 350 support personnel. By statute, OPLA serves as

the exclusive representative of DHS in immigration removal proceedings before the Executive Office for Immigration Review, litigating all removal cases including those against criminal aliens, terrorists, and human rights abusers."

U.S. FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)

U.S. TRANSPORTATION SECURITY ADMINSTRATION (TSA)

The mission of DHS as currently described in FY 2021 Budget in Brief for DHS 9found at *DHS FY 2021 Budget in Brief: https://www.dhs.gov/publication/fy-2021-budget-brief)* (BIB 2021) is as follows:

The Department of Homeland Security's (DHS) mission is to ensure a homeland that is safe, secure, and resilient against terrorism and other hazards. DHS has an expansive mission set: preventing terrorism and enhancing security; securing our borders; enforcing immigration laws; securing cyberspace; and ensuring disaster response and resilience. The men and women of this Department support key Presidential priorities, while protecting our country, our people, and our way of life. . .. This year's budget comes at a particularly important time. The Department is witnessing historic changes across the entire threat landscape and must remain vigilant to defend against and to combat these dangers in a manner that does not hamper lawful commerce, transportation, economic development, or personal freedoms. Our enemies and adversaries include a spider web of terrorist groups, emboldened transnational criminals, resurgent and hostile nation states, and more. The Department must continue to adapt in order to protect America and respond to rapidly evolving dangers – in the homeland, at our borders, in cyberspace, and beyond.

Last years' BIB 2020 elaborated a little differently on the mission by adding:

Nefarious actors want to disrupt our way of life. Many are inciting chaos, instability, and violence. At the same time, the pace of innovation, our hyperconnectivity, and our digital dependence have opened cracks in our defenses, creating new vectors through which our enemies and adversaries can strike us. This is a volatile combination. The result is a world where threats are more numerous, more widely distributed, highly networked, increasingly adaptive, and incredibly difficult to root out. The "home game" has merged with the "away game" and DHS actions abroad are just as important as our security operations here at home

Other U.S. GOVERNMENT AGENCIES/OFFICES WITH ROLES IN THE U.S. IMMIGRATION SYSTEM:

U.S. DEPARTMENT OF STATE (DOS)
- Citizenship (passports, reports of Birth Abroad)
- Immigrant and Non-Immigrant Visa Eligibility and Issuance

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)
- Refugee Programs
- Juvenile Programs

U.S. DHS OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES

U.S. DEPARTMENT OF LABOR
- Labor Certifications

❖ SOURCES OF IMMIGRATION LAW AND GENERAL GUIDANCE

U.S. Constitution
Administrative Law Regime + Power to Detain and Deport
Immigration and Nationality Act of 1952, as amended, codified in Title 8, United Stated Code
- NB: Immigration Judges (IJs) are not ALJs

8 C.F.R., ALIENS AND NATIONALITY
C.F.R. Sections 6, 20, 22, 28,42

Board of Immigration Appeals (BIA)
Administrative Appeals Office (AAO)

Circuit Court decisions

U.S. Supreme Court Decisions

Executive Orders
Presidential Proclamations

Internal Agency Policy and Guidance (Memos)

Adjudicator's Field Manual (AFM)

Foreign Affairs Manual (FAM)

EOIR Practice Manual
https://www.justice.gov/eoir/office-chief-immigration-judge-0

https://public.govdelivery.com/accounts/USDOJ/subscriber/new?topic_id=USDOJ_621
to sign up for stakeholder email updates from EOIR on "EOIR Topics" currently pertaining mostly to COVID 19 driven issues (such as standing orders for telephonic hearings or bond determinations waiving hearing and agreeing to entry of an order based on written pleadings)

OCIJ (Office of Chief Immigration Judge) Manual
https://www.justice.gov/eoir/page/file/1258536/download

BIA Practice Manual:
https://www.justice.gov/eoir/board-immigration-appeals-2

EOIR Virtual Law Library
https://www.justice.gov/eoir/virtual-law-library

Unpublished BIA decisions
Not precedential; collected by IRAC (Immigration & Refugee Appellate Center/ Ben Winograd) as an Index of Unpublished Decisions of the BIA
https://www.irac.net/unpublished/index-2/

Local practices

Reforming the Immigration System, a 2010 Report (updated in 2019) published by the American Bar Association Commission on Immigration
https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf

Immigration and Trial Handbook, Maria Baldini-Potermin, published by Thomson Reuters

Immigration Law Sourcebook, Ira J. Kurzban

The Waivers Book, American Immigration Lawyers Association (AILA)

NB: EOIR's posting on its site of EOIR "Myths and Facts" May, 2019, at https://www.justice.gov/eoir/page/file/1161001/download is criticized by AILA as a misrepresentation of immigration court proceedings in its AILA's **Policy Brief: Facts About the State of Our Nation's Immigration Courts** *AILA Doc. No. 19051438, dated May 14, 2019*: ow.ly/29Fe30oJBgs

PRACTICE TIP:
Review the Act, Regulations, and Case Law
Look to reputable secondary sources for overviews
Know the EOIR Practice Manual and BIA Practice Manual
Know your local practice and conventions
Join AILA-regardless of its expense; state chapter listserves and AILA National resources provide invaluable information on local practices, substantive law and current issues
The learning curve for immigration law is straight up
Start your case preparation EARLY

KEEP ALERT to EOIR developments—they affect your work:
E.g., the IJ "dashboard" and IJ Performance Quotas and other pressures on IJs and BIA members
Provisions of the INA of current interest:

INA §212(f) [1182(f)] Suspension of entry or imposition of restrictions by President
Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the
detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

INA §215(a) [1185] Travel control of citizens and aliens
(a) Restrictions and prohibitions
Unless otherwise ordered by the President, it shall be unlawful-
(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe

INA 221(i) (i) Revocation of visas or documents
After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance: *Provided*, That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees, shall not be penalized under section 1323(b) of this title for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation. There shall be no means of judicial review (including review pursuant to section 2241 of title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title.

❖ **OVERVIEW OF THE IMMIGRATION VISA SYSTEM-HOW TO ENTER THE U.S. LAWFULLY**

- Two broad categories of non-citizens are allowed admission into the U.S. provided they meet specific requirements:
  - Immigrants: those who intend to remain as lawful permanent residents
    Four major categories of immigrants (vs. nonimmigrants):
    - Family-sponsored:
      - Immediate Relatives-defined by statute:
        Spouse, child and parent if Petitioner≥21
        No visa quotas

        Preference groups-Visa quotas apply ("the waiting line"):
        F1: Unmarried Sons and Daughters of USCs
        F2A: Spouse and minor children of LPRs
        F2B: Unmarried Sons and Daughters of LPRs
        F3: Married Sons and Daughters of USCs
        F4: Siblings of USCs

    - Employment-based: five categories

    - Diversity lottery: for foreign nationals of countries "underrepresented"; based on intricate formula based on immigration statistics from immediately preceding five-year period; high-admission countries precluded; >10 million applicants/year; high school/skills requirements; check for suspension of the lottery for certain countries

    - Refugees: Numbers permitted vary

See the U.S. Department of State VISA BULLETIN (June 2020 Bulletin included here) for helpful descriptions of visa categories as well as for essential information about visa availability and processing times

https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html

  - Non-immigrants: those who enter the U.S. for specific purposes and for a temporary period of stay: there are more than 20 categories of NIVs (Non- Immigrant Visas), including:
    - Business-related – for work or investment in the U.S
    - Victims –of domestic and sexual violence, human trafficking, and who have assisted law enforcement in investigation/prosecution of a criminal case
    - Visitors – to visit family and friends, explore business opportunities, or for medical treatment; includes exchange visitors
    - Student –to study at an American high school, university, college, or vocational training school
    - Fiancé(e)s –engaged to a U.S. citizen; must marry within 90 days of entry into the U.S.

- Other visa categories for authorized stay in the U.S.:

  - ESTA (formerly Visa Waiver Program)
  - Canadians/Citizens of Bermuda
  - Mexican and Canadian NAFTA professionals
  - Mexican Border Crossing Cards
  - U, T, VAWA
  - Parole
  - Asylum, Withholding, CAT

- TPS, Registry
- Deferred Action for Childhood Arrivals (DACA)—watch for imminent release of U.S. Supreme Court decision this month on three consolidated cases challenging termination of DACA
- Deferred Action
- Authorization Granted in/after Removal Proceedings:
    - Prosecutorial Discretion; Administrative Closure; Termination; Deferred Action; Cancellation of Removal; NACARA Cancellation; Adjustment of Status.

In removal proceedings, a grant of relief can result in a grant of a "green card", a visa granting the Respondent lawful permanent residence.

A visa does not guarantee entry into the U.S. but allows travel to a Port of Entry to request permission to enter the U.S. CBP inspects the visa holder and makes the decision whether to grant admission.

INA 101(a)(13)(A) defines "admission":

- A lawful entry into the United States after inspection and authorization by an immigration officer. If someone has been "admitted" into the United States, they are subject to the grounds of removability under INA Section 237.

Generally speaking, a person who is seeking admission is not entitled to counsel until they have actually been admitted. *E.g*., during the "airport-defense" efforts organized after the first "Muslim Travel Ban", when people were detained at airports across the nation there were hundreds of lawyers ready to help but the lawyers were not allowed to speak with their clients.

Because immigration court removal proceedings are civil and not criminal proceedings, immigrants facing removal are not afforded the Sixth Amendment constitutional protections afforded criminal defendants. The respondent does have a right to counsel, but not to government appointed counsel.

> *In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose. 8 U.S.C §1362.*

The right to counsel does attach at any point where the applicant for admission "has become the focus of a criminal investigation and has been taken into custody." 8 CFR § 292.5(b).

❖ REMOVAL BY THE NUMBERS

DHS IMMIGRATION ENFORCEMENT APPROPRIATIONS

SOURCE DHS FY 2021 Budget in Brief:

https://www.dhs.gov/publication/fy-2021-budget-brief

- In FY 2019 OPLA handled 891,056 cases, a 3.3 percent increase over its FY 2018 caseload. OPLA obtained 188,191 orders of removal, for a ratio of about 170 orders per OPLA line attorney, representing a 9 percent increase from FY 2018a 53 percent increase over FY 2018. *DHS FY 2021Budget in Brief.*

- In FY 2019, ICE removed 267,258 aliens (a 4 percent increase over FY 2018). ERO (DHS ENFORCEMENT AND REMOVAL OFFICE) Officers arrested 143,099 aliens. During FY 2019, ICE housed an average daily population (ADP) of 48,850 adult detainees, a 22 percent increase over the FY 2018 adult ADP of 40,075 (60 percent of whom were apprehended at or near the border by CBP and 40 percent via ICE interior enforcement). *DHS FY 2021Budget in Brief.* "This increase was largely driven by historic levels of CBP Southwest Border apprehensions in FY 2019 and corresponding transfers into ICE detention. CBP apprehended 851,508 individuals at points of entry along the southern border in FY 2019, which is a 114 percent increase over FY 2018. In addition, the Alternatives to Detention program monitored an average daily participant level of 97,268 of the more than 3.2 million illegal aliens on ERO's non-detained docket. ERO responded to 1,619,269 immigration alien inquiries from Federal, State, and local law enforcement agencies through ICE's Law Enforcement Support Center. Additionally, ERO conducted 853 foreign Fugitive Alien Removals arrests – removable aliens wanted for or convicted of crimes committed abroad and residing within the United States. "DHS *FY 2021Budget in Brief.*

- FY 2019 BIB reported apprehension by CBP of a total of 859,501 migrants, "including an unprecedented number of migrant family units (473,682) and unaccompanied alien children (76,020) at the SWB, and deemed 288,523 aliens inadmissible at Ports of Entry." *DHS FY 2021Budget in Brief.*

From the White House's Budget for America's Future 2021
https://www.whitehouse.gov/wp-content/uploads/2020/02/budget_fy21.pdf :

"Along over 5,000 miles of border with Canada, 1,900 miles of border with Mexico, and approximately 95,000 miles of shoreline, CBP is responsible for preventing the illegal movement of people and contraband. Agents from the U.S. Border Patrol (USBP) and Air and Marine Operations (AMO) guard the Nation's land, littoral borders, and associated airspace to prevent illegal entry of people and goods into the United States. CBP Officers (CBPO) and Agriculture Specialists from the Office of Field Operations (OFO) are multi-disciplined and perform the full range of inspection, intelligence analysis, examination, and law enforcement activities relating to the arrival and departure of persons, conveyances, and merchandise at air, land, and sea ports of entry (POEs). CBP remains the second largest source of revenue in the Federal Government, and the Agency is committed to its dual role of trade facilitation and protection of revenue. Through the Office of Trade, CBP enforces nearly 500 U.S. trade laws and regulations on behalf of 49 Federal agencies, facilitating compliant trade, collecting revenue, and protecting the U.S. economy and consumers from harmful imports and unfair trade practices. "

Even though ICE received funding for 40,520 beds per day in fiscal year (FY) 2019, the detained population reached a high of 49,057 per day. Source: Migration Policy Institute,
https://www.migrationpolicy.org

FY 2021 BIB for CBP shows the largest line item request was for a Border Wall System:
Border Wall System.....$2.0B, 0 FTE
identifying expenditure would be for "[c]onstruction of approximately 82 miles of new border wall system" and explaining that "[f]unding supports real estate and environmental planning, land acquisition, wall system design, construction, and construction oversight. "

THE IMMIGRATION COURT CASELOAD
More than 460 Immigration Judges/67 courts, 1,129,000+ cases currently pending-FY 2020

TRAC Says Public Should Not Rely on Accuracy of Immigration Court Records
AILA Doc. No. 20060334 | Dated June 3, 2020

A new TRAC report titled "EOIR's Data Release on Asylum So Deficient Public Should Not Rely on Accuracy of Court Records" notes:
"TRAC has concluded that the data updated through April 2020 it has just received on asylum and other applications for relief to the Immigration Courts are too unreliable to be meaningful or to warrant publication. We are therefore discontinuing updating our popular Immigration Court Asylum Decisions app, and will take other steps to highlight this problem[1]. We also wish to alert the public that any statistics EOIR has recently published on this topic may be equally suspect, as will be any future reports the agency publishes until these major data deficiencies are explained and rectified [fn. omitted] . . .

The EOIR's apparent reckless deletion of potentially irretrievable court records raises urgent concerns that without immediate intervention the agency's sloppy data management practices could undermine its ability to manage itself, thwart external efforts at oversight, and leave the public in the dark about essential government activities. Left unaddressed, the number of deleted records will compound each month and could trigger an expensive data crisis at the agency. And here the missing records are the actual applications for asylum, and how the court is handling them. This is a subject on which there is widespread public interest and concern."

IMMIGRATION FORMS: Every immigration form has a number, an edition date and sometimes a filing fee; every form has instructions in a separate document.

PRACTICE TIP:
The instructions for all government required forms are binding.
A form must be properly filed. The requisite elements of proper filing are set forth at
INA § 204.1(B) and 8 CFR 103.2. Many times, forms must be filed by certain deadlines, and if the form is not properly filed and rejected, the deadline is not met. If the form is improvidently rejected, be careful to preserve and not waive any mandatory filing date that was met by proper filing, even though erroneously rejected.

USCIS forms are found at
http://www. uscis.gov/forms

EOIR forms are found at
https://www.justice.gov/eoir/list-downloadable-eoir-forms

❖ HOW A RESPONDENT GETS PLACED INTO IMMIGRATION COURT PROCEEDINGS

Identification of Non-citizens for Removal by DHS followed by apprehension, arrest and processing:

Enforcement of Immigration Laws:
Immigration enforcement authority is governed by federal law but can be delegated to certain state officials under INA § 287(g); INA § 275.

DHS powers to stop, search, seize, and arrest, found at INA § 287 and 8 C.F.R. § 287.8(b)(1), are extremely broad power, as long as liberty is not restrained. No "reasonable suspicion" is necessary at the border and any expectation of privacy is deemed to be less at the border affording expansive search powers. DHS may briefly detain an individual where there is reasonable suspicion (probable cause not required) of engagement in illegal activity or of unlawful presence in the U.S. Search warrants and probable cause are required for home searches. Search warrants and consent of owner or exigent circumstances are required for worksite searches (but not necessary for public areas).

Due process rights exist for non-citizens. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Landon v. Placencia*, 459 U.S. 21 (1982); *Pyler v. Doe*, 457 U.S. 202 (1982); *INS v. Lopez-Mendoza*, 468 U.S. 1032

(1984)("egregious violations of the 4th Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained")

Identification of targets for apprehension:
-through U.S. Citizenship and Immigration Services
-through U.S. Customs and Border Protection at a port of entry, or within 110 miles of the border
-through U.S. Immigration and Customs Enforcement (e.g., tips, workplace raids, local law enforcement referrals, cross-law enforcement agency agreements)

Apprehension
With a warrant
At the border (by CBP)
Pursuant to ICE detainer (8 CFR §287.7) "Upon a determination by the Service to issue a detainer… [local/state] agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Service."
ICE has the discretion to decide whether to take someone into custody unless otherwise required by law to do so

ICE Processing
Detainee is processed at ICE – ERO (Enforcement and Removal Office)
If going to be placed in removal proceedings (not everyone is entitled to removal proceedings) detainee is issued 3 documents:
- Warrant to Arrest Alien: Form I-120
- Notice to Appear: Form I-862
- Custody Determination: Form I-286

Detainee is transferred to detention facility or to outlying ICE-IGSA
- -thereafter will be transferred from outlying facility to detention facility for removal proceedings

Detainee remains detained or may be released on bond, on own recognizance, or under order of supervision
Some detainees are subject to mandatory detention pursuant to INA § 236(c) and will remain in custody through conclusion of removal proceedings

Remedies in proceedings for Due Process/Statutory and Regulatory Violations in Enforcement:
Motions to Suppress and/or Terminate Proceedings:

Evidence is only admissible if it is probative and its use is fundamentally fair.
Matter of Ramirez Sanchez, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
The exclusionary rule generally does not apply in civil immigration proceedings, but it is possible to suppress evidence obtained through egregious violations of due process. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).
Regulatory violations that prejudice the Respondent can also result in termination of proceedings. *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980). Avoidance of some bars to eligibility for relief may also result from prejudicial violations of due process. *Garcia-Flores, Lopez-Mendoza*.
Remember: DHS has extremely broad authority, it can delegate authority to state officials, INA §§275 and 287(g), its authority is even broader at the border and immigration removal proceedings are civil not criminal. AND the authority of an immigration judge to terminate proceedings is curtailed by current decisions prohibiting termination of proceedings if DHS does not agree to termination.

❖ IMMIGRATION COURT PROCEEDINGS: PRELIMINARIES

Who will be in the courtroom?
Immigration Judge; clerk; certified interpreter; ICE attorney; Respondent

Where is the court? When is the hearing?
http://www.justice.gov/eoir/
Immigration Court Information System: #1-800-898-7180

Who is representing DHS?
http://www.ice.gov/about/district_offices.htm

If your client is detained, how do you locate a detainee and how do you contact ICE?
Online Detainee Locator System: https://locator.ice.gov/odls/homePage.do
http://www.ice.gov/about/dro/contact.htm

Working with Opposing Counsel: Guidance from a former Immigration Judge:
Why work with opposing counsel:

DHS and IJ also want a just result
Minimizes the adversarial nature of proceedings
Efficiency of case before the IJ
Best possible outcome
Take the long view
Guard your reputation
Don't sell out for a single client
Know your case
Make sure DHS knows you mean business if necessary

Possible outcomes:
Prosecutorial discretion – new policy memos
Stipulations
Withholding prosecution
Repapering
Deferred Action

Assess the need for Pre- Hearing Motions
Common pre-hearing motions:

To Continue - *Matter of Hashmi*
To Accelerate
To Change Venue
To accept evidence out of time
To accept a witness or learned lay person
To accept telephonic testimony
To waive appearance
For telephonic appearance
To request a subpoena
Prepare to respond to a possible motion by DHS to Pretermit an Application

CHECK EOIR Practice Manual for filing requirements/deadlines

Motion to Continue?
Usually, a first continuance request is granted to pro se Respondents to seek counsel; then burden for continuance becomes good cause and newly retained counsel may be granted a continuance for attorney preparation. *Matter of Rahman,* 20 I&N Dec. 480 (BIA 1992). Other circumstances supporting a continuance include pending petitions before USCIS and pursuit of post-conviction relief under *Padilla v. Kentucky.*

- File a written motion no less than 15 days prior to the hearing (the earlier the better)

- Detail the reasons for the request and support with evidence; include preferred rescheduled dates

Motion to Change Venue?

Venue lies where the charging document is filed by the Service – 8 CFR §§ 1003.14(a), 1003.20(a): usually, where the Respondent resides or is detained. Access to counsel, to respondent, to witnesses, to evidence, are factors which might compel a need to change venue, especially when the respondent is detained.

PRACTICE TIP:
Be prepared to be required to enter pleadings as a prerequisite to a change of venue grant. Carefully consider the attendant consequences. If the NTA is deficient, if service was deficient, and more research needs to be completed, the risk of waiver and prejudice to the respondent is obviously very high. Later amendment of pleadings may not be permitted. Additionally, check with local practitioners in current venue regarding any benefits to maintaining venue and compare to benefits of second venue.
Know your courts. Check TRAC for pertinent data -e.g., asylum grant rates differ between courts
TRAC is a nonpartisan, nonprofit data research center affiliated with the Newhouse School of Public Communications and the Whitman School of Management, both at Syracuse University. For more information, to subscribe, or to donate, contact trac@syr.edu or call 315-443-3563.

TIPS for Motions:
Determine DHS's position on the motion prior to filing
Be clear about what you want the IJ to do
Include the who, what, when, where, why
Be clear and concise
Support your reasoning with evidence
Declarations, documentation, applications, etc.
Include a proposed order unless local practice instructs to the contrary

❖ PAST THE PRELIMINARIES: COMMENCEMENT OF PROCEEDINGS

Entries of Appearance

- Electronic registration of attorney required: call court clerk for instructions
- Entry of Appearance before the Immigration court: Form EOIR 28
- EOIR 28 Entry of Appearance is distinct from G-28 Entry of Appearance, which is required for filings with USCIS, which filings may be required in proceedings to pursue relief from removal

NB: Attorneys are not required to have a G-28 on file for detained client consultations.

THE NOTICE TO APPEAR (NTA): CHARGING DOCUMENT FORM I-862

Spend considerable effort reviewing the NTA and its accompanying warrant and custody determination.
Immigration Court proceedings are initiated by DHS with service of an NTA, Notice to Appear.
The NTA sets forth allegations and charges of immigration law violations against the Respondent and orders the Respondent to appear in immigration court. The NTA also includes various advisals about the removal proceedings. The NTA is published as a form, numbered I-862. The NTA must be lodged with the immigration court in order for proceedings to commence. INA § 239(a).

PRACTICE TIP: The NTA can be amended to add, or even drop, charges at any time. Provided proper service of the amended NTA is accomplished (it could even be in the courtroom) the case may continue to proceed.

Current HOT TOPIC: Deficiencies in the NTA can be basis for termination of proceedings or assist in a finding of eligibility for relief. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); see also *Banuelos- Galvez v. Barr*,

(03/25/2020 ,10th Cir.), in which the court granted the petition for review and held that, given the unambiguous statutory language for the stop-time rule and Notices to Appear (NTAs), the stop-time rule (which can preclude eligibility for cancellation of removal relief) is not triggered by the combination of an incomplete NTA and a notice of hearing as DHS contends. AILA Doc. No. 20040634. See also AILA Practice Advisory: The Pereira Ruling and Resulting Fake NTAs AILA Doc. No. 19082210 | Dated December 13, 2019 which page tracks government efforts to comply with the ruling, court decisions, attorney and media resources, and more.

PRACTICE TIP
Pereira is a game-changing case. Perhaps not entirely surprising, there is huge resistance by DHS to defer to the Supreme Court's plain language ruling. In the 10th Circuit, the *Banuelos-Galviz* ruling will serve as grounds for reopening many removal orders as well as permit applications for cancellation of removal which were wrongly deemed precluded after a respondent was served a Notice of Hearing. Keep an eye on developments in your circuit.

UPDATE AS OF 06-08-2020:
The U.S. Supreme Court granted certiorari in *Niz-Chavez v. Barr*, a 6th Circuit case ; the opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 789 Fed. Appx. 523. The decisions of the Board of Immigration Appeals and the immigration judge are unreported. The issue before the Court is: Whether, to serve notice in accordance with 8 U.S.C. § 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in Section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.

The requisite contents of AN NTA are set forth in INA § 239; 8 CFR §§ 239.2, 1003.20, 1239.2.
The nature of the proceedings, legal authority for the proceedings, acts or conduct alleged to be in violation of law and charges against the Respondent citing the underlying statutory authority for those charges are required. Additionally, notice of the right to be represented by counsel (at no expense to the government) and of the requirement that the Respondent must provide a current and updated address/phone number must be included.

The NTA must be served in person, or "if personal service is not practicable," through mail to the Respondent or counsel of record. Determine whether service was proper. At hearing, you will be asked to concede proper service.

Proceedings comply with due process when the NTA is correctly prepared, accurately alleged and charged, and properly served. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984); see also *Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994); *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979).

Identifying Deficiencies in/Challenging the NTA

Review allegations and charges carefully. If you fail to review the NTA and make objections, you will likely be waiving any future challenges *Chambers v. Mukasey*, 520 F.3d 445 (5th Cir. 2008); *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986)

Summary:

- Is the individual subject to proceedings?
- Is he/she removable as charged in the NTA?
- Is she/she eligible for relief?
- Statutory and regulatory requirements
- Correct date/manner of entry?
- Does the respondent have a claim to U.S. Citizenship?

- Is the categorization of criminal history correct?
- Is the respondent an Asylee/refugee in proceedings without DHS having
- terminated protected status? 8 CFR § 1208.24
- Is there possible diplomatic immunity – Respondent in A or G status

Why Challenge the Notice to Appear?
To: shift the burden of proof; preserve rights on appeal; terminate proceedings (e.g. if there is bona fide claim to U.S. citizenship, regulatory violation, as examples); permit for eligibility for relief, to contest mandatory detention.

Failure to timely object to deficiencies in the NTA may be deemed a waiver, *Chambers v. Mukasey*, 520 F.3d 445 (5th Cir. 2008); *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986, you also want to preserve the issue for appeal and you may also be able to shift the burden of proof on some elements to the government. Review all allegations and charges carefully. Termination of proceedings or successfully contesting mandatory detention may be achievable based on a deficient NTA. A respondent may not be removable as charge. Motions to Suppress and/or Terminate may be appropriate if there are egregious violations of due process.

Pleading to the allegations and charges in the NTA:

Usually oral pleadings are taken by the Immigration Judge, but for a variety of reasons written pleadings may be permitted or ordered.

Summary:
Admit or deny factual allegations and concede or deny charge(s) of removability
Remember you can admit in part and deny in part
Be prepared to explain the bases for any denials by Respondent
Address whether service of the NTA was proper
Certain advisals are required to be provided to the Respondent -- the judge will inquire as to whether Respondent waives a reading by the judge based on counsel having provided the requisite information. If counsel deems waiver appropriate, then counsel represents to the court that he/she has discussed the nature and purpose of proceedings, as well as contents of the NTA and that he/she has explained the consequences of failing to appear or filing frivolous applications. Sometimes it may be preferable to have the judge provide the necessary advisals, for example to ensure accurate interpretation.

Advise the Court what application(s) for relief from removal the Respondent will be filing and other matters

Be prepared to advise the court of how much time the Respondent needs to prepare and submit the application(s) (there may be several bases for relief and therefore more than one application). Be prepared to explain to the court how the respondent is prima facie eligible for the relief sought. The court will ask how much time is needed to present your case at final hearing. Check with local practitioners regarding usual time allotments afforded by your judge-but don't feel pressured to agree to insufficient time. You will also need to ensure that a request for an interpreter, if needed is recorded (usually the judge inquires as to the respondent's "best language" and whether s/he wants an interpreter. Be careful about designating or declining to designate a country of removal.

❖ BOND HEARINGS

If a Respondent is placed in immigration detention, s/he may be eligible for release on bond. The respondent must, at a minimum, establish s/he is not subject to mandatory detention not a danger to the community and not a flight risk. Initial bond determinations-including no bond- are made by the ICE Office of Enforcement and Removal with jurisdiction over the place of arrest. 8 C.F.R. § 236.1(d); INA § 236; 8 CFR § 1003.19. The

NTA is served with a Notice of Custody Determination which sets forth whether ICE has set a bond and in what amount. The minimum bond amount is $1500 and typically is much higher. There is no maximum amount and bonds of $20,000.00 are not necessarily uncommon. ICE itself can reconsider/re-determine initial bond. A respondent is usually afforded only one bond hearing, and may request a bond orally, in writing, or at the discretion of the judge, telephonically. The IJ's authority to review DHS custody and bond determinations is found at INA 8 CFR §1236. A respondent may also request a bond at the first Master Calendar hearing. *Id.* A motion for a bond redetermination may be made based on 'a material change in circumstances." 8 CFR § 1003.19(e).

PRACTICE TIP

It is important to know that a bond CAN be requested BEFORE an NTA is filed with the court and before a first scheduled hearing. 8 CFR § 1003.19(b). THIS IS NOT SOMETHING ALWAYS UNDERSTOOD.

If the Respondent is not subject to mandatory detention (typically not eligible for bond because of a particular criminal or immigration violations record), the Respondent may request a bond hearing. Normally, a respondent gets only one bond hearing. But a bond redetermination hearing is possible. For bond hearings, the respondent appears before the immigration judge presiding in the detention facility for issuance of a bond. ICE refers to these bonds as "delivery bonds" which identifies the purpose of a bond: to guarantee that the released detainee will appear at all future immigration court hearings, report to ICE if and as required, and depart the United States if so ordered. Failure to comply with these terms will result in forfeiture of the bond funds paid. Persons not eligible for bonds include: "arriving aliens", those with final orders of removal, including exclusion or deportation orders, those subject to reinstatement of prior removal orders, those with expedited, final administrative, stipulated removal orders, those with voluntary removal orders which have been made final orders of removal and those who have reentered the U.S. unlawfully. Those subject to mandatory detention under INA 236(c) is also not eligible for bond.

Nevertheless, there may be other bases for release of some who are bond ineligible.

Bond hearings can be very brief, and typically multiple bond hearings are docketed for identical time slots (typically 8:30 AM or 1:30 PM) and decisions rendered immediately upon conclusion of hearing. BUT not all bond hearings are short and simple; do not underestimate the importance of complete preparation.

You can ask for a bond hearing before an NTA is filed with the Court or before your client has his/her first hearing. If client is already on the docket, a bond hearing can be requested at the initial Master. 8 CFR 1003.19(b).

A questionnaire form used by the IJs for bond hearings is located at https://www.justice.gov/eoir/page/file/987991/download.

Bond hearing preparation should address all of those elements at a minimum. In addition to showing the respondent is not subject to mandatory detention, it is imperative to demonstrate that the respondent if released would not be a danger to society and is not a flight risk. 8 C.F.R. §1236.1(c)(8). The Immigration Judge will consider *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976) and look to the following factors:

Family and community ties: letters of support from family and community attesting to ties and service (live witness testimony could be compelling)
Prior immigration history, appearances at hearings
Prior failures to appear
School records/Employment history
Membership in community organizations
Evidence of community service and involvement
Manner of entry and duration of presence in the U.S.
Criminal history and rehabilitation if a criminal record and/or plan for maintenance of rehabilitation/remorse

Financial ability to post bond
Civil documents (birth and marriage certificates)

On or off the record?

A bond hearing is conducted off the record, usually, which requires contemporaneous attorney memorialization of the proceeding. Respondent's counsel should keep alert to the necessity of going on the record, for example, if DHS counsel seeks to have the courtroom cleared before commencing hearing.

PRACTICE TIP
Membership in certain political parties is argued by DHS to establish that a person is a danger to the community bond ineligible. While the IJ can take into consideration any information available or presented, 8 C.F.R. § 1003.19 (d), including information not set forth in the NTA. Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999), the evidence must be probative and specific. *Matter of Fatahi*, 26 I & N 791 at 794 (BIA 2016). In a recent decision (included here) the BIA determined that DHS' mere contention that the respondent was necessarily a danger to society because of political party affiliation was not evidence and remanded for a new hearing. Being on the record was likely helpful in obtaining the remand.

Substantial preparation is required for bond hearings, typically involving production of evidence similar to that which will be submitted at the Respondent's "trial" or Merits Hearing for relief from removal. Bond hearings are challenging in that attorneys must work with their clients in the detained setting and access to detention facilities, access to supporting evidence and to witnesses when the Respondent is detained is challenging. While unlikely to be agreed to, it is worth seeking a stipulation to bond from ICE counsel in advance of hearing.

Logistics of Posting a Bond
Immigration bonds are different from criminal bonds—immigration bond company requirements are more stringent and not all immigration bonding companies are reputable. If a bond company fails, a respondent may be taken into immediate custody. Respondents often seek bond obligors within their own families and communities. It may take years before a bond can be released and funds returned to the obligor, so it is important to ensure that the Respondent and bond obligor understand the process. Typically, a Respondent will have reimbursed the bond obligor early in the process, but ICE does not substitute the Respondent for the obligor, and it will be the obligor who will receive the bond amount upon release of the bond. The Respondent should ensure a satisfactory arrangement, including possibly a contract, with the bond obligor, for return of funds to the Respondent if the obligor has been reimbursed in full.

It is also important to be familiar with the bond posting process, which varies between jurisdictions; it is advisable to confirm with local practitioners what that process entails and to understand logistics. For example, if a bond is issued by the Court on a Friday afternoon, it is unlikely that release on bond will occur that day and the Respondent will be remain in detention for several more days, or, *e.g.,* cash is not accepted when posting a bond, so the bond obligor must provide another means of payment, or, *e.g.*, ICE offices where the bond must be posted may be located a long distance form the obligor and may have limited hours during which bond postings are accepted.

Logistics of Release on Bond
Prepare your client for release onto the street. Remember the clothes he went into detention with are the clothes he will wear out. If it was a summer day when he went in, and a snowstorm is raging on the day he walks out, he is going to need something other than flop-flops. And frequently enough, it may be counsel who has to manage this, if the client is detained far from friends and family.

It is not uncommon for an attorney to conclude representation after a bond hearing upon release of the respondent; if that occurs, it is of course essential that the respondent be advised of how next to proceed and of all pending deadlines.

❖ BOND REDETERMINATION

Because a judge can not only lower a bond but also raise it, revoke it or change its conditions, a motion for a bond redetermination requires careful consideration. In assessing whether to seek a redetermination, ask what does your client have to lose.? The respondent and/or DHS may appeal the immigration judge's bond redetermination decision to the Board of Immigration Appeals.

PRACTICE TIP

ICE may seek an emergency stay from BIA regarding any bond order. 8 C.F.R. 1003.19(i)(l). ICE may obtain an automatic stay of a bond order from an immigration judge by filing an EOIR-43 where ICE either denied bond or set an amount at $10,000 or more in first instance, and IJ then authorized release on bond

❖ MANDATORY DETENTION IN BRIEF - INA 236(c)

A respondent is subject to mandatory detention if s/he is:
Inadmissible for …

"any offense covered in INA 212(a)(2)":
Crime involving moral turpitude (CIMT) that is not a petty offense
Multiple convictions with aggregate sentence of > 5 years
Controlled substance violation
Controlled substance traffickers
Prostitution & commercialized vice

OR

Deportable for

"any offense covered in INA 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)":
Two CIMTs not arising out of single scheme
1 CIMT within first 5 years of admission + actual sentence of imprisonment > 1 yr
Aggravated Felony (after 11/18/88)
Controlled substance violation - exception possession of <30 grams of marijuana for own use
Certain firearms offenses
Firearm as defined in 18 USC § 921(a)

Only individuals released from criminal custody after Oct. 8, 1998 are subject to mandatory detention. *Matter of Adenji*, 22 I&N Dec. 1102 (BIA 1999); but see *Matter of West*, 22 I&N Dec. 1405 (BIA 2000).

When DHS erroneously charges a detainee as being subject to mandatory detention, challenge is made by what is termed a "Joseph Hearing", contested on the grounds that there is insufficient evidence to sustain removability charges specified in INA § 236 (c) and that DHS is substantially unlikely to prove removability. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

❖ DETAINED V. NON-DETAINED REPRESENTATION

DETAINED DOCKET:
Upon detention by the Department of Homeland Security (DHS) a respondent who has a right to appear before a judge to defend against removal or deportation, if not eligible for release on bond (or if cannot post bond) will proceed with defense of his/her case before an Immigration Judge presiding in the detention facility over the detained docket. Cases proceed more rapidly on the detained docket and are attended by myriad

access challenges: access to legal representation; access to evidence and witnesses necessary to present a defense; access to other support including medical, psychological and other expert witnesses. If a respondent proceeds pro se, legal libraries inside detention facilities are outdated and otherwise entirely inadequate.

Access difficulties by and to legal counsel for detained clients cannot be underestimated. Respondents must have sufficient funds on account to make calls, are restricted in their use of calls, both placing and receipt. Attorneys must go through time-consuming security (there are no attorney "clearance-cards" as in other courts). Attorneys must wait after clearing security to be escorted by the facility guards to meet with clients; they have to wait for availability of client meeting rooms; there is no guarantee of privacy and some facilities have acknowledged that recording of calls occurs. Attorney visiting hours are restricted. If attorneys show up during "count" or a client meeting extends into "count", attorney waiting time is extended significantly. Interpreters must be cleared in advance for attending with attorneys and clearances can expire and require renewal before the case is concluded. Check with local practitioners about the experience of accessing detained clients for important guidance.

Currently, attorneys are being permitted telephonic appearances under certain restrictions for master calendar hearings due to COVID19. The EOIR web page has a link to specific implementation of COVID 19 precautions with a chart linking to each immigration court's procedures. Included here are two standing court orders issued accordingly, for the Aurora, Colorado detention facility: one regarding telephonic appearances and one regarding bond determinations. The latter also serves to provide guidance (including submission deadlines) submissions) for what the court expects at bond hearings before that court.

What is the Immigration Detention "Bed Mandate"?

Detention facilities have a certain bed capacity; e.g., 1,100 beds. Facilities are mostly operated by two private contracting firms, GEO and Core Civic (fka Corporations Company of America or CCA). Congress appropriates funds annually for payment to these contractors "by the bed", Bed prices range typically between $125-$325 /bed/day. The bed count is broken down into "adult" beds and "family" beds; family beds are more expensive. The term "bed mandate" comes from the budget appropriations request, which specifies the bed count needed and an explanation as to the necessity for the number requested. For FY 2021 the bed count requested has been increased to 60,000. The explanation is that "*An increase in detention capacity is critical to supporting ICE's ability to apprehend, detain, and remove aliens*". DHS Budget in Brief FY 2021 ((BIB FY 2021).

The appropriation request for FY 2021 for 60,000 beds specifically looks like this:

1. *BIB FY2021--* ***Increase to 60,000 ADP.....$710.4M, 0 FTE***

The FY 2021 President's Budget Submission supports an ADP level of 60,000 (55,000 adult and 5,000 family). Of the requested adult beds, 52,372 will be funded from discretionary appropriations and 2,628 will be funded via mandatory fees.

❖ VOLUNTARY DEPARTURE AND VOLUNTARY RETURN: Is there a difference?

Voluntary Return

There is an abundance of guidance contending that there is no real difference between Voluntary Return and Voluntary Departure. Yet historically, the two differ in practice and process and legacy INS (Immigration and Naturalization Service, reorganized in 2003 into divisions of DOJ and DHS) distinguishes the two.

The ACLU describes "Voluntary Return" as "an informal process by which an individual who has been detained by Border Patrol or ICE agrees to be immediately expelled from the United States in lieu of formal

removal proceedings before an immigration judge", noting that Voluntary Return is far from voluntary in most instances. *Lopez-Venegas, et al v. Johnson*, Case No. 13-cv-3972-JAK-PLAx (D. Court for the Central District of California) (case settled). In 2009, the ACLU first realized what it calls "the disastrous consequences of the voluntary return regime" *Id*. As the ACLU explains:

- *The ACLU began investigating voluntary return and discovered that for years, countless families throughout Southern California have been torn apart by immigration enforcement agencies' coercive and deceptive voluntary return practices.*
- *As a matter of standard practice, ICE and Border Patrol have misinformed immigrants about the consequences of voluntary return and have withheld the fact that voluntary return can trigger a ten-year bar against returning to the United States.*

Id.

The case involved in part three teenaged Mexican students on their way to school when a Border Patrol agent demanded their papers and detained them at a Border Patrol station, where agents pressured the students to sign voluntary return forms. In June 2013, the ACLU filed a class action lawsuit, on behalf of two Southern California immigrants' rights organizations as well as seven individuals who the government had expelled through unfair voluntary returns.
Each individual plaintiff had significant family ties in the United States, lacked any serious criminal history, and would have had a strong claim to stay in the United States lawfully had immigration officers not misinformed or pressured them to accept voluntary return.

The case settled and the settlement was approved on February 25, 2015, establishing significant systemic reforms in the use of voluntary returns. CBP and ICE agreed to the ACLU monitoring compliance for three years and the settlement included provisions that allowed some of the hundreds of thousands of Mexican nationals who have been expelled from the United States pursuant to unlawful voluntary returns to reunite with their families in the United States. Class members were persons returned by Border Patrol San Diego Sector or ICE Los Angeles or San Diego Field Office. The settlement agreement should be looked at when defending a respondent who is alleged to have agreed to a Voluntary Return. It can be found at https://www.aclu.org/sites/default/files/field_document/settlementagreement90-4.pdf

PRACTICE TIP:
It is very important to examine whether a respondent was coerced into signing a Voluntary Return
A Voluntary Return can preclude eligibility for relief, but a coerced voluntary return is void as a preclusion
This is a very complex issue and requires consultation with an experienced removal defense lawyer

Voluntary Departure

Voluntary departure is considered a form of removal, not a type of relief. It is an alternative to a final order of removal. Referred to as VD, it is granted by an Immigration Judge before commencement of a merits hearing or at the conclusion of the hearing. For a grant of VD, the respondent must concede removability. If VD is requested at the beginning of proceedings, then the IJ has the discretionary authority to allow up to 120 days for the respondent to depart. The respondent must pay for his own departure. Certain criminal records preclude a grant of VD. Failure to depart within the time granted renders the order a final removal order, may carry a fine, and makes the respondent ineligible for voluntary departure and several forms of relief for ten years. In certain cases, immigration judges may grant voluntary departure in lieu of removal at the conclusion of proceedings and the respondent may be granted up to 60 days to depart. To qualify for post-conclusion VD, the respondent must have been present in the United States for one year immediately preceding the issuance of the Notice to Appear, have been a person of good moral character for the preceding five years, not be removable on aggravated felony or terrorist grounds, and have the means to depart the United States and intends to do so. A VD order alone does not bar a person from re-entry, but future admissions must be pursuant to eligibility for a visa and not barred by other circumstances, like unlawful presence. VD can also toll the accrual of unlawful presence in specific circumstances. These attending issues should be examined thoroughly in assessing the benefits of seeking VD. In particular, the effect of VD when potentially facing a 3- or 10-year unlawful presence bar should be explored. And as with any bar, whether a

waiver is available must also be assessed. While VD is a relatively straight-forward proceeding, especially at the beginning of proceedings, it needs to be contextualized for the respondent so that it is an informed election.

Administrative Voluntary Departure: This is similar to Voluntary Return in that it is issued by a DHS officer in lieu of formal removal proceedings. However, unlike voluntary return, this process is usually formal. INA § 240B.

❖ PROCEEDING TO REMOVAL HEARING

Whether released on bond, not eligible for bond or not subject to a bond, the Respondent proceeds after being charged as set forth in the NTA and after being served a Notice of Hearing to defend against his/her removal from the United States. The Notice of Hearing is either served by the Judge at the conclusion of a bond hearing or for respondents not yet having appeared before a judge, by mail.

During the individual hearing, the respondent and DHS present the merits of the case to the immigration judge.

Decisions by the IJ

In many cases, the immigration judge issues an oral decision at the conclusion of the individual hearing. Once a case is completed, either the respondent or DHS (or both) may appeal the decision to the Board of Immigration Appeals ("BIA"), whose decisions are thereafter appealable to the federal appeals court in which the immigration court is located for the circuit.

Sometimes however, the judge notifies the parties that a written decision will be forthcoming within a short tie frame, or decision is reserved because the law compels reservation—this happens routinely in certain cancellation of removal cases because there is a statutory cap (quota) of 4000 grants per year nationwide for those cases and for the past several years the cap is reached early in the fiscal year, creating a backlog. This backlog can result in a final decision being delayed for 18 months or more. The respondent continues to be eligible for work authorization if he was during proceedings and continues to renew his work authorization based on the case as still pending. The process for issuing these decisions has changed over time, and currently if the judge decides to deny the case, the judge does so at the conclusion of the hearing. But if the judge does not decide to deny, the judge cannot issue an intended grant until a visa becomes available under the cap limitation. And at that point, if the laws have changed in favor of the government, there is a risk that a presumed grant could be appealed by DHS on the basis of such a change. This is a complex process that should be reviewed with an experienced practitioner. It is also very challenging to explain adequately to clients.

NB: The government fiscal year runs October -October, so the cancellation of removal visa cap replenishes every October.

❖ BURDENS OF PROOF

Generally, the burden is on the Respondent to establish eligibility for relief. For most forms of relief, the respondent's burden includes appealing to the favorable exercise of discretion by the IJ. DHS bears the initial burdens to prove alienage and removability. Then the burden shifts to the Respondent. DHS may assume additional burdens, depending on the charges it lodges against the respondent.

If the Respondent is present without being admitted or paroled, (having entered without inspection or "EWI") the burden shifts to the Respondent to prove that he/she is lawfully present ("clear and convincing") or not inadmissible as charged ("clearly and beyond doubt"). 8 CFR § 1240.8(c). The burden remains on DHS to establish alienage. 8 CFR 1240.8. If there is any bona fide way to challenge alienage or removability, force DHS to meet their burden. If DHS has established alienage and removability, the burden shifts to the

Respondent to prove eligibility for relief from removal. INA § 240(c)(4). This includes the burden of establishing "clearly and beyond doubt" that s/he is not inadmissible under INA § 212.

If the Respondent was lawfully admitted but is now deportable, the burden is on DHS to prove that the Respondent is removable as charged by "clear and convincing evidence." INA § 240(c)(3)(A); 8 CFR § 1240.8(a).

If the government is charging the respondent with fraud and misrepresentation, it is the government's burden (clear and convincing evidence) to prove the fraud/misrepresentation in proceedings challenging inadmissibility.

Summary re: Meeting Your Burdens

- Show satisfaction of basic statutory/regulatory eligibility requirements
- Meet each element
- Address any bars to relief / inadmissibility issues
- Criminal, misrepresentation/fraud, statutory bars
- Show that a favorable exercise of discretion is warranted
- Address any adverse criminal factors
- Submit waivers if available
- Show rehabilitation and remorse
- Highlight positive factors including U.S. citizen or LPR family members, hardship to U.S. citizens or LPRs, contributions to community, lengthy presence in the U.S., lack of criminal record, rehabilitation, immigration history, payment of taxes; other civic duties

Remember a grant of relief is neither automatic nor required, by issued in the exercise of discretion: balancing favorable with unfavorable factors

Abridged Rules of Evidence Apply in Immigration Court

Rules of Evidence in proceedings come from the regulations and the EOIR Practice Manual

Advice from a former Immigration Judge:

Use your instincts
Make objections to maintain the issues for appeal
Rules that apply – aimed at reliability and trustworthiness
    Authentication
    Best Evidence
    Administrative Notice
    Stipulations
Rules that do not apply
    Hearsay
    Privileges

When in doubt, it's about fundamental fairness

PRACTICE TIP

Use Offers of Proof and come prepared with them—especially for the purpose of saving time during the hearing; but do not expect DHS counsel to withhold objection so remain prepared to put on the evidence

Form and Record of Proceedings (INA § 240(b)(2); 8 CFR § 1003.25(c))

- In person
- By video conference
- By telephone conference (evidentiary hearings on the merits may only be by telephone with consent)
- Record of Proceedings: electronic recording by the immigration Judge
- May be off-the-record discussions, which are summarized on the record by the IJ

❖ MASTER CALENDAR AND INDIVIDUAL HEARINGS

Summary of Master Calendar Hearings

- *The Respondent's first appearance before an Immigration Judge in removal proceedings*
- *Comparatively short in duration*
- *If additional attorney preparation time is needed, a continuance to a second Master Calendar may be requested-but beware of risks*
- *Purpose of Master Calendar Hearing:*
    - *Entry of Appearance*
    - *Advising the Respondent of rights and provision of certain warnings by the IJ*
    - *Explain the charges and factual allegations in the NTA*
    - *Pleadings to allegations and charges may be taken; IJ establishes whether removability is contested*

    - *Identify and narrow the factual and legal issues*
    - *Set filing deadlines*
    - *Status updates*
    - *Scheduling of the Individual Hearing for adjudication of contested matters and applications for relief*
    - *IJ Verification of information/ Issue spotting*
    - *Designation of country for removal; (do not designate for asylum seekers)*
    - *Statement of forms of relief which will be requested: include all to avoid waiver*
    - *Identification of interpreter issues*
    - *Court may set deadlines; may differ from EOIR Practice Manual*

PRACTICE NOTE

Without exception, request for Voluntary Departure in the alternative to other relief sought should be requested at every Individual Hearing, so it is not waived

Summary of Individual (Merits) Removal Hearings

- *An Individual Hearing is an evidentiary hearing on contested matters (on the merits)*
- *A filing deadline for applications for relief is typically ordered by the Court for a date well in advance of the Individual Hearing; subsequent deadline may be court-ordered or as standardized in the Immigration Court Practice Manual* available online at:
    http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm
    Format must be proper
    Must serve opposing party
- *Respondent challenges removability*
- *Possible scheduling of Pre-Hearing Conferences and Communications Between the Parties to narrow issues, obtain stipulations, and simplify proceedings*
- *The PRE-HEARING Submission deadline for briefs, criminal history charts, exhibits and witness lists, and any other matter you want considered or accepted into evidence, is 15 days in advance of hearing, unless the IJ has ordered otherwise (which often occurs and is usually 30 days in advance)*
- *Judges may have a particular format that they order: e.g. shorter written charts/summaries*
- *Not all counsel submits briefs—speak with trusted local counsel about the usefulness of briefs and other options*
- *Opening statements-may not be permitted-but prepare one anyway*
- *IJ marking of exhibits and rulings on evidence*
- *Swearing in Applications*

- *Presentation of witnesses and evidence*
- *The judge may elicit testimony from the respondent and often does*
- *REMEMBER rules of evidence and procedure are significantly relaxed but be prepared for more formal conduct regarding evidence*
- *Closing statements*
- *At conclusion, both parties will be asked whether they waive or reserve appeal*

Most Common Forms of Relief Currently Sought in Removal Proceedings

Asylum, Withholding of Removal, and Protection Under the Convention Against Torture – INA §§ 208(a), 241(b)(3)
Cancellation of Removal:
LPRs /Non-LPRs/ NACARA "Special Rule" Cancellation/ VAWA Cancellation
Adjustment of Status – INA § 245(a)
Special Cases
INA § 245(I)
Waivers – INA §§ 212(c), 212(h), 212(i)
VAWA and U visas

❖ **PREPARATION FOR INDIVIDUAL HEARING**

- Know and comply with the statute and regulations, the Immigration Court Practice Manual, and the basic rules of evidence
- Meet with and thoroughly interview client when you begin the case preparation and then again in preparation for hearing; ensure the client understands the case inside out
- Obtain as much objective documentation as possible regarding criminal history
- Take your time to thoroughly and persuasively present your case
- Do FOIAs and FBI checks early on
- Decide what experts you need
- Retain experts early on; decide whether you will file expert reports and have expert testimony
- Interview potential witnesses-don't assume anyone should be overlooked
- Get the sworn affidavits you need well in advance-decide if an affiant will be needed to also testify in court
- Contact the ICE Trial Attorney prior to the hearing to clarify and narrow issues; stipulate; understand what their concerns are in supporting relief
- Prepare client to testify:
  Tell the truth
  Don't "guess" when answering questions
  Take responsibility for mistakes
- DON'T:
  Try to "hide" negative or damaging information
  Submit supporting letters and documents that you have not thoroughly reviewed for accuracy/helpfulness
  Rely solely on the information your client has provided

- Make sure each witness knows the purpose of the proceedings and the purpose of his/her testimony
- Familiarize the witness with the procedures and what to expect
- Submit a Hearing Pre-Submission that can make your case on its own; This ensures thorough preparation for the hearing and may cover something you forget at hearing;

- Reformat the Hearing Pre-Submission into your Trial Notebook
- Add your proposed testimony for each witness
- Add copies of cases you may need
- Add a cheat sheet of rules of evidence and particularly objections
- Add an exhibits list to check to ensure admission of all of your exhibits

❖ AT HEARING

- Be prepared; be organized – know your client, know the facts, know the documentation on record with the Court
- Be on time: delay or failure to appear may result in the Respondent's removal in absentia (8 CFR § 1003.26(c))

After preliminary matters, some IJs will ask you for your theory of the case
This is your opportunity to tell the Judge what the case is all about
- Provide a road map of what you intend to do at hearing
- Decide whether to do an opening or closing or both-the Judge may not permit an opening but usually permits a closing

- Always keep "the record" in the back of your mind
- Protect your client and preserve issues for appeal
- Raise all non-frivolous arguments and challenge DHS
- Note anything improper or unfair to your client on the record b objecting to it (*i.e*., improper evidence or improper questioning)
- Always listen carefully and be alert!

Purpose of an Opening Statement
- Establish the theory of your case (legal requirements with supporting facts)
- Establish your theme – reduce a large amount of information to easily-remembered words
- and phrases
- Anticipate weaknesses and refute the other side
- Request an outcome – tell the IJ what you want

Direct Examination
- Have a plan, but be flexible
- Listen to your client's answers
- Pay attention to the Immigration Judge
- Ask direct, simple questions focused on the personal knowledge of the witness
- Watch out for leading questions
- Qualify your expert and/or witnesses to give opinions
- Defer to the Immigration Judge as the factfinder

Cross Examination of your witnesses
- Listen
- Be prepared to object and make your objections for the record

Re-direct Examination
- Don't repeat what has already been covered
- Purpose of re-direct is to respond to issues brought up on cross or to help clarify the
- Respondent's answers given on cross

Closing Statements

- Most IJs allow closing statements
- Prepare it before hearing-identify how the evidence has met every criterion for eligibility and favorable discretion
- Deal candidly with weaknesses and point out weaknesses in the government's case

. **Motions to Terminate/ Administratively Close/ Recalendar:**

"The order of the Immigration Judge shall direct the respondent's removal from the United States, or the termination of proceedings." 8 CFR § 1240.12(c).

Grounds for Motions for Termination

Respondent not removable/inadmissible
Lack of prosecution
Deficiencies in the NTA
Prosecutorial discretion
Regulatory violations

Administrative Closure of cases is simply not occurring currently. Recalendaring cases which have been administratively closed is, however, happening en masse by DHS

HOT TOPIC: Mass recalendaring motions by DHS are being filed on cases which have been previously "admin closed". When a case is "admin closed" either party may request a recalendaring, which puts the matter back on the active docket for full proceedings. In some instances, because of new developments in the law, relief may be available to respondents not previously available. In many cases, relief eligibility may be less likely. Keep tuned in to local practice addressing mass recalendarings.

Post-Hearing

Review all requirements in applicable EOIR Practice manuals

Generally

- APPEALS and STAYS OF REMOVAL:
  After reserving appeal, a Notice of Appeal must be filed within 30 days to BIA
  REVIEW BIA Practice Manual, last revised February 20, 2020
  Chapter 6: STAYS and EXPEDITE REQUESTS
  BIA Emergency Stay Line:703-306-0093
  Monday through Friday, except federal holidays
  9 a.m. - 5:30 p.m. Eastern Time

Currently if an appeal remains pending before the BIA for more than 6 months, EOIR director may decide the appeal. This is not without controversy.

- MOTIONS TO RECONSIDER:
  Request that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked
  File within 30 days of the entry of the final administrative order
  Only 1 permitted
  INA § 240 (c)(6);8 CFR § 1003.23(b)(1)
  May not seek reconsideration of a decision denying a previous Motion to Reconsider – 8 CFR § 1003.23(b)(2)

    - *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).

- Review requirements and guidance in BIA Practice Manual

- MOTIONS TO REOPEN:
  Based on new facts or evidence, evidence previously unavailable and material, evidence could not have been discovered at previous hearing, a change in the law, *e.g.* eligible for relief not previously available. Must be supported with evidence and application for relief (if not already filed). The BIA *sua sponte* may move to reopen for exceptional circumstance.8 CFR § 1003.2(a)
  Must be filed with Court having administrative control over the case
  .8 CFR § 1003.23(b)(1)(ii)
  Only 1 permitted (with limited exception)
  Deadline: file within 90 days; unless an exception applies
  (see deadline exceptions below)
  INA § 240 (c)(7)(i); 8 CFR § 1003.2(c)(2); 8 CFR § 1003.23(b)(1)

  Motions to Reopen In Absentia Orders:
  An In Absentia order of removal may result from not only a failure to appear but for a delay in in appearance (8 CFR § 1003.26(c)). There is no appeal, but parties may file a motion to reopen an In Absentia removal order.

  Motions to Reopen and Rescind an In Absentia Order
  - for Lack of Notice: No deadline; may be filed at any time
  INA § 240 (b)(5)(c); 8 CFR § 1003.23(b)(4)(ii)
  - due to Custody: No deadline
  INA § 240 (b)(5)(c); 8 CFR § 1003.23(b)(4)(ii)
  -due to Exceptional Circumstances: Deadline: 180 days
  INA § 240 (b)(5)(c); 8 CFR § 1003.23(b)(4)(ii)
  Exceptional circumstances: those beyond the Respondent's control
  Totality of the Circumstances Test (*Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996))
  Ineffective assistance of counsel (*Matter of Grijalva,* 21 I&N Dec. 27(BIA 1996); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988))
  -due to Changed Country Conditions: No deadline /show reasonable diligence
  INA § 240 (c)(7)(C)(ii); 8 CFR § 1003.2(c)(2); 8 CFR § 1003.23(b)(4)(i)
  -as a Qualifying Survivor of Domestic Violence:
  Deadline: one year, but waivable
  INA § 240 (c)(7)(C)(v)
  -due to Equitable Tolling: show reasonable diligence

ASYLUM, WITHHOLDING OF REMOVAL AND CONVENTION AGAINST TORTURE

Prepared by Lisa R. Green

THE BIG PICTURE

- To protect individuals who have been or would be persecuted or tortured in their home countries
- Refugees v. Asylees
  - Refugees are given refugee status OUTSIDE the US
  - Asylees are given asylum status INSIDE the US
- How do these procedures work?
  - Affirmative – available to people still in status or not yet in proceedings
  - Defensive
    - For people in removal proceedings including those that have had their affirmative case referred to Court
    - Special procedures for unaccompanied children
    - Detained v. not detained
- Three separate forms of relief to keep client in the United States
  1. Asylum
  2. Withholding of removal
  3. Relief under the Convention against Torture (CAT)
  - Note that Asylum and Withholding have same legal analysis , just different standard of proof. CAT has a separate legal analysis

Standards and Benefits for Asylum and Withholding

Asylum

- Meets definition of refugee. INA Sec. 101(a)(42)(A)
- Reasonable possibility of a well-founded fear of persecution of a protected ground
- At least a 10% chance of persecution. *I.N.S. v. Cardoza – Fonseca*, 480 U.S. 421 (1987)
- Discretionary
- Full benefits including family reunification and pathway to green card/citizenship

Withholding

- Meets definition of refugee. INA Sec. 101(a)(42)(A)
- More likely than not
- More than a 50% chance of persecution. *I.N.S. v. Stevic*, 467 U.S. 407 (1984)
- Mandatory relief
- Some benefits but no family reunification and not a pathway to green card/citizenship

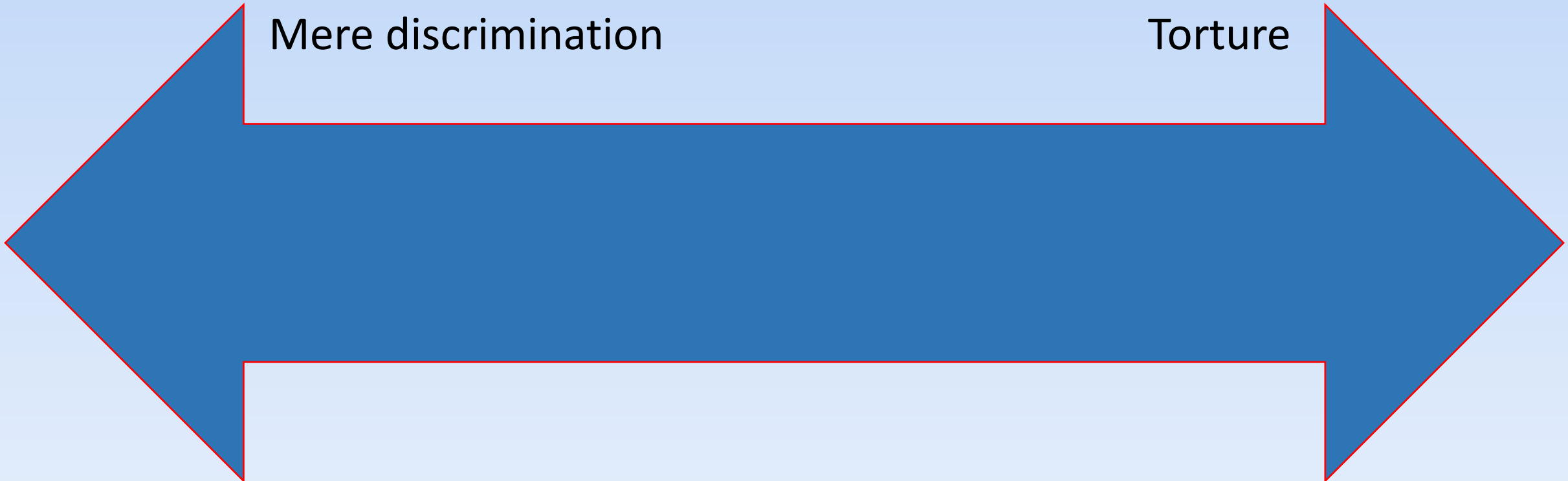
BUILDING BLOCKS of ASYLUM AND WITHHOLDING

1. PERSECUTION
2. ON ACCOUNT OF
3. PROTECTED GROUND

WHAT IS PERSECUTION?

A threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)

Persecution - Spectrum



HOW TO PROVE PERSECUTION

- Testimony
- Doctor's reports
- Psychologist’s reports
- Photos of scars
- Country Condition Reports
  - State Department reports
  - Human Rights groups
  - Journal/newspaper articles
- Expert Reports
- Corroborating affidavits

WHO IS THE PERSECUTOR?

THE GOVERNMENT OR A GROUP THAT THE GOVERNMENT IS UNABLE OR UNWILLING TO CONTROL

HOW TO PROVE?

1. **Testimony**
2. **Country condition reports**
3. **Expert reports**

WHEN DID THE PERSECUTION OCCUR?

- The timing of the persecution is critical to the analysis of the case.
- Asylum and withholding seek to protect people from being harmed in the future (a well-founded fear).
- Past persecution
  - Creates a rebuttable presumption of future persecution IF
    - No fundamental change in circumstances 8 C.F.R. 208.13(b)((1)(i)(A), AND
    - No possibility of internal relocation (only an issue if persecutor is NOT government) 8 C.F.R. 2013(b)(1)(i)(B)
    - Note, it is the government's burden to establish these. 8 C.F.R. 208.13
- Humanitarian Asylum
  - If presumption not available with past persecution, asylum still available if
    - The persecution was so severe, it would be inhumane to send the person home. 8 C.F.R. 208.13(b)(1)(iii)(A) OR
    - If the person would suffer other serious harm. 8 C.F.R. 208.13(b)(1)(iii)(B)
- Future persecution
  - If no past persecution, you will need to prove future persecution (crystal ball)
    - Subjective
    - Objective
    - Singled out or pattern and practice of persecution 8 C.F.R. 208.13(b)(2)(iii)

ON ACCOUNT OF A PROTECTED GROUND

- **Protected Grounds**
  1. **Race;**
  2. **Religion;**
  3. **Nationality;**
  4. **Social group Matter of M-Z-V-G, 26 I&N Dec. 227 (BIA 2014); Matter of W-G-R, 26 I&N Dec. 208 (BIA 2014);**
     a. **Immutability**
     b. **Particularity**
     c. **Social Distinction**

     (i.e. homosexuals, victims of domestic violence, family members)
  5. **Political opinion**

Imputed grounds available

ON ACCOUNT OF (Nexus)

- This addresses the issue of WHY your client was persecuted
- It must be established that there is a causal connection between the persecution and the protected ground
- The focus is on the persecutor's motive
- Can use direct or circumstantial evidence
- How to prove/Difficult to prove
  - Testimony
    - What did the persecutors say to your client?
  - Country Conditions
  - Expert Reports
  - Corroborating affidavits

BUILDING BLOCKS of ASYLUM AND WITHHOLDING

1. PERSECUTION
2. ON ACCOUNT OF
3. PROTECTED GROUND

Bars to Asylum and Withholding

	Asylum	Withholding
One year Does not apply to UAC's	X	
Firm resettlement Does not apply to UAC's	X	
Previously denied	X	
Safe 3rd country (only applies to Canada)	X	
Crimes • Particularly serious crime • Commission of serious non-political crime outside of US	X	X
Persecution of others	X	X
Danger to US security	X	X
Terrorism	X	X
Discretion	X	

RECENT BARS TO ASYLUM

As of the writing of this (6/5/20), the Trump Administration has instituted 3 new asylum bans. ALL of the them are currently under litigation

1. Asylum Ban 1.0- barring asylum eligibility to those who enter between points of entry
2. Asylum Ban 2.0 – barring asylum to people who transit through a third country if they have not yet first applied for asylum in the country of transit.
3. Added minor crimes to the list of “particularly serious crime” ban

This is in addition to other polices and programs including the “Remain in Mexico” program, changes in attempts to enter into 3rd safe country agreements with Guatemala, Honduras and El Salvador, changes in CBP protocol, tightening up of credible fear standards and internal relocation assessments by Asylum officers and limiting protections for UAC’s

Convention Against Torture
8 C.F.R. 208.16 to 208.18

- More likely than not the person would be in danger of torture upon return to home country

Elements

- Torture defined by regulation 8 C.F.R. Sec. 208.18 (a)(1);
- Past torture is indicative of future torture;
- Intentional;
- Directed against person in the offender's custody;
- Done by or with consent or acquiescence of public official or person acting in official capacity;
- For proscribed purpose (obtaining confession, punishment);
- Not arising out of a lawful sanction.

Convention Against Torture, Continued

Does not bestow permanent residence or benefits to family

Why use?

1. **No need to show protected ground**
2. **Fewer bars**

- **Separate analysis from asylum/withholding**
- **Must indicate on I-589 application**

Work Permission

- Clock starts ticking…
  - Upon the filing of an I-589, application for asylum

- Tick Tick Tick
  - File for work permission 150 days after clock is running
    - Form I-765 (www.uscis.gov)
  - USCIS will begin adjudication at day 180
    - Currently taking 90 days or more adjudicate

- Clock will stop
  - For any delay caused by applicant

4

Asylum Procedures

Affirmative Asylum – available to those still in status or not yet in proceedings

USCIS Asylum Office

File Application

Receipt and

Interview

(if not granted and if in status)

Grant!

Eligible for Asylum Benefits

Green Card in 1 Year

Citizenship in 5 Years

Refer

Notice of Intent to Deny

Respond

Deny

Grant!

Eligible for Asylum Benefits

Green Card in 1 Year

Citizenship in 5 Years

Defensive Asylum-

Available to those already in proceedings including those referred by the Asylum Office

Immigration Court

Master Calendar

Biometrics

Documents Due

Individual Hearing

Grant!

Deny

3. Appeal Process

OCC Waives Appeal or Fails to Appeal within 30 Days

Eligible for Asylum Benefits

Green Card in 1 Year

Citizenship in 5 Years

OCC Appeals within 30 Days to BIA

Appeal to BIA within 30 Days

File Brief According to Briefing Schedule

Grant!

Eligible for Asylum Benefits

Green Card in 1 Year

Citizenship in 5 Years

Deny

Remand to Immigration Court

Appeal to 10th Circuit Court of Appeals within 90 Days (No Automatic Stay)

10th Circuit can grant, deny, or remand to BIA

Final Appeal to U.S. Supreme Court

5

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
AURORA, CO

STANDING ORDER OF THE AURORA IMMIGRATION COURT RELATING TO PROCEDURES FOR CUSTODY REDETERMINATION HEARINGS

IT IS HEREBY ORDERED effective immediately and continuing through May 29, 2020:

1. All requests for custody redeterminations where Respondent is represented by counsel must include an indication as to whether an in-person or telephonic hearing is desired, and if neither party requests a hearing then it will be decided on the pleadings.

2. Written submissions shall include, but not be limited to, the following:

    a. The motion for custody redetermination;
    b. All evidence in support of or in opposition to the motion;
    c. Any brief or other pleading in support of or in opposition to the motion; and
    d. Any other papers related to the motion.

3. With respect to the Department of Homeland Security, the Department shall file a Form I-213 and any argument regarding whether a particular conviction requires mandatory detention.

4. With respect to the Respondent, Respondent shall file a criminal history chart setting forth each conviction and each pending charge. Respondent shall also file any argument regarding whether a particular conviction does not require mandatory detention.

5. Respondent shall set forth the bond amount Respondent is requesting.

6. All submissions required by this Order shall be filed no later than 48 hours prior to the custody redetermination hearing.

MATTHEW KAUFMAN
Digitally signed by MATTHEW KAUFMAN
Date: 2020.05.06 14:28:13 -06'00'

Matthew W. Kaufman
Assistant Chief Immigration Judge

6

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
AURORA, CO

STANDING ORDER OF THE AURORA IMMIGRATION COURT RELATING TO TELEPHONIC APPEARANCES OF COUNSEL AND PERMITTED ATTENDEES AT DETAINED MASTER CALENDAR AND INDIVIDUAL HEARINGS

IT IS HEREBY ORDERED that, effective immediately and continuing through May 29, 2020:

1. Any attorney for any party may appear telephonically in cases before the Aurora Immigration Court without prior approval and without filing a motion in advance. Attorneys who would like to appear telephonically for a particular case should contact that judge's legal assistant 48 hours prior to the scheduled hearing so that they can be provided a conference line number. By requesting a telephonic appearance the parties understand and agree that conference line numbers will only be disclosed to witnesses and parties and no further disclosure is permitted.

2. The Aurora Immigration Judges will **only** accept telephonic appearances on the conference lines provided by that judge's legal assistant.

3. Telephonic appearances **will only be accepted by the Aurora Immigration Court at the lines provided by the judge's legal assistant**. **No other method of telephonic appearance will be permitted**. If counsel fails to appear through the utilization of the conference line or in-person, counsel will thereafter be required to appear in-person at any rescheduled hearing.

4. Also during this time period, requests to continue cases due to COVID-19 concerns should be filed with as much notice as possible. On an emergency basis, in ECAS cases, motions should be filed electronically. In non-ECAS cases, motions to continue can be made to the court by telephone facsimile (FAX), by Faxing the request to 1-303-361-0688, while serving opposing counsel.

5. Any individual who wishes to appear telephonically does so with the understanding that any paper or electronic filings to be considered by the Court must be in the official record of proceeding in accordance with any deadlines set by the Court or, if none, in accordance with the filing deadlines set forth in the Immigration Court Practice Manual. No additional filings will be accepted at the hearing if counsel does not appear in person, and the decision of the Court will be based on the documents in the record at the close of the hearing.

6. Any party appearing telephonically waives the right to object to admissibility of any document offered in Court on the sole basis that they are unable to examine the document.

7. In person attendance at hearings shall be limited to attorneys, parties, witnesses, security officers, and any other necessary people, which will be determined by the presiding judge.

MATTHEW KAUFMAN
Digitally signed by MATTHEW KAUFMAN
Date: 2020.05.06 14:26:33 -06'00'

Matthew W. Kaufman
Assistant Chief Immigration Judge

7

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Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling

Mimi Tsankov

JUDICIAL INDEPENDENCE SIDELINED: JUST ONE MORE SYMPTOM OF AN IMMIGRATION COURT SYSTEM REELING

MIMI TSANKOV*

TABLE OF CONTENTS

* Mimi Tsankov serves as Eastern Region Vice President with the National Association of Immigration Judges ("NAIJ") and has been a full-time Immigration Judge since 2006. The views expressed here do not represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ. The author thanks NAIJ Intern, Nazmus Sakeeb, who assisted in the research and writing of this article.

I. INTRODUCTION

At the outset, we must acknowledge that the United States has a massive Immigration Court backlog, the scale of which is staggering. Any lasting solution must include dramatic legislative and executive action leading to comprehensive immigration reform. However, in the meantime, those that toil in this realm must persevere within the given system, all the while maintaining the highest level of judicial standards. Of late, this is proving quite difficult. In the name of addressing a high-profile backlog, reportedly in the range of 800,000[1] to 1,000,000[2] pending immigration removal cases, the existing U.S. Immigration Court system is under attack.

Over the past three years, there has been an alarming, unprecedented, and widely perceived partisan encroachment into the daily functions of the Immigration Court system.[3] The National Association of Immigration Judges ("NAIJ"), along with many others in the legal community, argue that these incursions into judicial independence are part of a broader effort to fundamentally alter how immigration removal cases are adjudicated from a systemic standpoint,

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1. Ashley Tabaddor, *Insight: Immigration Courts Face More Than 80,000 Canceled Hearings in Federal Shutdown*, BLOOMBERG LAW (Jan. 29, 2019, 4:01 PM), https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-immigration-courts-face-more-than-80-000-canceled-hearings-in-federal-shutdown-1 [hereinafter BLOOMBERG LAW] ("The longest running government shutdown in history has brought increased attention to our nation's immigration court system and the impact of the shutdown on the ever increasing backlog, currently at 800,000 cases and growing daily during the shutdown.").

2. *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGRATION (Nov. 6, 2018), http://trac.syr.edu/immigration/reports/536/.

3. *Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on* "Strengthening and Reforming America's Immigration Court System," 115th Cong. 1–13 (2018) (statement of Judge A. Ashley Tabaddor, President, Nat. Ass'n of Immig. Judges), https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf [hereinafter NAIJ Senate Testimony]; *see also*
New York City Bar Association, *Statement of the New York City Bar Association Concerning the Independence of Veterans Law Judges and Immigration Judges*, NEW YORK CITY BAR (Nov. 28, 2018), https://www.nycbar.org/media-listing/media/detail/statement-of-the-new-york-city-bar-association-concerning-the-independence-of-veterans-law-judges-and-immigration-judges [hereinafter NEW YORK CITY BAR].

and that such action is having deleterious effects.[4] From new case quotas and deadlines imposed on Immigration Judges[5] to the Attorney General's referral of high-profile matters to himself for decision, the effects are far-reaching.[6] A few dramatic instances involve the abrupt removal of cases from an Immigration Judge's docket[7] and repeated docket shuffling, seemingly designed to make political statements rather than addressing practical choices that serve efficiency while preserving due process.

The so-called "deportation machine"[8] that some say this administration is building squeezes Immigration Judges where they are most vulnerable—their status as "employees." If an Immigration Judge provides one too many case continuances, even though related to a valid due process concern, she risks being terminated.[9] The introduction of the "machinery" into the judicial process threatens to eviscerate procedural due process, though mandated by the U.S. Constitution.[10]

4. *See generally* NAIJ Senate Testimony, *supra* note 3.

5. *Id*.

6. *See* Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018). *See also* Letter from Catherine Cortez Masto, U.S. Sen., et al., to Kirstjen Nielson, D.H.S. Sec. & Jeff Sessions, U.S. Att'y Gen. (Sept. 13, 2018) (*available at* https://www.cortezmasto.senate.gov/imo/media/doc/Administrative%20Closure%20Letter%20(Cortez%20Masto).pdf.) (The letter states, in pertinent part, "On May 17th, Attorney General Sessions affirmed the BIA's decision in Matter of Castro-Tum after instructing the BIA to refer the case for his review, and used his authority to unilaterally overrule decades of precedent by determining that immigration judges and the BIA do not have the general authority to suspend indefinitely immigration proceedings by administrative closure. Additionally, Attorney General Sessions refused to delegate to judges and the BIA the general authority of administrative closures and spoke of the "need" for currently administratively closed cases to be returned to an active docket.") (footnote omitted).

7. Debra Cassens Weiss, *Union for Immigration Judges Files Grievance over Removal of Cases from Philly Judge*, ABA JOURNAL (Aug. 9, 2018), http://www.abajournal.com/news/article/union_for_immigration_judges_files_grievance_over_removal_of_cases.

8. Randy Capps, et al., *Revving up the Deportation Machinery: Enforcement under Trump and the Pushback*, MIGRATION POLICY INSTITUTE (May 2018), https://www.migrationpolicy.org/research/revving-deportation-machinery-under-trump-and-pushback.

9. *See generally* NAIJ Senate Testimony, *supra* note 3.

10. *Id*.

The political backdrop couldn't be more fraught with, a highly-politicized standoff between the President of the United States, who has expressed hostility toward the Immigration Judge Corps,[11] and the U.S. Congress, over how to fund immigration-related border security, including the provision of Immigration Court funding.[12] This impasse culminated in an unprecedented 35-day shutdown of the U.S. Department of Justice,[13] with appropriations not finalized until four months into fiscal year 2019.[14] During the shutdown, most Immigration Courts were closed[15] and it is estimated that some 80,000 Immigration Court cases, which were scheduled to be heard during those dates, were essentially "shelved" until they could be rescheduled to date sometime in the next few years.[16]

This article will begin by describing the existing Immigration Court system and will outline criticisms about its structure.[17] Then, it will discuss the new performance quotas and deadlines for Immigration Judges and explain why they have been criticized as not only unreasonable and troubling, but also as counterproductive and harmful.[18] Next, by examining erratic docket shuffling procedures

11. Steve Benen, *Trump Asks Supporters, 'What Other Country Has Judges?'*, WASH. POST (June 26, 2018), http://www.msnbc.com/rachel-maddow-show/trump-asks-supporters-what-other-country-has-judges.

12. Erica Werner, et al., *Trump Digs in on Border Wall Funds, but Democrats' Opening Bid Is Zero*, WASH. POST (Jan. 30, 2019), https://www.washingtonpost.com/politics/trump-digs-in-on-border-wall-funds-as-congressional-negotiators-prepare-to-convene/2019/01/30/56139e24-2488-11e9-ad53-824486280311_story.html.

13. Lisa Rein, et al., *Federal Employees Return to Backlog of Work After 35-Day Shutdown*, WASH. POST (Jan. 28, 2019), https://www.washingtonpost.com/politics/federal-employees-return-to-backlog-of-work-after-35-day-shutdown/2019/01/28/10030766-231c-11e9-81fd-b7b05d5bed90_story.html?utm_term=.6d9236d8370c.

14. H.R.J. Res. 31 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-joint-resolution/31/text. (On February 15, 2019, President Trump signed into law a $333 million omnibus appropriations bill that funded the federal government for the remaining seven-and-a-half months of fiscal year 2019).

15. Mallory Moench, *Immigration Courts in New York Stymied by Government Shutdown*, TIMESUNION (Jan. 22, 2019), https://www.timesunion.com/news/article/Shutdown-cancels-thousands-of-immigration-court-13549984.php.

16. BLOOMBERG LAW, *supra* note 1.

17. *See infra* II and III.

18. *See infra* IV.

vulnerable to the charge that they are outcome-driven, the article will explain the ways in which such actions impede due process.[19] This article will conclude that the Attorney General's wide-ranging efforts to curtail Immigration Judge decisional independence threatens the very foundation upon which the Immigration Court system is based, and supports a wholesale restructuring of the system in the form of an Article I Immigration Court.[20]

II. IMMIGRATION COURT STRUCTURAL BACKGROUND

The Immigration Court is a component of the Executive Office for Immigration Review ("EOIR"), an agency housed within the U.S. Department of Justice ("DOJ").[21] Under its authority delegated by the Attorney General, its mission is to adjudicate immigration cases by "fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws."[22] Immigration Judges preside over administrative removal proceedings at the trial level.[23] Because the Immigration Court is housed within the DOJ, Immigration Judges do not have structural independence.[24] However, since they are required to uphold and interpret immigration laws and regulations without interference, they do have decisional independence. They are held to the highest standards of judicial conduct while administering and interpreting U.S. immigration laws.[25]

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19. *See infra* V.

20. *See infra* VI.

21. *See generally* U.S. Dep't. of Justice Exec. Off. for Immigr. Review, *About the Office*, U.S. DEPT. OF JUSTICE, https://www.justice.gov/eoir/about-office (last visited Nov. 2, 2019) [hereinafter *About the EOIR*].

22. *Id*.

23. *See generally* U.S. Dep't. of Justice Exec. Off. for Immigr. Review, *About the Office*: *Office of the Chief Immigration Judge*, U.S. DEPT. OF JUSTICE, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge (last visited Nov. 2, 2019) [hereinafter *About the OCIJ*].

24. *See generally* ABA Commission on Immigration, *Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf [hereinafter ABA Report].

25. U.S. Dep't. of Justice Exec. Off. for Immigr. Review, *Ethics and Professionalism Guide for Immigration Judges*,

The EOIR's Office of the Chief Immigration Judge is comprised of more than 440 Immigration Judges,[26] supervised by the Deputy Chief and Assistant Chief Immigration Judges. They report to a Chief Immigration Judge, and she to the EOIR Director, who, in turn, reports to the Office of the Attorney General—the chief law enforcement authority in the United States.[27] The decisions of the Immigration Judges are reviewed by the Board of Immigration Appeals ("BIA"), itself a separate component within the EOIR.[28] Although the BIA operates through delegated authority, it is directed to exercise its independent judgment in hearing administrative appeals of Immigration Judge decisions.[29]

At present, there are sixty-three Immigration Courts across the United States, including those located within detention centers and correctional facilities.[30] The Immigration Judges at each Immigration Court preside over cases that are themselves initiated by a separate executive branch entity: the Department of Homeland Security ("DHS").[31] The DHS component charged with initiating cases before the Immigration Court is the Immigration and Customs Enforcement ("ICE").[32] Within ICE, the Office of the Principal Legal Advisor ("OPLA") brings charges of removability before the Immigration Court against those who it argues are present in the United States in violation of the nation's immigration laws.[33] OPLA trial attorneys represent the

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https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.

26. *About the OCIJ*, *supra* note 23; *see also About the EOIR*, *supra* note 21.

27. U.S. Dep't of Justice: Office of the Att'y General, *About the Attorney General*, https://www.justice.gov/ag/about-office (last updated July 17, 2017) ("The Judiciary Act of 1789 created the Office of the Attorney General which evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government.").

28. 8 C.F.R. § 1003.0(a) (2019).

29. U.S. Dep't. of Justice Exec. Off. of Immig. Review, *About the Board of Immigration Appeals*, https://www.justice.gov/eoir/board-of-immigration-appeals (last updated July 17, 2018).

30. *About the OCIJ*, *supra* note 21.

31. U.S. Immigr. and Customs Enf't. Off. of the Chief Counsel, *Office of the Principal Legal Advisor*, https://www.ice.gov/opla (last updated Mar. 6, 2019).

32. *Id*.

33. *Id*.

U.S. government as civil prosecutors in all such removal proceedings before the Immigration Judges.[34]

III. GENERAL STRUCTURAL AND SYSTEMIC CRITICISMS

The Immigration Court system has received wide-ranging criticism since its establishment in 1983.[35] In 2006, what had begun as general concerns about professionalism,[36] became, in 2007, Congressional Hearings about partisan, politically motivated hiring,[37] and, in 2010, calls for large-scale reform by the American Bar Association.[38] This article will focus on five of the most prominent areas of concern expressed by leaders in the legal community.

First, public skepticism has never wavered regarding the Immigration Court's lack of independence from the DOJ.[39] In 2008[40] and 2018,[41] despite elevated professionalism standards for DOJ personnel,[42] there were multiple scandals involving politicized hiring decisions, including an ideologically-driven purge of the BIA.[43] Given

34. *Id*.

35. *See generally* ABA Report, *supra* note 24.

36. *Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE (Aug. 9, 2006), https://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html.

37. *See generally* DEP'T. OF JUSTICE OFF. OF INSPECTOR GENERAL, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL, (July 28, 2008), https://oig.justice.gov/special/s0807/final.pdf.

38. *See generally* ABA Report, *supra* note 24.

39. *See generally id*.

40. *Politicized Hiring at the Department of Justice, Hearing Before the Committee on the Judiciary United States Senate*, 110th Cong. 2 (2008).

41. Letter from Elijah Cummings, U.S. H.R., et al., to Jeff Sessions, U.S. Att'y General (Apr. 17, 2018) (*available at* https://cummings.house.gov/sites/cummings.house.gov/files/Dems%20to%20DOJ%20re.%20EOIR%20Politicization.pdf.).

42. *See generally* 5 C.F.R. § 2635 (2019), 5 C.F.R. § 3801, and 28 C.F.R. § 45 (2019).

43. *See generally* Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829 (2009).

the history of past bias, the current public is leery of all hiring decisions, which are regularly scrutinized for ideological bents.[44]

Second, politicization has created crippling funding disparities between the DHS and the DOJ.[45] For many years, the Immigration Courts were severely under-resourced, especially as compared to their DHS.[46] For example, in 2012, the government spent $18 billion on immigration enforcement—more than all other criminal federal law enforcement agencies combined.[47] In addition, from 2003 to 2015,[48] spending for the Customs and Border Protection and ICE increased 105%. The resulting impact of these funding increases dramatically expanded enforcement capability, exemplified by the use of state law-enforcement resources for immigration enforcement.[49] Meanwhile, Immigration Court spending only increased by a modest 74% during the same time period.[50] These funding imbalances have contributed to the severe backlogs. With fewer than 450 Immigration Judges, and each facing rapidly ballooning caseloads, the sheer volume is dire.[51]

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44. *Strengthening and Reforming America's Immigration Court System for the Subcomm. on Border Security and Immigr., Comm. on the Judiciary, U.S. Sen.* (2018) (statement from Hilarie Bass, President of the American Bar Association Commission on Immigration) (*available at* https://www.americanbar.org/content/dam/aba/uncategorized/GAO/HilarieBassStatement-4-18-18.authcheckdam.pdf) [hereinafter ABA Senate Testimony].

45. *See generally Fact Sheet: Empty Benches: Underfunding of Immigration Courts Undermines Justice*, AM. IMMIGR. COUNCIL (June 17, 2016), https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice.

46. *The Growth of the U.S. Deportation Machine*, AM. IMMIGR. COUNCIL (Mar. 1, 2014), https://www.americanimmigrationcouncil.org/research/growth-us-deportation-machine.

47. DORIS MEISSNER, ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2 (Migration Policy Institute, 2013).

48. *Empty Benches*, *supra* note 45.

49. *Id*.

50. *Id*.

51. IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES (U.S. Gov't. Accountability Office (GAO) 2017) (*available at* https://www.gao.gov/products/GAO-17-438).

Third, the Immigration Court system is susceptible to use as a political tool in furtherance of law enforcement policies.[52] For example, under a previous administration, mandated "surge" dockets prioritized recent arrivals over pending cases.[53] Any public doubt that political motivations prevented the orderly adjudication of Immigration Court cases was surely erased following the highly-politicized standoff between the President and Congress over Immigration Court and border security funding.[54] The effects of the multi-week shutdown are still being felt, and will continue to delay adjudications for years.

Fourth, since the Immigration Court is housed within a law enforcement agency, and derives its authority from the Attorney General, Immigration Judge decisions are susceptible to a perception of partiality.[55] The role of the Immigration Judge lacks the fundamental procedural protections present in other parts of this nation's justice system.[56] In the end, Immigration Judges are civil servants, deriving authority from the top law enforcement officer—the Attorney General. While they are charged with protecting due process, and have decisional independence, they *do not* have *independent* authority to apply Constitutionally-mandated due process standards.

Finally, of the many concerns expressed, likely the most troubling is that Immigration Court proceedings lack basic procedural protections.[57] Since immigration cases are classified as "civil" matters as opposed to "criminal" cases, Respondents have no right to free representation,[58] even in cases involving juveniles, mentally

52. NAIJ Senate Testimony, *supra* note 3.

53. *Id*.

54. Peter O'Dowd & Lisa Mullins, *Week in Politics: Trump and Pelosi Still Feuding over Border Wall Funding*, WAMU (Feb. 1, 2019), https://wamu.org/story/19/02/01/week-in-politics-trump-and-pelosi-still-feuding-over-border-wall-funding/.

55. *Id*.

56. *Id*.

57. *See generally* Ingrid Eagly & Steven Shafer, *Special Report: Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court [hereinafter *Access to Counsel Report*].

58. *See* Immigration and Nationality Act of 2011 § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2019) (providing that "the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings"); Orantes Hernandez v. Thornburgh,

incompetent individuals, or detainees.[59] As a result, many have argued that the system unfairly prejudices those unable to obtain representation, or who suffer from a legal disability.[60]

In sum, the Immigration Court system has received a broad range of criticism, all of which implicates the fundamental integrity of entire system. As a result, what is often suggested as the best means of redress are proposals for restructuring Immigration Courts, which are discussed further later in this article.[61]

IV. NEW IMMIGRATION JUDGE PERFORMANCE QUOTAS AND DEADLINES

The Immigration Court system is operating under a new existential threat involving the recent imposition of a series of untested quotas and deadlines.[62] As a result, Immigration Judges are now under greatly amplified external pressure to accelerate adjudications, and the well-documented structural defects in the process have been exacerbated under these new conditions.[63]

Although Immigration Judges have been subject to performance measures for more than a decade, the current measures are designed to directly infringe on decisional independence, which is in stark contrast to prior approaches to measuring performance.[64] A leading scholar on this topic, Brookings Institute Visiting Fellow, Russell Wheeler, argues

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919 F.2d 549, 554 (9th Cir. 1990) (finding that immigrants have a due process right to obtain counsel of their choice at their own expense).

59. An exception exists for certain individuals with serious mental disorders. *See* Franco-Gonzalez v. Holder, 767 F. Supp. 2nd 1034 (C.D. Cal. 2011); *see also* Exec. Off. For Immigr. Review, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, U.S. DOJ (Apr. 22, 2013), https://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguardsunrepresented-immigration-detainees.pdf.

60. *Access to Counsel Report*, *supra* note 57, at 15–16.

61. *See infra* VII.

62. *See* NAIJ Senate Testimony, *supra* note 3, at 7; *see also Immigration Judge Performance Quotas FOIA Request*, AM. IMMIGR. COUNCIL (Apr. 23, 2018), https://www.americanimmigrationcouncil.org/foia/immigration-judge-performance-metrics-foia-request.

63. *See* NAIJ Senate Testimony, *supra* note 3, at 8.

64. *Id*. at 10.

that performance measures imposed by the DOJ are agenda-driven, unproductive, harmful, and devoid of useful meaning.[65] Although the DOJ's objective in implementing the new policy is the "timely administration of justice,"[66] its quotas and deadlines have, in application, curtailed Respondents' due process rights.[67] Judges are pressured to rush through decisions to protect their employment[68] because failure to adhere to the strict requirements imposed by the Agency's policy subjects the judges to discipline, including termination of employment.[69] This has been implemented notwithstanding the fact that many prominent community mem argue that the current quotas and deadlines do not judge fairly the performance of individual Immigration Judges.[70]

Remarkably, the current measures fail to incorporate most of the recommendations provided in a detailed and comprehensive report commissioned by the EOIR itself.[71] That report recommended a

65. Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, BROOKINGS INSTITUTE (June 18, 2018), https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/ [hereinafter *Cutting Corners*].

66. ATT'Y GEN., U.S. DOJ, MEMORANDUM FOR THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: RENEWING OUR COMMITMENT TO THE TIMELY AND EFFICIENT ADJUDICATION OF IMMIGRATION CASES TO SERVE THE NATIONAL INTEREST (Dec. 5, 2017).

67. *See* NAIJ Senate Testimony, *supra* note 3, at 8.

68. *Federal Immigration Judge Discusses Court System*, C-SPAN (Sept. 21, 2018), https://www.cspan.org/video/?451809-1/federal-immigration-court-system&start=348. ("'This past week or so, they [EOIR] unveiled what's called the IJ dashboard . . . this mechanism on your computer every morning that looks like a speedometer on a car,' said Ashley Tabaddor, and 'it has all of the numbers there and 80% of it is red and there is a little bit of yellow and a little bit of green. The goal is for you to be green but of course you see all of these reds in front of you and there is a lot of anxiety attached to that.'").

69. AM. IMMIGRATION LAWS. ASS'N, AILA DOC. NO. 18092834, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS 1-2 (Sept. 28, 2018) [hereinafter AILA POLICY BRIEF].

70. *Id*.

71. AILA POLICY BRIEF, *supra* note 69. *See generally* U.S. DOJ, EXEC. OFFICE FOR IMMIGRATION REV., AILA DOC. NO. 18042011, LEGAL CASE STUDY: SUMMARY REPORT (Apr. 20, 2018) (the report was more than a year in the making and compiled by an independent, third party group) [hereinafter LEGAL CASE STUDY: SUMMARY REPORT].

judicial performance review model that "emphasizes process over outcomes and places high priority on judicial integrity and independence"[72] which is in marked contrast to the quotas and deadlines fashioned by this Administration.

The following are five examples reflecting how the quotas and deadlines are counterproductive and actually harmful to the Agency's mission.

A. Quantity over Quality

Under this Administration's quotas and deadlines, Immigration Judges are now required to complete at least 700 cases per year.[73] Yet, the Agency has provided no evidence that a majority of the 442 Immigration Judges could meet such a quota.[74] This is especially troubling given the wide disparity among the various Immigration Court docket sizes.[75] When the new policy was implemented, former Attorney General Jeff Sessions reported, "We are now directing [immigration judges] to complete at least 700 cases a year. This is about average."[76] As Mr. Wheeler states,

72. *Id*. at 21.

73. KATHERINE H. REILLY, U.S. DOJ, AILA DOC. NO. 18073084, IMMIGRATION JUDGE PERFORMANCE MEASURES OVERVIEW 1 (June 7, 2018) [hereinafter Deputy Director Presentation Overview].

74. See James McHenry, Director, Exec. Off. For Immigr. Review, Dep't of Justice, Hearing Before the Senate Comm. on Homeland Sec. and Gov'tal Affairs: Unprecedented Migration at the U.S. Southern Border: the Year in Review (Nov. 13, 2019) (*available at* https://www.justice.gov/opa/speech/executive-office-immigration-review-director-james-mchenry-testifies-senate-committee).

75. *See* NAIJ Senate Testimony, *supra* note 3, at 3. ("The DOJ claimed that the border surge resulted in an additional completion of 2,700 cases. This number is misleading as it does not account for the fact that detained cases at the border are always completed in higher numbers than non-detained cases over a given period. Thus, the alleged 2,700 additional completions was a comparison of apples to oranges, equating proceedings completed for those with limited available relief to those whose cases by nature are more complicated and time consuming as they involve a greater percentage of applications for relief.").

76. *See Attorney General Sessions Delivers Remarks on Immigration Enforcement*, U.S. DEPT. OF JUSTICE (Apr. 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement.

> It is, but the "average" is *meaningless* because immigration courts are highly diversified. Based on the Department's most recent published statistics (2016), almost two thirds of the courts had per-judge case completions below 700 and two-fifths were below 500. Individual courts' per-judge completion rates varied from under 300 in a few courts to well over 1,000 in others.[77]

Moreover, under the new rubric, statistical "completions" are limited to "dispositive" case decisions,[78] which fails to capture administrative decisions[79] and variations in case complexity.[80] While some Immigration Judges preside over dockets comprised mostly of straightforward removal cases, in other courts, respondents' claims are far more complex involving requests for relief, creating lengthier and more complicated cases.[81] Similarly, Immigration Judges that preside over dockets comprised of large numbers of family cases may find their completion statistics artificially inflated, by comparison, since each family member counts as a *separate* statistic. (emphasis added)[82] Consequently, requiring completion of 700 cases for all Immigration Judges is both unreasonable and unrealistic because most Immigration Judges preside over dockets with vastly different qualitative characteristics.[83]

77. *Cutting Corners*, *supra* note 65 (emphasis added).

78. Deputy Director Presentation Overview, *supra* note 73, at 2.

79. *Id.* at 3.

80. *Id*.

81. *Cutting Corners*, *supra* note 65.

82. *See* Deputy Director Presentation Overview, *supra* note 73, at 2, "Lead and riders are each counted as a completion."

83. *NAIJ Internal Union Meeting Notes* (on file with the author); *see also* Lomi Kriel, *Immigration courts backlog worsens*, HOUS. CHRON. (May 15, 2015), https://www.houstonchronicle.com/news/houston-texas/houston/article/Immigration-courts-backlog-worsens-6267137.php (The *Legal Case Study: Summary Report* reported that "Each immigration judge was handling over 1,400 'matters'/year on average at the end of FY 2014—far more than federal judges (566 cases/year in 2011) or Social Security administrative law judges (544 hearings/year in 2007) (National Association of Immigration Judges President Dana Leigh Marks estimate).

B. Punishes the Provision of Due Process

The imposition of an artificial and unattainable quota directly conflicts with due process because of the arbitrary time limits judges must now respond to.[84] By extrapolation, the 700-case completion quota mandates that Immigration Judges complete 13.46 full trials per week, which equates to 2.69 full trials per day, at 2.97 hours per trial.[85] This unrealistically assumes that Immigration Judges can be on the bench forty hours of every week, and that each case requires only a single hearing. These assumptions are unrealistic.

Immigration Judges are responsible for a range of duties off the bench that support their work on the bench.[86] If an Immigration Judge must allot 40 hours of the work week to the bench, this leaves no time for additional case responsibilities such as coordination and communication with legal staff about pending motions, guiding judicial law clerks in decision writing, or even record review of the massive volume of documents filed in any given case.[87] Even while on the bench, it is common for judges to hold multiple pre-trial hearings to address matters such as removability, the admission of evidence, motions to terminate, custody matters, and a range of other issues related to the eventual trial. Moreover, since many cases are held via video teleconference, there are instances in which a case cannot go forward as planned due to technical difficulties. Thus, when case complexity and off-the-bench issues are factored in, along with unforeseen circumstances (such as a snow day, a medical appointment, or an interpreter issue) it quickly becomes apparent that an Immigration Judge must weigh fairness and due process against the consequences of failure to adhere to the new requirements and possible termination.[88]

Even more worrisome is the exponential effect of missing even a single completion statistic by one day because one completion statistic lost means the Immigration Judge, to ensure compliance with the new

84. *See* NAIJ Senate Testimony, *supra* note 3.

85. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

86. Hon. Dorothy Harbeck, *Borrowed Robes: A Day in the Life of an Immigration Judge*, ABA JUDGES JOURNAL (July 1, 2017), https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/summer/borrowed-robes-day-life-immigratijudge/.

87. *See generally NAIJ Internal Union Meeting Notes*, *supra* note 83.

88. *Id*.

policy, must make-up that lost statistic on another day, thereby implicating due process concerns for cases scheduled for multiple days.[89] Since complexity is not factored into the completion rate of cases, an Immigration Judge who routinely presides over multi-day hearings for a single case (presumably including testimony from expert witnesses and record documents numbering in the thousands of pages) will be disadvantaged and suffer greater exposure to discipline.[90] The system equates a straightforward single-hearing, uncontested removal case to a complex, heavily-litigated matter involving requests for relief, and, either belies intellectual honesty or pursues an outcome-driven agenda, where the completion statistic is the valued outcome.[91] This one-dimensional approach serves neither the Agency's stated mission, nor the provision of Constitutionally-mandated procedural due process.[92]

The impact of this approach can be dire, especially in the context of the thousands of children who appear in Immigration Court proceedings, many of whom have been segregated from their families and have no representation.[93] Because juveniles without representation are particularly vulnerable, Immigration Judges must ensure the integrity of the proceedings by taking additional steps to ensure fairness in the adversarial process, as well as screening for issues such as human trafficking, all of which requires valuable court time to ensure due process.[94]

The Agency's mandated quota punishes the Immigration Judge that affords due process by taking time acquainting herself with the evidence filed, preparing for trial, granting a continuance to an attorney who falls ill, or relaxing a strict time allotment in a hearing involving a vulnerable juvenile respondent. The completion quota disregards the qualitative differences in docket and case types, punishes too much time spent on preliminary hearings for adequate case preparation, vigorously ignores duties related to additional court assignments, devalues the

89. *Id*.

90. *Id*.

91. *Id*.

92. *Id*.

93. *Family Separation and Detention*, AM. BAR ASS'N. (July 9, 2018), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/immigration/familyseparation/.

94. *Id*.

crafting of written decisions in complex cases (since such work requires time spent off the bench), and favors completions over quality of decision.[95]

C. Undervalues Judicial Preparation

The 700-case completion quota undervalues and, to an extent, even ignores the time necessary for case preparation.[96] The inflexibility of the quota artificially denotes Immigration Court cases to "widget" status—identical in complexity and standardized in subject matter.[97] Operating a court docket with such a notion not only belies reality but fairness, as well.[98] Judicial reflection, preparation, and exactitude are not only a bedrock of our judicial system, but are demanded by judges. Moreover, immigration cases are ultimately reviewed through a gauntlet of appellate courts, and, in some rare cases, reach review by The United States Supreme Court. It is both unreasonable and unrealistic to expect Immigration Judges to decide complex contested motions, such as motions to terminate and motions to suppress, without adequate time for review and consideration.[99] In this way, the quota is troublesome because it fails to value the application of judicial ideals in the face of highly complex and time intensive adjudications.[100] For example, an Immigration Judge faced with a highly complex 12-hour case, requiring testimony from multiple fact and expert witnesses, may feel pressure to give short shrift to the litigants due to the quota.[101] Similarly, pro se respondents with special vulnerabilities, such as juveniles or mentally incompetent respondents, may require additional judicial resources in order to present their case effectively. These pro se respondents are ill-served by the quota.[102] This completion quota presents an unreasonable and unattainable mandate that is not designed

95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*.
99. *Family Separation and Detention*, *supra* note 93.
100. *Id*.
101. *Id*.
102. *Id*.

to preserve the value in preparation and judicial reflection, but to over-emphasize speed of adjudication.[103]

D. Arbitrary and Corrosive Remand Rate Quota

The second new performance quota mandates fewer than 15% of an Immigration Judge's decisions subject to remand from appellate courts, including the Board of Immigration Appeals, the Federal Circuit Courts of Appeal, and the U.S. Supreme Court.[104] Astonishing in its simplicity, the quota fails to capture data in any meaningful way.[105]

$$\frac{\text{Remands to the Immigration Judge}}{\text{Total Appeals*}}$$

* Total appeals includes appeals to the Board and Circuit Court. Interlocutory appeals, appeals on motions, and appeals on bonds are included.[106]

This new bright-line standard does not appear to be based on any empirical evidence suggesting that a remand rate exceeding 15% reflects unsatisfactory performance and does not determine to what extent an Immigration Judge's performance is unsatisfactory.[107] Rather, it takes two raw data points and reduces their meaning to a deceptively simple conclusion.[108]

The reality is that Immigration Court matters are remanded for a variety of reasons. Although those reasons may include error on the part of the Immigration Judge, often the reason for remand does not reflect the Immigration Judge's performance ability. A case can be remanded for a variety of reasons outside of an Immigration Judge's control, including:

103. *Id*.
104. *See* Deputy Director Presentation Overview, *supra* note 73, at 3.
105. *NAIJ Internal Union Meeting Notes*, *supra* note 83.
106. *Id*.
107. *Id*.
108. *Id*.

1) the need for further fact-finding;
2) the presentation of new evidence on appeal;
3) the need to have DHS complete background checks;
4) the dismissal of a DHS appeal;
5) a finding that the BIA lacks jurisdiction;
6) the desire to pursue voluntary departure;
7) the withdrawal of an appeal;
8) the application of temporary protected status;
9) the decision to administratively close a matter;
10) a change in or clarification regarding the law related to the case;
11) differing appellate views on the exercise of discretion;
12) ineffective assistance of counsel; and many, many others.[109]

With so many factors operating entirely outside of an Immigration Judge's control, drawing any conclusions about the "remand rate" is generally meaningless.[110] Therefore, it is unreasonable to apply such an oversimplified standard when evaluating Immigration Judges.[111]

Although there are likely instances in which an Immigration Judge issues an errant decision, and efforts should be taken to minimize such outcomes, a standard that mandates such a high degree of precision is arbitrary, exceedingly onerous, and counter to the regulatory requirements that require measures to be "achievable" to be sound.[112] When considering the enormous time-based pressures that are applied to Immigration Judges, coupled with the range of factors outside their control, this standard is devoid of accurate interpretation.

The simplistic standard could have the remarkably counterintuitive effect of penalizing Immigration Judges whose decisions are not often

109. *See generally* Bryan Johnson, *Statistics on BIA Remands of Immigration Judges from FY2016–FY2018YTD*, AMOACHI & JOHNSON, PLLC, ATTORNEYS AT LAW (Feb. 21, 2018), https://amjolaw.com/2018/02/21/statistics-on-bia-remands-of-immigration-judges-from-fy2016-fy2018ytd/.

110. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

111. *Id*.

112. *See id*.; *see also A Handbook for Measuring Employee Performance*, U.S. OFF. OF PERSONNEL MGMT (Mar. 2017), https://www.opm.gov/policy-data-oversight/performance-management/measuring/employee_performance_handbook.pdf ("Performance elements and standards should be measurable, understandable, verifiable, equitable, and achievable.").

appealed.[113] For those Immigration Judges with low overall appeal rates, the rigidity of the standard can skew disproportionately to reflect poor performance when the measure is, in fact, simply reflective of a limited data pool.[114] For example, an Immigration Judge with few cases appealed during the performance period, a single remand can inaccurately skew results.[115] Similarly, an absolute standard of 15% fails to credit the fact that Immigration cases have not been appealed—presumably indicating satisfaction from the parties and a satisfactory performance by the Immigration Judge.[116]

In addition, immigration cases do not take place in a vacuum and often operate alongside collateral relief efforts.[117] For example, if a Respondent gets married while an appeal is pending, a case might be remanded so that the Respondent can pursue previously unavailable relief. Similarly, a Respondent who files an appeal of a criminal conviction might persuade an appellate court to remand the criminal case for additional consideration and the criminal conviction may be overturned. It is clear that the decision to take an appeal is both complex and strategic, since an appeal is based on a host of factors, (including whether a Respondent is detained or not), many of which underlying the bald statistic are simply unrelated to an Immigration Judge's performance capability.[118]

Finally, the imposition of an inflexible 15% standard is corrosive to the process because it puts unfair and unreasonable pressure on an Immigration Judge.[119] It unfairly holds an Immigration Judge accountable for factors s/he cannot control. At its most erosive, it can impel a judge to weigh the repercussions of a decision on herself, such as whether such decision will result in termination.[120] Judges should never be asked to choose between making a difficult, reasoned decision out of fear that their case might be remanded, which, as a result, may

113. *NAIJ Internal Union Meeting Notes*, *supra* note 83.
114. *Id*.
115. *Id*.
116. *Id*.
117. *See, e.g.*, *Matter of L-A-B-R-*, 27 I&N Dec. 405 A.G. (2018).
118. *NAIJ Internal Union Meeting Notes*, *supra* note 83.
119. *Id*.
120. *Id*.

lead to termination. These are external pressures that should not be introduced into any fair judicial decision-making process.[121]

Moreover, there is no methodological evidence to establish this data collection system is either useful or accurate.[122] There is no publicly available evidence that the Agency's examination of raw remand rates is conducted in a reliable manner, devoid of data integrity concerns, bias in application, and applied in a consistent, standardized way. All of this leads to unfair and damaging actions by the Agency with profound repercussions for Immigration Judges and those that appear before them.[123]

E. Deadlines for Selected Case Completions

Immigration Judges are now subject to a host of performance deadlines which are designed to expedite various aspects of the adjudication process, rather than measuring or valuing careful review and deliberation by Immigration Judges.[124] For example, one of the deadlines requires that 90% of custody review determinations be completed at the initial hearing.[125] This deadline is arbitrary, and many respondents are simply not ready for such a hearing at the time that it has been scheduled. This can lead to Respondents withdrawing requests to hold such hearings. However, concern about, the performance measure might influence a judge to require a Respondent to go forward at a hearing even without the parties' adequate preparation.[126]

Similarly, another deadline requires that 100% of credible fear and reasonable fear review proceedings be completed at the initial hearing.[127] The lack of flexibility and failure to grant a continuance for a new hearing date can result in the denial of due.[128] Consider, for

121. *Id*.

122. *Id*. *See generally* LEGAL CASE STUDY: SUMMARY REPORT, *supra* note 71.

123. *NAIJ Internal Union Meeting Notes*, *supr*a note 83.

124. *See id*.; *see generally* Aaron Reichlin-Melnick, *As Immigration Court Quotas Go Into Effect, Many Call For Reform*, IMMIGRATIONIMPACT (Oct. 1, 2018), http://immigrationimpact.com/2018/10/01/immigration-court-quotas-call-reform/.

125. *See* Deputy Director Presentation Overview, *supra* note 73, at 5.

126. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

127. *See* Deputy Director Presentation Overview, *supra* note 73, at 6.

128. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

example, an individual who has retained an attorney, and the scheduled hearing date happens to fall on a day of religious observance or the attorney is ill and cannot attend the hearing. An Immigration Judge's decision to grant a continuance places an undue burden on the Judge. Although the Judge might recognize that participation by the attorney is not possible, she also knows that granting a continuance may impact her job security. To grant a new hearing date for a legitimate due-process protecting purpose would result in the Immigration Judge failing to meet the initial hearing deadline, even if every other similar type of hearing is completed at the initially scheduled hearing.[129] There is no flexibility for due process built into the measure, even for accommodation of a single due-process based continuance. This type of deadline is orientated more towards enforcement, at the risk of curtailing due process.

F. Universally Denounced as Due Process Compromising Incentives

Both scholars and legal community leaders agree that the use of such unrealistic devices to evaluate an Immigration Judge's performance compromise an Immigration Judge's independence and erodes due process.[130] In some cases, these types of quotas and deadlines create undue pressure on Immigration Judges to accelerate hearings and decide cases without allowing themselves enough time to fully consider the issues.[131]

The NAIJ has called the standards the "death knell for judicial independence"[132] and the New York City Bar Association has called the quotas "neither efficient nor just."[133] The American Bar

129. *Id*.

130. *Id*.; *see generally* Letter from Jill E. Family, Commonwealth Professor of Law and Government, et al., to Jeff Sessions, U.S. Att'y Gen. (Aug. 14, 2018) (*available at* https://commonwealthlaw.widener.edu/files/resources/letter-to-sessions-immigration-adjudication-with-s.pdf.).

131. *Id*.

132. *NAIJ Has Grave Concerns Regarding Implementation of Quotas on Immigration Judge Performance Reviews Before the S. Judiciary Comm. Oversight Hearing* (Oct. 18, 2017) [hereinafter NAIJ Senate Testimony 2017] (*available at* https://drive.google.com/file/d/0B_6gbFPjVDoxX1hFUHRWNjdnMWM/.).

133. IMMIGRATION & NATIONALITY LAW COMMITTEE, QUOTAS IN IMMIGRATION COURTS WOULD BE NEITHER EFFICIENT NOR JUST (N.Y.C. Bar Ass'n. Apr. 10, 2018) (*available at* https://www.nycbar.org/member-and-career-

Association has recommended an Immigration Court model that embodies the ideals proposed by the Institute for Advancement of the American Legal System. "These models stress judicial improvement as the primary goal, *emphasize process over outcomes*, and place a high priority on maintaining judicial integrity and independence."[134]

A commonly held view is that the central cause of the backlog of cases is due to the DOJ's failure to properly staff and fund the Immigration Courts in the face of an imbalanced budget for immigration law enforcement, and is not due to Immigration Judges' lacking performance or efficiency.[135] As a result, performance measures that emphasize outcomes over process are the antithesis of the remedy for the backlog of cases. Since the backlog has grown as a result of a decade-long delay in appointing an adequate number of Immigration Judges to address the caseload, a solution that is too reliant on curtailing Immigration Judges' authority, and which uses unrealistic quotas and deadlines will not achieve the goal of reducing that backlog.[136] Ironically, the new quotas and deadlines threaten to exacerbate the backlog. The integrity of, and the impartiality of, the Immigration Judge are compromised by the appearance of a financial interest in the outcomes (if not an actual financial interest), since the very structure under which case decisions are made implicate due process concerns.[137] The measures will likely generate individual and class action litigation, creating even longer adjudication times and greater backlogs, instead of making the overall process more efficient.[138]

services/committees/reports-listing/reports/detail/quotas-in-immigration-courts-would-be-neither-efficient-nor-just).

134. ABA Senate Testimony, *supra* note 44 (emphasis added).

135. *Id*.; *see also* Hon. Dana Leigh Marks, *Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, 59 FED. LAW. 29 (Mar. 2012), https://www.naij-usa.org/images/uploads/publications/Legal-Cinderella-March2012_1.pdf; Cristobol Ramon, et al., *Why Hiring More Judges Would Reduce Immigration Court Backlogs*, BIPARTISAN POLICY CENTER (July 25, 2018), https://bipartisanpolicy.org/blog/why-hiring-more-judges-would-reduce-immigration-court-backlogs/.

136. ABA Senate Testimony, *supra* note 44.

137. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

138. ABA Senate Testimony, *supra* note 44.

Immigration Judges serve as impartial decision-makers, rule on the admissibility of evidence and legal objections, make factual findings, reach conclusions of law, and have the authority to issue decisions about removability. Yet, in juxtaposition, they are civil servant employees subject to discipline and/or termination.[139] Immigration judges have no fixed term of office and their removal and transfer are subject to federal labor law protections and any rights conferred through collective bargaining. This construct creates pressure on Immigration Judges and by its very nature calls into question their independence, undermining public confidence in their capability and neutrality.[140] Moreover, critics agree this organizational structure impedes the quality of the Immigration Court system.[141]

Such criticism dates back to December 26, 2000, when the DOJ published a proposed 72 FR 53673, a rule in the Federal Register revising the authorities delegated to the EOIR Director and the Chief Immigration Judge.[142] 8 C.F.R. Section 1003.2 was then modified to confer authority on the EOIR Director to: "Direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, *to set priorities or time frames for the resolution of cases*[.]"[143]

It was also modified to permit the imposition of performance appraisals, but required that, "such appraisals must fully respect their roles as adjudicators."[144] Moreover, the rule placed limits on the authority of the EOIR Director, stating that "[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations and *shall not direct the result of an adjudication assigned* to the Board, *an immigration judge*, the Chief Administrative Hearing Officer, or an Administrative Law Judge."[145]

At the same time, 8 C.F.R. Section 1003.10 was modified to state,

139. *See generally* 8 C.F.R. §§ 1003 (2003) & 1240 (2003).

140. ABA Senate Testimony, *supra* note 44.

141. NAIJ Senate Testimony 2017, *supra* note 132.

142. Final Rule, Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge [72 FR 53673] [FR 50-07] (Sept. 20, 2007) [hereinafter Final Rule]. https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-123038/0-0-0-139104/0-0-0-140843.html.

143. 8 C.F.R. § 1003.0(b)(ii) (2019) (emphasis added).

144. *Id*. § 1003.0(b)(v) (emphasis added).

145. *Id*. § 1003.0(c) (emphasis added).

> Immigration judges shall exercise the powers and duties delegated to them by the Act and by the Attorney General through regulation. In deciding the individual cases before them, and subject to the applicable governing standards, *immigration judges shall exercise their independent judgment and discretion* and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.[146]

During the 60-day comment period, three individuals submitted comments about the authorities of the Director all of which related to a concern that the setting of deadlines could impede judicial independence.[147] They raised an alarm that setting priorities or time frames for the resolution of cases could lead "an official to direct the outcome of a specific case by setting an unyielding completion goal which would prevent an immigration judge from taking the time necessary to adjudicate a case fairly."[148] One commentator asked specifically whether the rule is intended:

> (a) To authorize an official to establish time frames for particular types or classes of cases which would be *guidelines* for the judges to follow, but permit a departure from the guidelines in individual cases when necessary; or
> (b) to have an official *direct* a judge to cut short a particular case regardless of the judge's need to take additional time.[149]

Another commenter went so far as to state that "the rule can be interpreted to abrogate the parties' right to a full and complete hearing."[150] This commenter would have the rule recognize that only the Immigration Judge should determine the amount of time necessary to complete a case."[151]

In responding to the comments, the DOJ stated that it, "*does not believe that the authority to establish time frames and guidelines 'directs' the result of the adjudication.* Time frames and guidelines are designed to ensure the timely adjudication and conclusion of

146. *Id*. § 1003.10.
147. Final Rule, *supra* note 142.
148. *Id*.
149. *Id*. (emphasis added).
150. *Id*.
151. *Id*.

proceedings, and their use is well-established in immigration procedure."[152] To support its view, the DOJ referenced not regulatory but *statutorily*-mandated completion deadlines.[153] It noted that asylum cases have a *statutory* completion requirement of 180 days[154] and that a credible fear review by an immigration judge has a *statutory* completion requirement of seven days.[155] Furthermore, the DOJ relied on the fact that "individual immigration judges set hearing calendars and prioritize cases. Within each judge's parameters for calendaring a case, *that judge will take the time necessary for the case to be completed*. Some cases take less time to complete, some more, and most fall within the estimated times."[156] The DOJ justified the finalization of the rule unchanged stating,

> *Experience* has shown that the time frames do not "direct the result" of a particular case, but rather that the guidelines promote timely results. The Department shares the commenters' concern for due process and fairness in immigration proceedings. Timely adjudications ensure due process and fairness for the aliens in proceedings, as well as for the government and its citizens who have an interest in having cases adjudicated, benefits conferred, and the laws enforced.[157]

152. *Id*.

153. Final Rule, *supra* note 144.

154. *Id*. *See also* 8 U.S.C. § 1158(d)(5)(A)(iii) (2019). In addition, the DOJ referenced an unrelated Board of Immigration Appeals case management system where single Board members are required to dispose of all assigned appeals within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel as set forth in 8 C.F.R. § 1003.1(e)(8)(i) (2019). However, this type of deadline is not at all like the deadlines currently imposed on Immigration Judges as it involves appellate review of a closed record, rather than trial judge rulings in a fluid case being adjudicated in an Immigration Court over a period of time.

155. Final Rule, *supra* note 144. *See also* 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2019).

156. Final Rule, *supra* note 144.

157. *Id*. (emphasis added). The DOJ relied on the decisions of Capital Area Immigrants' Rights Coalition, v. U.S. Dep't of Justice, 264 F.Supp. 2d 14 (D.D.C. 2003) (rejecting challenges to the Attorney General's reform of the Board's procedures in 2002); Nash, v. Bowen, 869 F.2d 675, 681 (2d Cir. 1989) (rejecting administrative law judge (ALJ) challenge to efforts by the Social Security

This reasoning is flawed because *experience* is now showing that the DOJ *can and will* create performance measures that impede judicial independence which curtail an Immigration Judge's ability to "set hearing calendars and prioritize cases." Under the new performance measures, NAIJ argues that EOIR disregards the DOJ's assumption that "[w]ithin each judge's parameters for calendaring a case, *that judge will take the time necessary for the case to be completed*." Doing so can exact a heavy penalty, up to and including termination of the Immigration Judge, at the expense of due process for litigants.

The politicization of our country's judicial functions undermines the fundamental democratic principles that Immigration Judges have sworn to uphold.[158] For Immigration Courts to continue to be impartial, Immigration Judges must be free to decide cases based upon the laws and facts of the case impervious to either external pressures or internal preferences.[159] Impartiality is impossible to achieve unless Immigration Judges are independent and free from external threats and intimidation, as well as from fear of sanctions on their employment status. Immigration Judges decide matters of "life and death" for people facing deportation at the U.S border.[160] One faulty decision and an Immigration Judge can inadvertently return a Respondent to the hands of their persecutor.[161] Because of such, these quotas and deadlines are of particularly grave concern especially in hearings involving vulnerable populations.

Administration (SSA) to improve the quality, timeliness, and efficiency of the ALJ decision making process; "those concerns are more appropriately addressed by Congress or by courts through the usual channels of judicial review in Social Security cases. The bottom line in this case is that it was entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decision making process.").

158. In removal proceedings, a respondent has the right to a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government. See 8 C.F.R. § 1240.10(a)(4) (2015). The Fifth Amendment requires that removal proceedings "conform to the traditional standards of fairness encompassed in due process; and accordingly, statements made by an alien used to support [removal] must be voluntarily made." Cuevas-Ortega v. Immigration Naturalization Service, 588 F.2d 1274, 1277 (9th Cir. 1979).

159. *NAIJ Senate Testimony 2017*, *supra* note 132.

160. *Id*.

161. *Id*.

V. USE OF ERRATIC PARTISAN DOCKETING SHUFFLING MECHANISMS

Over the past three years, Immigration Judges have been whipsawed through a range of policy initiatives as key law enforcement tools in the Administration's ever-evolving, "crisis"-mode immigration policy.[162] Immigration Judges have dutifully accommodated a range of policy implementations, including special temporary assignments,[163] presiding over immigration cases involving vulnerable immigrant children who have been separated from their parents,[164] and tolerating unfounded public disparagement from the President of the United States questioning the value of their role in the entire process.[165] Not surprisingly, "The judges' morale is the lowest it's been in years . . . [t]o argue or pretend like they're not an integral part of the system and that they're not an integral part of the solution only exacerbates that problem."[166] More importantly, these aberrations from normal operations are a worrisome distraction from attending to their primary responsibilities—addressing the backlog and resolving cases assigned to their home court dockets.[167]

In 2017, the Administration began a series of rotating detail assignments for Immigration Judges handling immigration cases at border courts along the U.S.-Mexico Border in order to stymie migrant

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162. Lorna Aldrich, *Legal Panel Says Changes to Immigration Courts Create Barriers to Justice and Due Process*, NAT'L. PRESS CLUB (Sept. 28, 2019), https://www.press.org/news/legal-panel-says-changes-immigration-courts-create-barriers-justice-and-due-pro.

163. Press Release, Dep't. of Justice, Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) (*available at* https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal).

164. Press Release, Dep't. of Justice, Justice Department Announces Additional Prosecutors and Immigration Judges for Southwest Border Crisis (May 2, 2018) (available at https://www.justice.gov/opa/pr/justice-department-announces-additional-prosecutors-and-immigration-judges-southwest-border) [hereinafter Southwest Border Crisis].

165. Eric Katz, *Immigration Judges Are 'Shocked and Disappointed' by Trump's Disparagements*, GOV'T EXEC. *(*June 25, 2018), https://www.govexec.com/management/2018/06/immigration-judges-are-shocked-and-disappointed-trumps-disparagements/149273/.

166. *Id*.

167. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

entrants at the border.[168] At the taxpayers' expense, large groups of Immigration Judges were ordered to cancel their home court dockets and relocate to centers along the border, where they were ordered to adjudicate only those cases involving migrants detained while crossing.[169] That program was scaled back significantly soon after Immigration Judges began to report that, upon arrival, their caseloads were nearly half empty.[170] "The problem was so widespread that, according to internal Justice Department memos which were reported widely, nearly half the thirteen courts charged with implementing these directives could not keep their visiting judges busy in the first two months of the new program."[171] By May 2018, the program had been retooled to involve supervisory Immigration Judges presiding over border court dockets, in some instances by video teleconference.[172]

Surprisingly, the temporary reassignments have been criticized as having the opposite of the intended effect.[173] Rather than leading to more rapid and streamlined deportations, and reduction of the backlog, the "surge" of Immigration Judges to the border exacerbated the backlog. When the policy went into effect, Immigration Judges sent on temporary assignments had to cancel cases on their overloaded home court dockets. From March 2017 to May 2017, the policy delayed more than 20,000 home court hearings, thus exacerbating already overloaded home dockets.

Next, the Administration announced a new policy and, "escalated effort," to address a crisis at the southwest border of the United States. Dubbed a "zero-tolerance" policy, then-Attorney General Sessions announced that the DOJ would criminally prosecute all illegal entrant

168. *Id*.

169. Meredith Hoffman, *Trump Sent Judges to the Border. Many Had Nothing to Do*, POLITICO (Sept. 27, 2017), https://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649.

170. *Id*.

171. *Id*. ("Within the first three months of the program, judges postponed about 22,000 cases around the country, including 2,774 in New York City alone, according to the DOJ memos. The delays added to an already clogged system: New York City's immigration court backlog stood at 81,842 as of July, according to the immigration data tracker TRAC Immigration.").

172. Southwest Border Crisis, *supra* note 164.

173. *Id*.

referrals from the Department of Homeland Security.[174] This presented a crisis because when an adult is referred for prosecution, a child traveling with the adult is turned over to the U.S. Health and Human Services Department, which is responsible for placing the child with a sponsor as the child's immigration case is resolved.[175] The policy proved to be controversial as more than 2,000 children were separated from their parents at the border between April and May, while their parents faced criminal prosecution.[176] Following legal action and relentless public pressure, the Administration reversed course, and the policy was discontinued in June.[177]

In 2018, the Administration issued a new precedent decision which severely limited the grounds for granting asylum and reversed previously established law. *Matter of A-B-*[178] overruled a prior decision, *Matter of A-R-C-G-*,[179] which held domestic violence survivors could receive asylum protection in some circumstances. Additionally, *Matter of A-B-* attacked asylum claims involving harm caused by non-state actors. This shift furthers the Administration's policy of separating children from parents who cross the southern border seeking asylum.[180] Regardless, it vastly complicates resolution of possibly hundreds of thousands of pending cases.[181] Astoundingly,

174. Press Release, Dep't. of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018) (*available at* https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry.).

175. Salvador Rizzo, *The Facts about Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?utm_term=.b022b181a1fa.

176. *Id*.

177. *Id*.

178. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

179. *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014).

180. Eli Rosenberg, *Sessions Defends Separating Parents and Children*, WASH. POST (June 5, 2018), https://www.washingtonpost.com/news/post-politics/wp/2018/06/05/sessions-defends-separating-immigrant-parents-and-children-weve-got-to-get-this-message-out/?utm_term=.6bb1bc819980.

181. *Asylum Practice Advisory: Applying for Asylum After Matter of A-B – Matter of A-B- Changes the Complexion of Claims Involving Non-state Actors, but Asylum Fundamentals Remain Strong and Intact*, NAT'L IMMIGRANT JUSTICE CTR. (June 2018), https://www.immigrantjustice.org/sites/default/files/content-

the Administration seems to be increasing the complexity surrounding case adjudication while simultaneously imposing a one-size-fits-all case-completion mandate on all Immigration Judges.[182]

Given the breadth of the challenges facing the Immigration Judge corps, including constantly shifting policy directives with unusually high turnover related to the investiture of each new Attorney General, Immigration Judge retirement has skyrocketed.[183] New Immigration Judges operate in constant fear that they will be subject to discipline, despite their diligence in attending to the massive backlog of pending cases assigned to them.[184]

In the midst of all these challenges, the Administration took its most worrisome action yet in the case of *Matter of Castro-Tum*.[185] In this decision, the Attorney General, in a case certified to himself, ruled that Immigration Judges and Board of Immigration Appeals Board Members lack general authority to administratively close cases, and restricted administrative closure to circumstances where explicitly provided by regulation or settlement agreement.[186] Administrative closure is a useful docket-management mechanism that has been used for more than three decades. It temporarily suspends removal proceedings in appropriate cases while collateral relief, such as a family-based visa petition, is being pursued, or while a respondent is serving time in criminal custody.

After the *Castro-Tum* case was remanded to the presiding Immigration Judge at the Philadelphia Immigration Court, Castro-Tum, the Respondent, failed to appear for his hearing, and the Immigration

type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf.

182. Daniella Silva, *Trump Administration Begins Returning Asylum Seekers to Mexico*, NBC NEWS (Jan. 29, 2019), https://www.nbcnews.com/news/latino/trump-administration-begins-returning-asylum-seekers-mexico-n964256.

183. Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS (Feb. 13, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump.

184. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

185. 27 I&N Dec. 271 (A.G. 2018); *see also Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ*, NAIJ (Aug. 8, 2018), https://assets.documentcloud.org/documents/4639659/NAIJ-Grievance-Morley-2018-Unsigned.pdf [hereinafter *NAIJ Grievance*].

186. *Id*.

Judge continued the case briefly on due process grounds. As a consequence, the case was removed from the Immigration Judge's docket, and reassigned to an Assistant Chief Immigration Judge for adjudication, following which Castro-Tum was ordered removed.[187]

The NAIJ brought a grievance against the Administration arguing infringement upon the Immigration Judge's independence to provide due process and noting that an additional eighty-six cases had been reassigned for similar reasons.[188] The NAIJ argued that the reassignment of the *Castro-Tum* case violated the trial Immigration Judge's decisional independence described under 8 CFR 1003.9(c), his discretion to grant a continuance "for good cause" or to grant a reasonable adjournment, and his ability to take any action deemed appropriate under law.[189] Here, the exercise of the Immigration Judge's judicial independence led the Agency to reassign *Castro-Tum* and other cases.[190] The Agency denied the grievance.

The NAIJ vehemently disagrees with the Agency's decision to exercise its power to reassign cases as in the *Castro-Tum* case.[191] Here, the actions taken by the Agency infringed on an Immigration Judge's decisional independence, and while the Agency has the authority to "assign" work, it must do so without interfering with judicial independence.[192] This new trend must be stopped immediately before it taints both due process and the Immigration Court's impartiality. The Agency violated that precept by taking the reassignment actions in this case and other related matters on the affected Immigration Judge's docket.[193]

VI. TOWARDS AN ARTICLE I COURT—PROSPECTS FOR THE FUTURE

We began this discussion with an acknowledgment that any lasting solution to address the massive Immigration Court backlog must include dramatic legislative and executive action, leading to

187. *Id*.
188. *Id*.
189. 8 C.F.R. § 1003.10 (2019); 8 C.F.R. § 1003.29 (2019); 8 C.F.R. § 1240.6 (2019); 8 C.F.R. § 1240.1 (2019).
190. *NAIJ Grievance*, *supra* note 185.
191. *NAIJ Internal Union Meeting Notes*, *supra* note 83.
192. *Id*.
193. *Id*.

comprehensive immigration reform. In the absence of such reform, we must identify and take steps to address the root causes of the backlog. Underfunding the Immigration Court and then, once hobbled, subjecting it to a series of untested and demonstratively ineffective policies does not lead to a real solution. The Immigration Court is but one element of an interconnected process. Solutions that disregard that fact by experimenting with powerful policy levers undermine the importance of the Immigration Court and harm our democratic ideals.

While we wait for comprehensive solutions, those that toil in this realm must persevere within the given system while maintaining the highest judicial standards. Of late, this has proven challenging. Immigration Judges are not Article III members of the judicial branch, and they do not enjoy the full independence that federal court judges have. Additionally, they have increasingly limited job security. The DOJ has the authority to set the conditions of employment for Immigration Judges, including if, and whether, such employment continues. While a DOJ regulation mandates that Immigration Judges "exercise independent judgment and discretion" when making decisions, as demonstrated in *Castro-Tum*, the Agency can infringe on decisional independence unimpeded.

When the DOJ takes action that conflates an Immigration Judge's exercise of its adjudicatory responsibilities with enforcement, such as with unrealistic case completion quotas and deadlines, confidence in the system further erodes. Immigration Judges must maintain their independence when hearing cases being prosecuted by a wholly different entity—the DHS. Immigration Judges do not serve as prosecutors and are not tasked with enforcement, but rather, their role is to carefully evaluate another agency's claims that an individual should be removed from the United States. Instead of providing adequate resources or implementing productive management tactics, the DOJ has implemented case completion quotas and deadlines disregarding the importance of independence, and fomenting conflict of interest concerns regarding adjudicatory decision-making.

For years, the NAIJ has been calling on Congress to remove the Immigration Courts from the Executive Branch and to create a separate Article I Immigration Court. This model would offer independence for Immigration Judges and build greater confidence in Immigration Courts. The need for an independent Article I Immigration Court has become increasingly more urgent given the experiences described here.

As this article has discussed, the Administration is engaging in alarming, unprecedented, and widely perceived intrusions into Immigration Judge decisional independence.[194] Moreover, the Administration's varied policies vis-à-vis Immigration Court proceedings in furtherance of expedited adjudications have proven ineffective, as the case backlog has ballooned by more than 50% since the beginning of 2017.[195] The answer is not to scapegoat the Immigration Judges and demean the value that they bring to the adjudicatory process. Nor is it productive to over-emphasize removal at the expense of due process as doing so impedes the ability of Immigration Judges to maintain the high standards that litigants deserve. The creation of an Article I Immigration Court would improve workforce professionalism and credibility. Third party stakeholders including the American Bar Association,[196] the Federal Bar Association,[197] and the American Immigration Lawyers Association, have all called on Congress to create an Article I independent Immigration Court to address these concerns.

In 2018, Rebecca Gambler presented prepared testimony before the U.S. Senate entitled *Immigration Court: Observations on Restructuring Options and Actions Needed to Address Long-Standing*

194. NAIJ Senate Testimony, *supra* note 3; *see also* NEW YORK CITY BAR, *supra* note 3.

195. *Immigration Court Backlog Surpasses One Million Cases*, *supra* note 2. (The Syracuse TRAC reports that "The Immigration Court backlog has jumped by 225,846 cases since the end of January 2017 when President Trump took office. This represents an overall growth rate of 49 percent since the beginning of FY 2017. Results compiled from the case-by-case records obtained by TRAC under the Freedom of Information Act (FOIA) from the court reveal that pending cases in the court's active backlog have now reached 768,257—a new historic high.").

196. AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM, ES–46 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_executive_summary.pdf; *see also* AM. BAR. ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 2–29 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

197. *Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N. (2018), http://www.fedbar.org/Advocacy/Article-1-Immigration-Court.aspx.

Management Challenges.[198] She referenced a General Accounting Office report from June 2017, which found that EOIR case backlogs were of epic size, resulting from costly, ineffective case management, and relied on outdated technologies. The Report stated that the majority of Immigration Court experts and stakeholders interviewed favored replacing the current Immigration Court system within the DOJ with an independent Article I Immigration Court outside of the executive branch.[199] The recommended restructuring would instill effectiveness and efficiency in the system, increase the perceived independence of the system, and improve the professionalism and credibility of the workforce.[200] These are laudable goals, fully supported by the NAIJ.[201]

The creation of an Article I Immigration Court is not the *deus ex machina* which will would definitively solve all of the immigration challenges facing the U.S. However, our Nation's democratic institutions are founded upon fairness and due process. The current Immigration Court system is falling short of these ideals. An Article I Immigration Court is but one aspect of the complex immigration system that needs re-tooling. Taking the Immigration Court out of the executive branch would instill trust in this honorable institution, making it more effective in handling the fair, expeditious, and orderly review and processing of immigration cases.

198. *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GENERAL ACCT. OFF. (June 1, 2017), https://www.gao.gov/products/GAO-17-438.

199. *Id*.

200. *Id*.

201. *See generally* NAIJ Senate Testimony, *supra* note 3.

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United States Department of State
Bureau of Consular Affairs

VISA BULLETIN

Number 42 Volume X **Washington, D.C.**

IMMIGRANT NUMBERS FOR JUNE 2020

A. STATUTORY NUMBERS

This bulletin summarizes the availability of immigrant numbers during June for: "Final Action Dates" and "Dates for Filing Applications," indicating when immigrant visa applicants should be notified to assemble and submit required documentation to the National Visa Center.

Unless otherwise indicated on the U.S. Citizenship and Immigration Services (USCIS) website at www.uscis.gov/visabulletininfo, individuals seeking to file applications for adjustment of status with USCIS in the Department of Homeland Security must use the "Final Action Dates" charts below for determining when they can file such applications. When USCIS determines that there are more immigrant visas available for the fiscal year than there are known applicants for such visas, USCIS will state on its website that applicants may instead use the "Dates for Filing Visa Applications" charts in this Bulletin.

1. Procedures for determining dates. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; USCIS reports applicants for adjustment of status. Allocations in the charts below were made, to the extent possible, in chronological order of reported priority dates, for demand received by May 11th. If not all demand could be satisfied, the category or foreign state in which demand was excessive was deemed oversubscribed. The final action date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. If it becomes necessary during the monthly allocation process to retrogress a final action date, supplemental requests for numbers will be honored only if the priority date falls within the new final action date announced in this bulletin. If at any time an annual limit were reached, it would be necessary to immediately make the preference category "unavailable", and no further requests for numbers would be honored.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, EL SALVADOR, GUATEMALA, HONDURAS, INDIA, MEXICO, PHILIPPINES, and VIETNAM.

4. Section 203(a) of the INA prescribes preference classes for allotment of Family-sponsored immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First: (**F1**) Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:

A. (**F2A**) Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. (**F2B**) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.

Third: (**F3**) Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: (**F4**) Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

A. FINAL ACTION DATES FOR FAMILY-SPONSORED PREFERENCE CASES

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. (NOTE: Numbers are authorized for issuance only for applicants whose priority date is **earlier** than the final action date listed below.)

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	22MAY14	22MAY14	22MAY14	15NOV97	01FEB11
F2A	C	C	C	C	C
F2B	15MAR15	15MAR15	15MAR15	15FEB99	01SEP10
F3	15APR08	15APR08	15APR08	22JUN96	15APR01
F4	O8AUG06	08AUG06	22JAN05	08MAY98	01FEB01

B. DATES FOR FILING FAMILY-SPONSORED VISA APPLICATIONS

The chart below reflects dates for filing visa applications within a timeframe justifying immediate action in the application process. Applicants for immigrant visas who have a priority date earlier than the application date in the chart below may assemble and submit required documents to the Department of State's National Visa Center, following receipt of notification from the National Visa Center containing detailed instructions. The application date for an oversubscribed category is the priority date of the first applicant who cannot submit documentation to the National Visa Center for an immigrant visa. If a category is designated "current," all applicants in the relevant category may file applications, regardless of priority date.

The "C" listing indicates that the category is current, and that applications may be filed regardless of the applicant's priority date. The listing of a date for any category indicates that only applicants with a priority date which is **earlier** than the listed date may file their application.

Visit www.uscis.gov/visabulletininfo for information on whether USCIS has determined that this chart can be used (in lieu of the chart in paragraph 4.A.) this month for filing applications for adjustment of status with USCIS.

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	15FEB15	15FEB15	15FEB15	22DEC99	01SEP11
F2A	01MAY20	01MAY20	01MAY20	01MAY20	01MAY20
F2B	01DEC15	01DEC15	01DEC15	22SEP99	01MAY11
F3	15MAR09	15MAR09	15MAR09	15JUL00	15NOV01
F4	31JUL07	31JUL07	01OCT05	08FEB99	01SEP01

5. Section 203(b) of the INA prescribes preference classes for allotment of Employment-based immigrant visas as follows:

EMPLOYMENT-BASED PREFERENCES

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "*Other Workers".

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of Pub. L. 102-395.

A. FINAL ACTION DATES FOR EMPLOYMENT-BASED PREFERENCE CASES

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. (NOTE: Numbers are authorized for issuance only for applicants whose priority date is **earlier** than the final action date listed below.)

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES	VIETNAM
1st	C	15AUG17	C	08JUN16	C	C	C
2nd	C	01NOV15	C	12JUN09	C	C	C
3rd	08NOV17	15JUN16	08NOV17	01APR09	08NOV17	08NOV17	08NOV17
Other Workers	08NOV17	15JUL08	08NOV17	01APR09	08NOV17	08NOV17	08NOV17
4th	C	C	15DEC16	C	08JUN18	C	C
Certain Religious Workers	C	C	15DEC16	C	08JUN18	C	C
5th Non-Regional Center (C5 and T5)	C	15JUL15	C	01JAN20	C	C	22APR17
5th Regional Center (I5 and R5)	C	15JUL15	C	01JAN20	C	C	22APR17

*Employment Third Preference Other Workers Category: Section 203(e) of the Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997, as amended by Section 1(e) of Pub. L. 105–139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW final action date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002. For Fiscal Year 2020 this reduction will be limited to approximately 350.

B. DATES FOR FILING OF EMPLOYMENT-BASED VISA APPLICATIONS

The chart below reflects dates for filing visa applications within a timeframe justifying immediate action in the application process. Applicants for immigrant visas who have a priority date earlier than the application date in the chart may assemble and submit required documents to the Department of State's National Visa Center, following receipt of notification from the National Visa Center containing detailed instructions. The application date for an oversubscribed category is the priority date of the first applicant who cannot submit documentation to the National Visa Center for an immigrant visa. If a category is designated "current," all applicants in the relevant category may file, regardless of priority date.

The "C" listing indicates that the category is current, and that applications may be filed regardless of the applicant's priority date. The listing of a date for any category indicates that only applicants with a priority date which is **earlier** than the listed date may file their application.

Visit www.uscis.gov/visabulletininfo for information on whether USCIS has determined that this chart can be used (in lieu of the chart in paragraph 5.A.) this month for filing applications for adjustment of status with USCIS.

Employment-Based	All Chargeability Areas Except Those Listed	CHINA - mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	01OCT17	C	15MAR17	C	C
2nd	C	01AUG16	C	01JUL09	C	C
3rd	01APR19	01MAR17	01APR19	01FEB10	01APR19	01APR19
Other Workers	01APR19	01AUG08	01APR19	01FEB10	01APR19	01APR19
4th	C	C	01FEB17	C	C	C
Certain Religious Workers	C	C	01FEB17	C	C	C
5th Non-Regional Center (C5 and T5)	C	15DEC15	C	C	C	C
5th Regional Center (I5 and R5)	C	15DEC15	C	C	C	C

6. The Department of State has a recorded message with the Final Action date information which can be heard at: (202) 485-7699. This recording is updated on or about the seventeenth of each month with information on final action dates for the following month.

B. DIVERSITY IMMIGRANT (DV) CATEGORY FOR THE MONTH OF JUNE

Section 203(c) of the INA provides up to 55,000 immigrant visas each fiscal year to permit additional immigration opportunities for persons from countries with low admissions during the previous five years. The NACARA stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually allocated diversity visas will be made available for use under the NACARA program. This will result in reduction of the DV-2020 annual limit to approximately 54,650. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For June, immigrant numbers in the DV category are available to qualified DV-2020 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately		
AFRICA	CURRENT	Except: Egypt	42,000
ASIA	CURRENT	Except: Nepal	13,500
EUROPE	CURRENT		
NORTH AMERICA (BAHAMAS)	CURRENT		
OCEANIA	CURRENT		
SOUTH AMERICA, and the CARIBBEAN	CURRENT		

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2020 program ends as of September 30, 2020. DV visas may not be issued to DV-2020 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2020 principals are only entitled to derivative DV status until September 30, 2020. DV visa availability through the very end of FY-2020 cannot be taken for granted. Numbers could be exhausted prior to September 30.

C. THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN JULY

For July, immigrant numbers in the DV category are available to qualified DV-2020 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately			
AFRICA	CURRENT	Except:	Egypt	42,000
ASIA	CURRENT	Except:	Nepal	13,500
EUROPE	CURRENT			
NORTH AMERICA (BAHAMAS)	CURRENT			
OCEANIA	CURRENT			
SOUTH AMERICA, and the CARIBBEAN	CURRENT			

D. FOR THE LATEST INFORMATION ON VISA PROCESSING AT U.S. EMBASSIES AND CONSULATES DURING THE COVID-19 PANDEMIC, PLEASE VISIT THE BUREAU OF CONSULAR AFFAIRS WEBSITE AT TRAVEL.STATE.GOV

E. OBTAINING THE MONTHLY VISA BULLETIN

The Department of State's Bureau of Consular Affairs publishes the monthly Visa Bulletin on their website at www.travel.state.gov under the Visas section. Alternatively, visitors may access the Visa Bulletin directly by going to:

http://www.travel.state.gov/content/visas/english/law-and-policy/bulletin.html.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

listserv@calist.state.gov

and in the message body type:
Subscribe Visa-Bulletin
(example: Subscribe Visa-Bulletin)

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address:

listserv@calist.state.gov

and in the message body type: **Signoff Visa-Bulletin**

The Department of State also has available a recorded message with visa final action dates which can be heard at: **(202) 485-7699.** The recording is normally updated on/about the 17th of each month with information on final action dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

VISABULLETIN@STATE.GOV

(This address cannot be used to subscribe to the Visa Bulletin.)

Department of State Publication 9514
CA/VO: May 11, 2020

9

File: A[redacted] - Aurora, CO

Date: APR 28 2020

In re: [redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Elsa D. Burchinow, Esquire

ON BEHALF OF DHS: Sunika Pawar
Assistant Chief Counsel

APPLICATION: Change in custody status

The respondent, a native and citizen of Bangladesh, has appealed from an Immigration Judge's September 6, 2019, decision denying his request for a change in custody status. The Department of Homeland Security (DHS) has moved for summary affirmance. The record will be remanded to the Immigration Judge for further proceedings consistent with this order and for the entry of a new decision.

On appeal, the respondent argues that the Immigration Judge violated his right to due process and a fair hearing by denying his request for a bond without any evidence to support her decision. The respondent further contends that the Immigration Judge erred in finding that he posed a threat to national security solely on the basis of statements made by the DHS that were unsupported by evidence.

Specifically, the respondent argues that the DHS did not offer evidence to support its assertion that the Liberal Democratic Party, the party to which the respondent claimed to belong, is a terrorist organization. While the respondent bears the burden of establishing that he is not a danger to the community or a flight risk, an Immigration Judge's determination that an individual poses a danger to the community must be based on probative evidence in the record.[1] *See* 8 C.F.R. § 1236.1(c)(8). The statements of the DHS attorney during the bond hearing in this case do not constitute evidence. *See, e.g., Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (noting that counsel's statements in a motion are not evidence).

In determining whether an alien may be released on bond, an Immigration Judge may consider any evidence in the record that is probative and specific. *Matter of Fatahi*, 26 I&N Dec. 791, 794 (BIA 2016). The Immigration Judge may consider direct or circumstantial evidence and may make reasonable inferences. *Matter of Fatahi*, 26 I&N Dec. at 794-95. In this case, while the Immigration Judge found the respondent did not meet his burden of proof, the record contains

[1] Similarly, an Immigration Judge's determination that a respondent is not eligible for bond because he or she falls within the aliens described in section 236(c)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c)(1), must be based on some type of evidence.

insufficient evidence pertinent to the respondent's dangerousness, and the Immigration Judge only cited the statements of DHS counsel to support an apparent link between the respondent and a terrorist organization (IJ at 1).

We therefore must remand the record to the Immigration Judge for further consideration of the respondent's request for a change in custody status, specifically, the Immigration Judge should address whether the respondent poses a danger to the community, considering all evidence of record, or whether he is a flight risk.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this order and for the entry of a new decision.

FOR THE BOARD

10

Additional Resources:

https://www.uscis.gov/legal-resources/immigration-and-nationality-act