AMERICAN IMMIGRATION COUNCIL

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February 13, 2012

Administrative Conference of the United States
Committee on Adjudication Comments
1120 20th Street, NW
Suite 706 South
Washington, DC 20036

Submitted via Comments@acus.gov

Re: Comments on Immigration Adjudication Draft Report

Dear Committee Members:

The American Immigration Council's Legal Action Center (LAC) commends ACUS for undertaking an extensive study of the immigration court system and considering ways in which the Executive Office for Immigration Review (EOIR) can improve adjudication procedures. We are grateful for the opportunity to provide the following comments to the first draft report on immigration adjudication (dated January 12, 2012). Our comments focus on issues that relate to our current work. We did not comment on the aspects of the report where we agree with your recommendations; instead, we highlighted only recommendations and discussions that we believe require some revision.

**Representation**

Although the Immigration and Nationality Act (INA) provides for a right to counsel "at no expense to the Government" – and thus does not provide the *right* to paid counsel – it does not preclude the government from providing paid counsel when it chooses to do so or when otherwise required. The report, however, suggests otherwise (see bottom of page 56). Further, the report does not make any explicit recommendations for government-appointed counsel programs. While we support Recommendation 25 (making the case that funding representation for detainees is efficient and will save money), the LAC urges you to encourage EOIR to take additional steps to provide appointed counsel to noncitizens who would otherwise be unable to retain lawyers. Specifically, EOIR should plan for and seek necessary funds for an appointed counsel pilot project. Further, the report should acknowledge that its recommendations with respect to Legal Orientation Program (LOP), pro se law clerks, and "know your rights" materials – though certainly worth exploring – are not substitutes for individual representation by lawyers with immigration law experience.

The report also highlights that EOIR has acknowledged the need to warn noncitizens about "unscrupulous lawyers and others" who provide deficient assistance (page 60). In addition, the report seeks to address individual incompetence within the immigration bar (pages 77-79). Conspicuously missing, however, is a discussion or any recommendations regarding how to ensure that noncitizens who are the victims of such incompetence, fraud, or other deficient assistance have an adequate remedy. Significantly, in *Matter of Compean*, 25 I&N Dec. 1 (AG 2009), Attorney General Holder directed EOIR to initiate rulemaking procedures to evaluate the current framework for adjudicating claims of ineffective assistance of counsel in immigration proceedings and to determine what modifications should be proposed for public consideration. Subsequently, the LAC submitted a letter to EOIR detailing recommendations for new rules on ineffective assistance of counsel (see http://www.legalactioncenter.org/sites/default/files/docs/lac/IAC-EOIRletter-2009-11-12.pdf). The letter outlines the deficiencies of the current rules, as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), suggests ideas that would reduce the number of ineffective assistance claims, and recommends revisions to the regulatory system and framework. The LAC urges ACUS to echo these recommendations.

**Disclosure of Documents**

Recommendation 41 advises EOIR to consider a pilot project "to evaluate situations in which the judge should order the Trial Attorney to produce essential records from the A File." Given the mandatory language of INA § 240(c)(2)(B) and the dictates of due process, the LAC believes that this recommendation should go further. For example, it could say: "EOIR should clarify the authority for judges to order the trial attorneys to turn over documents in the respondent's A-File where required by INA § 240(c)(2)(B) or due process, or in the interest of efficiency." EOIR also could instruct judges to inquire about the disclosure of documents at the first master calendar hearing and encourage trial attorneys to disclose documents without a formal order, especially in cases where the respondent is pro se.

**BIA Case Management Procedures**

Recommendation 59 suggests that EOIR should proceed to make the 2008 proposed regulations final. Though not identified, the proposed regulations that this recommendation refers to are "Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents," 73 Fed. Reg. 34654 (June 18, 2008). This recommendation is worded too broadly. The draft report discusses only one aspect of this proposed regulation: referral of cases for a decision by a three member panel of the BIA. We agree that this aspect of the proposed regulation was not controversial and should be adopted. However, the proposed regulation included a number of other changes, such as lowering the standard for issuance of the controversial "Affirmance Without Opinion" (AWO) decisions (as distinct in existing regulations from single member decisions); purporting to restrict judicial review over AWO decisions; and purporting to regulate exhaustion of administrative remedies for purposes of judicial review. These latter proposed changes were very controversial (*See, e.g.*, comments from the American Immigration Council (formerly American Immigration Lawyers Foundation) and the American Immigration Lawyers Association, http://www.legalactioncenter.org/litigation/fair-procedures-immigration-court). We suggest

clarifying that the recommendation pertains only to adoption of that portion of the proposed regulation pertaining to the referral of cases for three member BIA decisions but does not recommend adoption of the remaining portions of the regulation.

In addition, we are concerned that, by stating that problems at the BIA have "abated to the point that our research time and resources would be better spent on other subjects," the report suggests that there are no remaining problems with Board performance. Because you admittedly did not engage in a full analysis of BIA performance, you cannot speak to problems that may remain, notwithstanding improvements that have been made since the Board's all-time low in the early to mid-2000s. In fact, the statistics themselves raise a red flag. It is difficult to believe that over 90% of all BIA appeals meet the standard for single member affirmances – that is, that they all involve harmless errors that are either squarely controlled by precedent or do not involve substantial factual or legal issues. 8 C.F.R. § 1003.1(e)(4)(ii). Given that the BIA was not a focus of your investigation, we suggest that you make clear that, beyond the limited recommendation regarding referrals to three member panels, you can draw no conclusions about BIA performance.

**Evaluating the Use of Stipulated Removal Orders**

We appreciate your acknowledgment of the due process concerns associated with stipulated removal orders. However, we agree with the concerns raised by others and feel strongly that the report does not go far enough to protect against the documented abuses that routinely occur when stipulated removal orders are issued. For a full discussion of such abuses, see the report from the National Immigration Law Center, http://www.nilc.org/2011sept8dwn.html. Consequently, we encourage you to recommend that stipulated removal orders *never* be used in pro se cases because otherwise there is no way to ensure that that their use is *always* consistent with a knowing waiver of rights. Comparing charts 3 and 4 in the appendices, it appears that those courts with the highest use of stipulated removal orders consistently have a high incidence of pro se respondents appearing before them. This raises the inference that the majority of stipulated orders are issued in cases in which the respondents are pro se, a conclusion confirmed by the NILC report.

For purposes of efficiency, it is possible for the courts to encourage the parties to stipulate to specific factual or legal issues without requiring that pro se respondents – who are not afforded a personal hearing – stipulate to a removal order.

**Prosecutorial Discretion**

We agree with Recommendation 5, which would require that a DHS lawyer approve every NTA, and believe that this type of screening mechanism is so critical that it should be implemented without a pilot project. We would also recommend additional training of both DHS attorneys and immigration officers on the implementation of existing DHS guidance on prosecutorial discretion (see below). EOIR could encourage DHS's exercise of prosecutorial discretion in appropriate cases by granting continuances or otherwise ensuring that DHS has access to comprehensive information regarding the respondent's equities.

Your discussion of the relevant factors set forth in the June 2011 memo is thorough, but you should also discuss the more recent guidance that ICE issued in November 2011. The LAC's Practice Advisory, "DHS Review of Low Priority Cases for Prosecutorial Discretion" (see http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_9-1-11.pdf) summarizes this guidance and flags inconsistencies between the June and November memos.

You speculate that the high number of legally insufficient NTAs issued by CBP "may reflect the pace of work on the border and the fact that many border patrol agents are not legally trained." While both these factors may be at play, we would also note that, although DHS announced last June that all DHS agencies would be issuing prosecutorial discretion policies, CBP has yet to do so. This may reflect a more deep-seated resistance within the agency.

Admittedly, DHS could also do more to expand the use of prosecutorial discretion – such as creating a mechanism for all respondents granted prosecutorial discretion to apply for work authorization, utilizing forms of prosecutorial discretion other than administrative closure, and undertaking a broad public information campaign for unrepresented respondents – but these issues may be beyond the scope of your report.

**Administrative Closure**

The BIA's recent decision in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), held that immigration judges and the Board may administratively close removal proceedings, even if one of the parties is opposed. Relevant factors include the reason administrative closure is sought; the basis for any opposition to administrative closure; the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside removal proceedings; the anticipated duration of the closure; the responsibility of either party in contributing to any delay; and the ultimate outcome of removal proceedings when the case is recalendared. This case overruled *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996), which you cite in footnote 187. Advocates are concerned that this decision may be improperly used to justify administrative closure in cases where DHS seeks to exercise prosecutorial discretion, but the respondent prefers to pursue a (presumably strong) claim. We suggest that you add a recommendation addressing this concern.

**Video Hearings**

We agree with others who have commented on the narrow scope of the video hearing discussion and its failure to address the underlying problem of increased detention, particularly in remote facilities, and the perspectives of respondents, particularly those who are pro se. Perhaps most notably, we reject the premise that the use of video hearings should continue pending the execution of empirical research to assess the impact of this practice on the outcome of removal proceedings. In light of the concerns flagged by critics, video hearings raise serious due process concerns, and their use may deprive a respondent of a full and fair hearing. At a minimum, respondents or representatives should be able to object and request in-person hearings in cases where video hearings may jeopardize fairness. Other critical improvements — including a mechanism for attorneys to consult privately with their clients, a system that enables a

respondent to see the interpreter, and better technology — are also necessary. Our primary concerns with video hearings are flagged in the LAC's Practice Advisory on "Objecting to Video Merits Hearings" (see http://www.legalactioncenter.org/sites/default/files/lac_pa_121203.pdf).

**Asylum/Employment Authorization Clock**

Recommendation 9 advises EOIR to amend its regulations to provide that in cases where the respondent seeks asylum as a defense to removal, a judge should administratively close the case to allow the respondent to file the asylum application at the USCIS Asylum Office. In a November 2011 memorandum, DHS stated that the asylum clocks of respondents whose cases are administratively closed for prosecutorial discretion will stop. (*See* November 17, 2011 Memorandum from Principal Legal Advisor Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases*, p.3 n 5, http://www.aila.org/content/default.aspx?docid=37680). Given this development, the recommendation should state explicitly that administrative closure by the immigration judge to allow a respondent to refile an asylum application with the Asylum Office should not toll the 180-day waiting period for work authorization pursuant to 8 C.F.R. § 1208.7(a)(2). Any other result would conflict with the regulations, which limit tolling of the 180-day waiting period for applicant-caused delay.

Recommendation 14 advises the Office of the Chief Immigration Judge (OCIJ) to amend the Immigration Court Practice Manual to allow immigration court employees other than immigration judges to accept the submission of asylum applications and to provide the required statutory advisals. The LAC supports this recommendation but suggests that the introduction to the recommendation be expanded to include the following points. First, the proposed amendment is supported by the language of the regulation, which only requires an asylum applicant to file a complete asylum application with the "immigration court." 8 C.F.R. § 1208.4(b)(3). Second, crowded court dockets often cause delays in scheduling an initial hearing, where a respondent can submit an asylum application to the immigration judge. Because applicants' asylum clocks do not begin running for purposes of work authorization until the asylum application is "filed," the ability to submit an application prior to an initial hearing is critical. The recommendation would be strengthened by stating that defensive asylum applications may be "filed" with appropriate court employees, thus ensuring the 180-day waiting period for EAD eligibility is triggered.

We support Recommendations 22-24 suggesting that EOIR's role in the asylum employment authorization clock be eliminated. The LAC agrees, in principle, that many asylum clock problems would be resolved if there was a presumption of work authorization eligibility 180 days after an asylum application was filed.[1] We agree with the conclusion that there are other satisfactory measures that guard against the filing of frivolous asylum applications, and suggest that it may be time to consider a regulatory change eliminating altogether the purely regulatory

[1] Your recommendation states that there should be a presumption of eligibility after 150 days, but the statute suggests an applicant may not receive employment authorization until 180 days after the asylum application is filed. INA § 208(d)(2) ("[a]n applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum").

concept that the 180-day waiting period for EAD eligibility should be tolled for applicant-caused delay.

The LAC suggests, however, that the introduction not include the option of categorically refusing to ever grant or renew work authorization because an asylum applicant has, on some occasion, frustrated the adjudication of the application. This undefined grant of discretion to EOIR may result in an uptick in outright denials of work authorization, which in turn would lead to challenges by the asylum applicant – exactly the result that the recommendation attempts to curb. At the very least, the LAC suggests that in instances of "unreasonable delay" on the part of the applicant, work authorization not be granted until the delay has been resolved and a period of 180 days have elapsed without unreasonable delay.

In addition, if the adjournment code system were eliminated, as the recommendation suggests, some problems related to calculation of the 180 days would remain. For example, EOIR's restrictive policy regarding when an application is considered "filed" for purposes of triggering the 180-day period would still create problems for asylum applicants in some jurisdictions (see suggestions above regarding Recommendation 14).

Further, applicants may continue to be subject to EOIR policies that stop counting the 180-day period when the asylum application is denied by an immigration judge.[2] The recommendation currently states that there is "a presumption of work authorization eligibility 150 days after the application has been filed," but it is not immediately clear that the calculation of the 180-day period should continue during any remand to the Board of Immigration Appeals or the immigration court. We suggest that such continuing eligibility be made explicit in the recommendation.

Finally, EOIR should clearly state that, following a grant of prosecutorial discretion that results in administrative closure of a removal case, an asylum applicant should be able to obtain work authorization while the removal case is administratively closed. Administrative closure carried out to benefit DHS (e.g., so that it can focus on high priority cases), the immigration courts (e.g., to reduce the current crushing backlog of cases), and the respondent should not be considered "applicant-caused delay" under the regulations. Moreover, where the applicant had an EAD prior to administrative closure (and had already satisfied the 180-day waiting period), EOIR should make clear that the EAD will continue and can be renewed while the case is administratively closed. The LAC believes this is permitted under the regulation as the asylum application would remain pending during administrative closure. See 8 C.F.R. § 274a.12(c)(8).

[2] EOIR policy states that the asylum *adjudications* clock – as distinct from the asylum EAD clock – permanently stops when the judge issues a decision granting or denying the asylum application, because this decision is a "final administrative adjudication of the asylum application, not including administrative appeal." OPPM 11-02: *The Asylum Clock* at 16 (citing INA § 208(d)(5)(A)(iii)). As a result, the asylum clock does not run "during any appeal of the decision" to the BIA, "during judicial review before the Federal courts, or if a case has been remanded to the immigration court." *Id*.

It also may be helpful to offer some solutions to asylum clock problems if the adjournment code system remains in place. One issue of major concern is the failure of the clock system to recognize the resolution of applicant-caused delays between hearings. The regulations provide that an adjudication delay "caused" by the asylum applicant will stop the clock only during the time the delay exists: "Any delay requested or caused by the applicant shall not be counted as part of these time periods." 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2). The regulation does not require an applicant to wait until the next hearing for the clock to start. Therefore, applicants should be able to notify EOIR that a delay has been resolved, after which EOIR should immediately start or restart the asylum clock Currently, there is no clear mechanism for restarting the asylum clock before the next hearing.

In addition, a "good cause" system should be put in place, whereby individual cases would be evaluated to determine whether an applicant's action, even when resulting in a delay in proceedings, was for "good cause." If so, the respondent should continue to accrue time toward the 180-day waiting period.

Finally, if the adjournment code system continues, EOIR must improve its process for notifying applicants of actions taken regarding their asylum clocks. In particular, EOIR should be required to inform applicants as to when or why their asylum clocks stopped, did not start, or failed to restart. EOIR also should be required to inform an applicant when decisions regarding the clock are made at a time other than a hearing. In particular, court administrators, who are granted significant authority over the asylum clock under current guidance, should notify applicants of actions taken regarding the clock.

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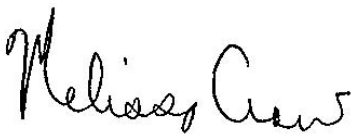
We look forward to reviewing the Committee's final report. Should you have any questions regarding our comments, please do not hesitate to contact us at 202-507-7516 or by e-mail at mcrow@immcouncil.org or bwerlin@immcouncil.org.

Respectfully submitted,



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