

Follow-Up Comment On ACUS' Recently Posted: "Outline Of Study Of Immigration Removal Adjudication"

Introduction

I see an improvement in characterizing the proposed study as limited to "Immigration Removal Adjudications" as opposed to simply "Immigration Adjudication" which was an overly broad label for the actual issues under consideration. That said, I still see a few fundamental flaws in the proposal. I also see some areas of promise to expand upon. ACUS is seeking to make recommendations so, please make them useful and worthwhile recommendations.

I. "Denied Marriage Petitions"

The USCIS form *I-130, Petition for Alien Relative*, is used by either a U.S. citizen (USC) or a lawful permanent resident (LPR or "green-card" holder) to request a place in line for an immigrant visa for a specific relative. Among the relatives for whom the I-130 can be filed is a spouse. The spouse of a USC is an "immediate relative" (IR) for whom an immigrant visa is legally, "immediately available". This allows many IR's to file with USCIS, an *I-485, Application To Register Permanent Residence Or Adjust Status*, concurrently with the USC's I-130.

Given the ease with which so many people have entered into fraudulent or "sham" marriages over the decades, Congress passed the Marriage Fraud Amendments back in the 1980s. It has long since seeped into the American consciousness to the point of desensitization and apathy. Remember the movie "Green Card" (1990) starring Gérard Depardieu and Andie MacDowell? Currently, an immigrant visa issued by the State Department abroad or adjustment of status granted by USCIS or an Immigration Judge (IJ) domestically, is issued on a *conditional* basis in the case of a spouse who enters or adjusts as a spouse if the marriage upon which it is based has lasted less than two (2) years on the date of entry or adjustment.

The alien spouse is issued a conditional green-card (form I-551) with a two (2) year expiration date. Normally, within the 90 day period before the expiration date on the card, a form *I-751, Petition to Remove Conditions on Residence*, is to be filed with USCIS. In order to have conditions lifted. The applicants must demonstrate that the marriage is *bona fide*, or the alien must show that (s)he is eligible for a waiver of the continuation of the bona fide marriage. In general, the alien seeking a waiver must demonstrate that the marriage was entered into in *good faith* but it deteriorated and ended in divorce. Another alternative is for the alien spouse to seek protection as a victim of abuse or extreme cruelty under VAWA (Violence Against Women Act) [it applies to males as well as females and the protection extends to children or can be based on abuse to the child and extended to the alien parent]. If the alien spouse or both spouses, if it was

filed jointly, fail to convince USCIS, then USCIS will *terminate* the status and [allow the alien to depart or] will issue a Notice to Appear (NTA) to initiate Removal Proceedings. The alien may renew their request for the lifting of conditions or a waiver before an IJ. The IJ denial would be appealable to the BIA etc...

Another scenario that may arise is the outright denial of the I-130 standing alone by USCIS. This decision may be appealed to the BIA directly depending on the basis for denial. Generally these would entail evidentiary issues or matters of interpretation of foreign laws or U.S. State laws pertaining to marriage, divorce, adoption (other than international orphan adoptions), or on the legal status of illegitimate or out-of-wedlock children. In some countries there are both secular and religious laws to be considered as well as historical or repealed statutes and recent or progressive statutory or Constitutional changes, not to mention controlling judicial rulings both foreign and in the U.S. Certain petitions are appealed to the USCIS Administrative Appeals Office (AAO). If a marriage is entered into *after* the alien has already been placed in Removal Proceedings, things get even more complicated.

In general, an IR spousal petition may be filed concurrently with an application for adjustment of status. When the issue of proving a *bona fide marriage exemption* is involved then the underlying evidence is pertinent to both the I-130 and the I-485 not to mention certain waiver applications. This is a sticky area involving overlapping jurisdictional issues. This case can involve USCIS adjudicators at a Service Center and District Office as well as the AAO, the BIA and an IJ all being involved at one point or another in the same case.

If an applicant seeks *adjustment of status* to lawful permanent residency pursuant to section 245(a) of the Act, 8 USC § 1255(a) but the director denies the application pursuant to the regulation at 8 CFR § 245.1(c). The director's decision cannot be appealed. The Director could accept, entertain and decide on a Motion under 8 CFR § 103.5 but the AAO is without authority unless the Director certifies the decision pursuant to 8 CFR § 103.4.

The regulation at 8 CFR § 245.2(a)(5)(ii) states, in pertinent part: "No appeal lies from the denial of an application [to adjust status under *most parts of* section 245 of the Act] by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240."

The AAO has jurisdiction to review denials of applications for adjustment of status filed by aliens seeking the *bona fide marriage exemption* and aliens in U or T nonimmigrant status. Section 245(e), (l) and (m) of the Act, 8 USC § 1255(e), (l), (m); 8 CFR §§ 245.1(c)(8)(viii)¹, 245.23(i)², 245.24(f)(2)(ii)³. The AAO has no jurisdiction to review denials of applications for

¹ (viii) Appeals. An application for... eligibility for the bona fide marriage exemption contained in this part may be appealed...

² (i) *Denial*. If the application for adjustment of status or the application for a waiver of inadmissibility is denied, USCIS will notify the applicant in writing of the reasons for the denial and of the right to appeal the decision...

³ (ii) *Denial*. Upon the denial of any application for adjustment of status, the applicant will be notified in writing of the decision and the reason for the denial in accordance with 8 CFR part 103. If an applicant chooses to appeal the denial...

adjustment of status under section 245(a) of the Act. 8 CFR § 245.2(a)(5)(ii). Accordingly, any such appeal must be rejected.

“It appears that a small percentage of the immigration court removal orders are appealed to EOIR’s Board of Immigration Appeals (BIA).^{1*} The BIA also has jurisdiction over some other forms of agency adjudication such as the review of *denied marriage petitions*; this review constitutes a smaller part of its docket. In fiscal year 2010, the appeals from DHS decisions represented nearly 24% of all appeals; 8,591 of 35,787 (Yearbook page S2). A non-citizen subject to a final order of removal may seek review in a federal court of appeals. The last decade saw a substantial increase in the number of such cases. The growth peaked at mid-decade.” *At page 2⁴ [Emphasis added.]*

Footnote from original:

^{1*} It is difficult to assess the actual rate of appeal from the Statistical Yearbook. In fiscal year 2010 the BIA received 27,196 appeals from immigration judge decisions (S2). These appeals can be filed by either DHS or non-citizen respondents (the Yearbook does not break them out). At first blush, it appears that the 27,196 appeals represent approximately 10% of the total 287,207 completions (D1) made by the immigration judges. But the rate of appeal depends on the universe of immigration judge decisions eligible for or likely to be appealed. If the denominator is all IJ completions, the rate of appeal is 9.4% (27,196/287,707). But if the denominator is completions only in cases in which the respondent filed an application for relief from removal (reported at N1), the appeal rate is 37.8% (27,196/71,924). Knowing more about which and how many immigration judge completions are appealable will provide a firmer fix on the appeal rate.

Many IJ’s will *terminate* Removal Proceedings, usually *without prejudice* (to DHS re-filing charges). This is done to basically dump the case back on USCIS so that if relief is available through adjustment of status and/or certain waivers, it can be dealt with outside of Removal Proceedings and handled by USCIS who will charge fees rather than wasting resources not recouped by ICE and EOIR through fees. ICE and USCIS have taken steps to become more efficient in processing such cases. USCIS has issued a Policy Memo dated Feb 4, 2011, and entitled: “Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings.”⁵ ICE has a corresponding Policy Memo⁶. The interplay between administrative authority and the shared jurisdiction is complex when it comes to alien relative petitions. All stand alone I-130s (not just spousal petitions) as well as certain other relative petitions (I-360 for widow(er)) are appealable to the BIA however they may NOT be decided by an IJ *in the first instance*.

II. IJ Time Spent on Non-Citizens’ Motions To Reopen Expedited Removal Proceedings, Judicial Orders of Removal, and Administratively Issued or Re-Instated Orders of Removal is ZERO

⁴ <http://www.acus.gov/wp-content/uploads/downloads/2011/05/Full-Outline-ACUS-Immigration-Adjudication-Project.pdf> (Longer outline.)

⁵ <http://www.uscis.gov/USCIS/Laws/Memoranda/2011/April/guidance-adjudication-remove-proceedings.pdf>

⁶ <http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf>

Removal Proceedings before an IJ are commenced pursuant to INA § 240. Expedited Removal Proceedings commenced by CBP for arriving aliens are under authority found in INA § 235. The controlling regulations provide for limited review of challenges to expedited removal under very specific criteria. [See 8 CFR § 235.3] If expedited removal is found to be inappropriate at any point in the proceedings, the case can be converted over to INA § 240 Removal Proceedings.

ICE may issue an Administrative Removal Order of certain aliens convicted of aggravated felonies under authority of INA § 238, there is a direct judicial appeal for this Order of Removal. The Circuit Courts generally just determine whether the criminal conviction is appropriately classified as an aggravated felony under INA § 101 (a)(43).

Also under that same section, a U.S. Attorney may request a Judicial Order of Removal at time of conviction in a U.S. District Court. This order, or the denial thereof, can also be appealed to the Circuit Courts of Appeals by the alien or the Government. Stipulated removal orders as part of plea agreements require a waiver of appeal as part of the plea bargain agreement.

Under INA § 217, an alien is waived the usual requirement to obtain an actual physical visa that would be placed in their passport at an embassy or consulate abroad. Under CBP's ESTA (Electronic System for Travel Authorization) under INA § 217, a qualified alien from a participating country, is waived from having to apply for the B-1 (business traveler visa) or B-2 (tourist visa) in exchange for waiving most rights to contest an Administrative Removal Order, except when claiming asylum or seeking adjustment as an immediate relative (IR) of a USC.

There are limitations on such requests for IR adjustments that are still being litigated as to whether there is or is not any right whatsoever to file an I-485 after the expiration of the 90 days of authorized stay. No matter how that question plays out, the ultimate decision on an adjustment application is discretionary and non-reviewable by a Court whether it is decided by USCIS or EOIR. The last word on the request for adjustment by a visa waiver program (VWP) entrant rests with USCIS. The VWP entrant is not entitled to any Removal Proceedings before an IJ or appeal to the BIA but can challenge an Administrative Removal Order in the Circuit Court of Appeals with jurisdiction on a question of law or Constitutional due process violation.

The newly posted revamped proposal for the intended study is still flawed in expending energy on something that is virtually non-existent. In the following excerpt, it is incorrectly assumed that an IJ can entertain any motions to reopen expedited removal orders or administratively issued or re-instated orders of removal. IJ's are without jurisdiction. The only valid point in this next paragraph is the vast number of motions filed against *in absentia* orders. These, however, are usually not very time consuming as they can often be dispensed with rather quickly and easily. Only a handful of such motions, in any given year, are valid due to minor clerical errors and if so, go unopposed by DHS so that the case can get back on track. DHS would rather have a

valid Order of Removal that it could easily re-instate if the removed alien illegally re-enters in the future. The BIA is not very hesitant to re-issue a decision that is shown to have been mailed to a wrong or old address in order to restart the appeal period. The nonsensical motions are quickly denied by the IJ and then the BIA and become the problem of the Circuit Courts.

“We will also examine what effect, if any, the existing *expedited removal* or stipulated removal procedures, including in absentia proceedings, have on the efficiency and operation of the immigration courts. In some situations, the immigration judges spend a significant amount of time considering motions to reopen earlier proceedings because there are few, if any, remedies or opportunities that afford the individual the ability to challenge the sufficiency or accuracy of such an expedited order. The ultimate time savings in court resources provided by administrative removals in the first instance may disrupt court procedures in collateral attacks. At page 5⁷ [*Emphases added.*]

Here is an example of what I term a “nonsensical motion”:

***Mukash Kumar Patel v. Atty Gen USA, 10-1554*⁸ (3rd Cir. 02/24/11) [Precedent Filed 04/25/11]**

“Motion filed by Respondent Atty Gen USA to publish the opinion filed on 02/24/11. The foregoing Motion is GRANTED. The designation of the opinion in this matter as precedential does not alter the Court’s previously issued judgment. As such the filing date of the judgment and the decision remain unchanged.”

“PER CURIAM

Mukash Kumar Maneklal Patel, a citizen of India, entered the United States without inspection in January 1996. The former Immigration and Naturalization Service took him into custody in Texas. On January 14, 1996, Patel was personally served with an Order to Show Cause, which charged him with being deportable pursuant to former Immigration and Nationality Act (“INA”) § 241(a)(1)(B) [8 U.S.C. § 1231(a)(1)(B)]. The Order to Show Cause was read to Patel in Hindi, and Patel acknowledged receipt by signing the Order. On April 5, 1996, Patel posted bond and was released from detention. Patel later asserted that he was unaware of who had posted the money for his release, and “walked around aimlessly for 6 hours in the rain” until he found a bus depot. Patel boarded a bus for St. Louis, Missouri. Shortly thereafter, he traveled to Milwaukee, Wisconsin.

Meanwhile, Patel’s family hired Saul Brown, an attorney in New York, who entered his appearance on April 12, 1996. On April 23, 1996, Attorney Brown submitted a motion to change venue, asserting that Patel was staying with friends in New Jersey. Over the Government’s objections, the Immigration Court granted the motion and transferred the

⁷ *Supra.*

⁸ <http://www.ca3.uscourts.gov/opinarch/101554p.pdf>

matter to the Immigration Court in Newark, New Jersey. By certified letter dated May 24, 1996, the Immigration Court notified Attorney Brown that Patel's master calendar hearing was scheduled for September 13, 1996. The record contains a signed return receipt, indicating that someone in Attorney Brown's office accepted the notice.

On August 27, 1996, Attorney Brown moved to withdraw from the case, arguing that he had not "seen or heard from the respondent since the respondent was released from detention ..." At the time, Attorney Brown acknowledged that Patel's next hearing was scheduled for September 13, 1996. The Immigration Court denied the motion to withdraw on September 6, 1996. Patel did not appear for the September 13, 1996, hearing, and he was ordered deported in absentia on September 16, 1996. Notice of the Immigration Judge's ("IJ") decision was mailed to Attorney Brown.

Thirteen years later, in September 2009, Patel filed a motion to reopen the proceedings on the ground that he had not received proper notice of the hearing. The IJ denied the motion, holding that Patel "was provided with proper notice of his deportation case." The IJ noted that notice of his September 13, 1996, hearing was sent by certified mail to Patel's attorney of record, that Patel had made no effort to contact his family to ascertain the name of the attorney who posted his bond, or to hire another attorney, and that he otherwise failed to "take[] reasonable action to determine his obligation to the Immigration Court and to his attorney of record." The Board of Immigration Appeals ("BIA") dismissed Patel's appeal. It agreed that Patel had received proper notice under the statutory requirements in effect in 1996. Even if Attorney Brown was not authorized to represent Patel, the BIA concluded that notice was adequate because Patel had not complied with the requirement, set forth in the Order to Show Cause, that he notify the Immigration Court of address and telephone number changes. Patel filed a timely petition for review from the order.".....

The 3rd Circuit summed up their analysis in *Patel* quite simply and briefly in footnote #1:

"The proceedings could also be reopened at any time if the alien demonstrated that he was in custody and that the failure to appear was through no fault of his own. *See* INA § 242B(c)(3) [8 U.S.C. § 1252b(c)(3)]. Also, an in absentia order of removal could be rescinded "upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances." INA § 242B (c)(3)(A) [8 U.S.C. § 1252b(c)(3)(A)]. Neither of these provisions is applicable here because Patel was not in custody, his motion to reopen was filed 13 years after he was ordered deported in absentia, and, as noted below, he did not act diligently as would be required for equitably tolling the time period for filing a motion to reopen based on exceptional circumstances. *See Mahmood v. Gonzales*, 427 F.3d 248, 252 (3d Cir. 2005)."

This next excerpt carries forth the flaws with another inaccuracy. Here, the concepts of administrative adjudications performed by USCIS rather than an IJ are being confused with motions on such proceedings incorrectly assumed to be filed with an IJ. This is a case of mixing

apples and oranges. If USCIS denies a benefit under the INA, certain decisions have an administrative appeal to the USCIS' AAO, other denials have no appeal rights, but any motion filed is filed with the last official to make a decision. Any such motion would be filed with USCIS and not an IJ.

If the denial by USCIS leaves the alien amenable to removal proceedings, USCIS would issue an NTA. While a motion could still be filed with USCIS, any *adjustment of status* case would be removed to the jurisdiction of the IJ by reason of the USCIS-issued NTA. As mentioned earlier, an IJ might terminate proceedings and dump a case back on USCIS. Similarly, USCIS can deny a benefit and issue an NTA and dump a case on the IJ.

Flaws aside, the time and effort spent making the case for coordinating which cases should be handled by USCIS rather than EOIR, *in the first instance*, at the very least, is worthy of study by the Administrative Conference.

We will seek to clarify why certain cases require immigration court review while others are appropriate for disposition by DHS, and whether other categories of cases now subject to immigration court adjudication could be efficiently resolved by non-adversarial adjudication with sufficient administrative review and record-keeping protections. We will also examine whether the IJ time that *administrative removals* save is greater than *the time IJs spend on non-citizens' motions to reopen such proceedings* in order to challenge the sufficiency or accuracy of such orders.” *At page 2*⁹

“In some removal cases, the adjudication procedures require holding the immigration court proceedings in abeyance while segments of the adjudication are reassigned to DHS's Citizenship and Immigration Service. Granting CIS greater authority to complete the adjudication in these cases or undertake it as an alternative to initial adjudication within the immigration courts could have significant impact on the workload of those courts. For example, allowing the CIS asylum corps to complete the asylum adjudication in expedited removal cases without immigration court review unless the application was denied might help reduce periods of detention and free court resources. Another area may be allowing CIS authority to adjudicate applications for adjustment of status raised as a defense to removal and to terminate or stay the immigration court proceedings while the CIS makes an initial determination of statutory eligibility for such relief. At the current time, there are many procedural hurdles because both EOIR and CIS have to coordinate to complete adjustment of status adjudications and there can be significant docket and paperwork delays inherent in the dual agency participation in these adjudications.”
*At page 5*¹⁰

⁹ <http://www.acus.gov/wp-content/uploads/downloads/2011/05/Short-Outline-ACUS-Immigration-Adjudication-Project.pdf> (Short outline.)

¹⁰ *Supra.*

III. “A Specific Case For Better Coordination of Efforts: Original Citizenship Claims by Arriving Travelers to the United States”

Working within the existing regulatory and statutory framework, an arriving traveler who asserts a claim to United States Citizenship *by an action of law* should be *deferred* by CBP to the appropriate USCIS Field Office to file an *N-600, Application for Certificate of Citizenship*. Ideally, an individual should have handled this issue prior to departing for the U.S. via the adjudication of a Form *FS-240, Consular Report of Birth Abroad*, for a minor or a *DS-11, Passport Application*, for an adult (age 18 or older), by a Consular Officer abroad.

The adjudication of an N-600 can be protracted because documentary evidence may not be readily available. Indeed, this may be why the individual could not make the citizenship claim to a Consular Officer abroad. Depending on the particular situation, it may be necessary for the claimant to seek old census records; marriage, birth and death records; court records; Social Security or IRS records; military personnel records; perhaps even old INS records. If the claimant must further seek non-governmental records such as school, church, hospital or privately held medical or legal documentation (employment (private company’s) records, bank records, physicians’ or lawyer’s case files etc...) it may take a rather long time to conclude the case. In addition, testimony may be required of persons not currently in the United States. The working relationship between DHS and DOS and existing procedures already allows for foreign based testimony to be secured by either a Consular or DHS Officer stationed abroad and transmitted to a domestic office.

If records and testimony need to be obtained in order to support the citizenship claim, *USCIS may continue the period of deferral* for such time as is required to accomplish the purpose pursuant to 8 CFR § 235.2 (c) and INA § 212(d)(5)(A) to include any administrative appeal and judicial review(s) until a final decision is reached on the matter of the claim to citizenship.

It is inappropriate for CBP to refer an arriving traveler who is making a claim to U.S. citizenship to an I.J. via any Expedited Removal process. However, there may be instances when CBP refers someone to an I.J. via § 235 Expedited Removal or § 240 Removal Proceedings who first brings up the possibility of a claim to U.S. citizenship after reaching the I.J. The claim could also first arise if the presumed alien has been handed over to ICE from CBP at a POE or, by another law enforcement agency within the U.S. or, when first encountered by ICE itself. ICE has procedures when the citizenship claim arises in its purview, CBP it seems, needs to refine its approach in order to coordinate with USCIS better. ICE could play a major role in terms of escorting an arriving citizenship claimant from a POE to USCIS and could use the means at its disposal to assure that an arriving claimant did not abscond into the country rather than report to USCIS. ICE has electronic monitoring and tracking capability at their disposal if such measures are

deemed necessary. In the alternative, ICE could be that person's first "host" by providing accommodations in the U.S., if that person arrives indigent.

If the arriving person first asserts a citizenship claim directly to an IJ., what is the IJ supposed to do? Further consultation between the Departments of Justice and Homeland Security are required in order to determine the proper course of action in this scenario.

Matter of Lujan, 25 I&N Dec. 53 (BIA 2009) Decided by the Board July 20, 2009:

“The Board of Immigration Appeals lacks jurisdiction to review an appeal by the Department of Homeland Security of an Immigration Judge’s decision to vacate an expedited removal order after a claimed status review hearing pursuant to 8 C.F.R. § 1235.3(b)(5)(iv) (2009), at which the Immigration Judge determined the respondent to be a United States citizen.”

“...without an explicit grant of appellate jurisdiction in an otherwise carefully constructed regulatory and statutory process, we cannot assume appellate jurisdiction.....”

Original Jurisdiction in Citizenship Claims v. Ultimate Legal Interpretation Authority

The IJ as a representative of the A.G. is not the designee within the INA to make the *initial determination of USC inside the United States*, the Secretary of Homeland Security through USCIS is the official with delegated statutory authority.¹¹ However, in matters of legal interpretation, the A.G. is the final arbiter to whom the Secretary must defer. *INA § 103(a)(1) [8 USC 1103(a)(1)]*. The BIA can exercise this legal interpretation authority on behalf of the A.G. AAO can exercise the Secretary’s authority¹² in citizenship claim cases. The AAO/Secretary, in consultation with the EOIR/BIA/A.G., can also publish Precedent Decisions within its areas of expertise (see 8 CFR § 130.3(c)). Who deserves the right to consider the facts of the particular citizenship claim case ***in the first instance*** when there is disagreement between an IJ and ICE Counsel? Is it properly a matter for the AAO or should it go to the BIA? 8 CFR § 1235.3 (b)(5)(iv) says that once an IJ determines that someone in Expedited Removal under INA § 235 is a USC, that DHS cannot place them in regular Removal Proceedings under INA § 240. That regulation is *ultra vires*.

¹¹ Even the State Department should not be issuing Passports to derivative citizens that are resident inside the U.S., but that is a whole other debate.

¹² Department of Homeland Security Delegation Memos 0150 and 0150.1, Delegation to the Bureau of Citizenship and Immigration Services [now USCIS].

At this point, the water gets even muddier.

Perhaps DHS switched over to INA § 240 proceedings and the **BIA disagrees with the IJ** determination and then the claimant fights the Removal Order in a *Petition for Review* in a Circuit Court of Appeals. DHS can dispute the claim to USC, and if the Circuit Court finds that questions of material facts exist, it then transfers the case to District Court. Again, it falls to DHS to fight in court as it should be.

However, if the **BIA agrees with the IJ** what should it do? On the one hand, the BIA is ostensibly speaking for the A.G. and the Secretary is supposed to defer to that determination in matters of *legal interpretation*. On the other hand, this particular determination is supposed to be made by the Secretary in the first instance according to the INA. This determination involves the evaluation and weighing of evidence and fact-finding. BIA regulations prohibit it from being the primary fact-finder on appeal.

- Should such a case be decided through direct consultation between the BIA and AAO?
- Should the case be held in abeyance by the BIA and referred to the AAO?
- Should the matter be forwarded (*certified* or *referred*) directly to the A.G in order to settle the dispute between DHS and EOIR?
- Should the proceedings be remanded back to the IJ with instructions to suspend proceedings and the claimant be directed to file an N-600 with USCIS (the IJ can grant a fee waiver if need be and USCIS will honor it as it does for any other application for relief directed to be filed with USCIS by an IJ's order)?
- Should the IJ have suspended, terminated without prejudice, or administratively closed the Removal Proceeding and directed the claimant to file an N-600 without deciding the final merits and thus have avoided allowing the case to be appealed to the BIA in the first place?
- What is ICE Counsel's role? To Join a Motion? To authorize parole?
- Can ICE detain the individual whose status is uncertain by virtue of a dispute between ICE Counsel and the IJ?
- Should CBP have contacted USCIS rather than sending the case to Immigration Court?
- Should CBP have *paroled* the individual to appear at a USCIS Office *in the same manner as a deferred inspection used to be handled under INS*?

Joint DOJ-DHS Rulemaking is needed in this area along with internal procedural refinements within EACH Component of EACH Department involved in the matters discussed above. Recommendations are needed on these issues.

IV. *Staffing Alternatives: Pro Se Law Clerks*

The EOIR employs more support staff in the form of law clerks, general attorneys, and other clerical and technical staff than actual IJs like any other court system. Unfortunately, the BIA is gobbling-up most of the resources to the detriment of the front-line troops, that is, the IJs.

“Immigration judges have high workloads not simply because of the high case-to-judge ratio but because of the dearth of personnel assistance in managing those cases. The judges share pool clerks, most of whom are hired immediately out of law school. In some cities eight judges may share one clerk. The Board of Immigration Appeals [*which is authorized a maximum of 15 board members*] has approximately 125 staff attorneys, but immigration courts have no similar resources possible that some of these resources should be redeployed to support the trial level and that might in turn further reduce rates of appeal to the BIA.” *At page 11*¹³

“As we note below, staffing alternatives for immigration courts, although likely precluded by lack-of-funds, are worthy at least of mention. For example, U.S. trial courts employ staff attorneys as “pro se law clerks” to screen pro se submissions to identify their legal merit for the judge’s consideration and to respond orally and in writing to questions posed by pro se litigants about legal procedure and other process in the court (but not substantive legal questions). We will assess whether such positions could provide efficiencies in immigration adjudication, which is pro se-intensive.” *At page 6*¹⁴

By way of comparison, USCIS utilizes adjudications officers (current job title is Immigration Services Officer (ISO) which lumps together the former job titles of: Adjudications Officers, District or Center Adjudications Officer, Immigration Information Officers, and Application Adjudicators; DAO’s were formerly Immigration “Examiners”). Asylum Officers seem to be held apart at this time. In the old days, Examiners had to be attorneys. This was found to be unnecessary and that requirement was dropped. The world has not collapsed because of it. Specific, highly specialized training has been developed to ensure that these employees have the required skills to complete the tasks assigned. The proposed examination of the utilization of Pro Se law clerks by Immigration Courts is commendable. The positions should not require the individual employees to be “attorneys” and members of a bar. Establishment of Pro Se Law Clerks in Immigration Courts around the country is a darn good move and would require little convincing of anyone to make it happen. This could be a “slam dunk” portion of the study and an easy sell. It has been a big success in the U.S. District Courts since it began as a pilot program in 1975.¹⁵ Thirty-six (36) years of proven success makes for an easy argument for implementation in Immigration Courts.

¹³ *Supra.*

¹⁴ *Supra.*

¹⁵ http://www.uscourts.gov/News/NewsView/11-04-26/Pro_Se_Law_Clerks_A_Valuable_Court_Resource.aspx

V. *“EOIR Electronic Case Filing: Something Similar to PACER”¹⁶”*

EOIR has been trying to implement an electronic case filing system similar to that utilized by the Judicial Branch of government for years. EOIR published a proposed rule at 68 FR 75160¹⁷ on December 30, 2003, entitled **“Executive Office for Immigration Review Attorney/ Representative Registry”** which called for all practitioners representing aliens before the Immigration Courts and BIA to register and obtain a unique “UserID” and password for electronic case filing and docket management. The EOIR system encompassing, enhancing, and combining existing databases would allow the immigration practitioners to file and manage cases before EOIR from their desktop computers. The rule stated that law firms or other similar entities will not be issued a UserID. Practitioners working on behalf of a law firm (including attorneys, law graduates, and law students) or other entity (such as accredited representatives employed by recognized organizations) must individually register with EOIR. It is too bad that it has been fought tooth and nail by Immigration Practitioners even when the official AILA position¹⁸ is to demand implementation of such a system as recently as June 17, 2010, in its testimony at a Congressional Hearing.

“The Case Access System for EOIR (CASE) tracks and manages caseload information, testimony, and documents for cases before the Immigration Courts and the Board of Immigration Appeals (BIA). This system combines the functions of legacy systems ANSIR (for the Immigration Courts) and BIAP System (for the BIA) into a consolidated system, with added functionality, Data from the legacy systems has been migrated to CASE. This system is the first step toward having an electronic case filing system.”¹⁹

The more pressure placed towards the final push for implementation is not wasted effort simply because the system is not yet in place. The earlier regulatory change proposed in 2003, is long overdue and the earlier arguments against, which in my opinion were invalid from the beginning, must have been overcome by now. Exactly which lawyer or BIA accredited representative in the United States, in 2011, does not have access to a desktop computer? Who would seek help from or hire such a person to defend them against removal from this country?

[Proposed] 8 CFR § 1292.1 Representation of others.

* * * * *

(f) *Registration requirement for attorneys and representatives.* The Director or his designee is authorized to register, and establish procedures for registering, attorneys and representatives, as defined by 8 CFR 1001.1(f) and (j), as a condition of practice before immigration judges or the Board of Immigration Appeals. Such registration procedures will include a requirement for electronic registration. The Director or his designee may administratively suspend from practice before the immigration judges and the Board any attorney or representative who fails to provide the following required registration

¹⁶ http://www.uscourts.gov/News/TheThirdBranch/08-11-01/The_PACER_Service_Center_The_Backstory.aspx

¹⁷ <http://www.gpo.gov/fdsys/pkg/FR-2003-12-30/pdf/03-32019.pdf#page=1>

¹⁸ <http://www.aila.org/content/default.aspx?docid=32247>

¹⁹ http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-ofjustice/rg-0060/n1-060-08-007_sf115.pdf

information: practitioner name, address(es), date-of-birth, last four digits of social security number, e-mail address (if applicable) and bar admission information (if applicable). After such a system has been established, an immigration judge may, under extraordinary and rare circumstances, permit an unregistered practitioner to appear at one, and only one, hearing if the immigration judge first acquires from the attorney or representative, on the record, the required registration information. An unregistered practitioner who is permitted to appear at a hearing in such circumstances shall complete the electronic registration process immediately after the hearing at which he or she is permitted to appear.²⁰

VI. “Obvious Biases”

The proposed study retains certain obvious biases of its authors. The zealot and the defeatist philosophies still stand out. First from the zealot who refers to individuals in Removal Proceedings strictly as “immigrants”, blames ICE Counsel for hampering proceedings, and sees Video Hearings as a clear cause for adverse credibility findings. Then one can see input from the defeatist who sees the Judicial Branch as so much better than EOIR which could be improved except that it can’t be and won’t be done.

“Enhancing Immigration Judge Authority by Evaluating Accountability of ICE Trial Attorneys

Some of the problems or significant delays within the immigration courts are created by government counsel, largely ICE Trial Attorneys. Under the current regulatory model there are no disciplinary procedures within EOIR for **ICE Trial Attorneys’ failure to meet deadlines or other problematic behavior**. Some of these matters may be separately referred to the Office of Professional Responsibility within ICE. The EOIR manual refers complaints to the District General Counsel for ICE. The AILA website refers people with complaints about ICE counsel to the Office of Bar Counsel in Washington. It is unclear [if] immigration judges ever make such a referral. There appears to be a clear problem of inconsistent and nontransparent accountability for government counsel. Although respondents’ having counsel is more likely to help **address failure or inappropriate behavior by the government counsel (which leads to reform of bad actors)**, the *immigration judges’ long-sought goal of contempt authority* merits some assessment in considering case management efficiencies. Further, **increasing professionalism and accountability in the ICE Trial Attorneys** help *develop the administrative record by preserving important issues for further agency or judicial review*. Cooperation with the removal orders of the EOIR rests in part on the respect the public has for the proceedings held within the tribunal and **abuse by government counsel can be a problem**. The current system may be damaging the court’s overall operations.” *At pages 10-11*²¹

“Video hearings

Immigration courts increasingly conduct proceedings by video hookups that link the judge, the respondent, and counsel, some or all of whom are not in the same place. Video

²⁰ *Supra.*

²¹ *Supra.*

hearings obviously reduce EOIR's transportation costs and those of the parties and may achieve more timely resolutions. **They are, however, controversial, especially because credibility assessments are often key to an immigration judge's ruling and the video format may not provide adequate means for assessing credibility.** Use of video conferencing may be more appropriate during motion hearings and status conferences." *At page 11*²²

The above underlined statement completely discounts ACUS' own preliminary research that has already directly questioned EOIR on this aspect. ACUS found that the main factor that can be of concern via video hearings, specifically, "demeanor" is at the very bottom of the IJ's list of factors to consider in credibility determinations.

"When interviewed, EOIR officials noted that since the *Rusu* decision [in 2002], the agency has invested in significant technological improvements to try to improve the use of video hearings. Moreover, while EOIR officials recognize that critics are of the opinion that the use of video impairs a decision-maker's ability to judge a respondent's credibility, they maintain that the only type of credibility that could possibly be impacted by the use of video would be the ability to judge demeanor credibility. To this point, EOIR officials note that the agency's IJs are told that **judging credibility by demeanor (whether at a video hearing or an in-person one) is the agency's least preferred method and that it should not be used when other methods of judging credibility are available to an IJ.**" *At page 36*²³

"Recently, the most visible object of attention to immigration adjudication has been its proper site within the federal government. Some observers believe that relocating the immigration adjudication that now occurs in executive branch administrative tribunals to a statutory court, commonly called an Article I court, would enhance the adjudicators' professionalism and autonomy. There is debate about whether to establish such a court with the Department of Justice or elsewhere within the executive branch or even within another branch of government. That subject is not an object of this report, in part because it has been well analyzed and in part because the **prospects for major structural alteration appear remote for the foreseeable future.** We will, however, evaluate published reports' and academic studies' suggestions about immigration adjudication that could be incorporated short of creating a statutory (Article I) court. *At page 1*

Everyone who has given immigration adjudication more than a casual glance knows that lack of resources in the immigration courts and the BIA are a major hindrance to creating an immigration adjudication system that serves the legitimate interests of non-citizens, their U.S. family members and the United States. **The resource situation is unlikely to improve in the foreseeable future and, given rising concern about the national debt, may well get worse**²⁴. With that understanding, we seek recommendations that are practical and likely to be cost effective." *At pages 1-2*

²² *Supra.*

²³ <http://www.acus.gov/wp-content/uploads/downloads/2011/05/Revised-Final-Draft-Report-on-Agency-Use-of-Video-Hearings-5-10-11.pdf>

²⁴ Defeatist concessions from the very beginning of the proposal do not bode well for a productive exercise.

Individuals in removal proceedings are usually individuals without any valid or lawful immigration status in the U.S. Most folks will be those who have entered without inspection (EWI), overstayed a visa, or have been found inadmissible but are seeking some form of relief. That percentage that has previously been issued green cards will usually be there because a crime has been committed or a fraud has been uncovered. By referring to them all as “immigrants” merely makes the bias more obvious. If one wants to be politically neutral, they are “alleged aliens”, “respondents”, or simply “individuals”. Referring to persons, the majority of whom are without a valid lawful immigration status, as “immigrants” implies that they are “lawful permanent residents” (LPRs) fighting to retain lawfully obtained “green cards”. Most are not.

“Enhancing telephonic access to counsel for people in detention

We will investigate suggestions made to us by ACUS staff that audio links established and maintained by DHS could enable private attorneys, pro bono groups, and law school clinics to provide legal advice to **immigrants** in pre-removal detention. Even where non-profit organizations post information about free phone lines, the hours and availability of help is severely limited due to the limited resources of those organizations. If ACUS wishes us to pursue this suggestion, we will try to learn: (1) DHS’s interest in implementing, probably on a pilot basis, the technology for secure audio links that representation providers could use, (2) what types of providers might be willing to use the technology, and (3) what kind of representation might they provide using the technology. Would they use it only to answer detainees’ procedural questions or use it more extensively, to provide substantive advice or design litigation strategies, for example[?]

Creating even this simple enhanced technology in detention centers, **however, faces considerable hurdles**, including objections that government-funded links would violate the ban on use of government funds for representation for those in removal proceedings, even if users paid for service time. **The proposal may be doomed** as well by realities on the ground, including the refusal of detention facilities, including state and local facilities, in which DHS rents space, to allow such links. A newly released report of the Migration Policy Institute cited a 2010 National Immigrant Justice Center study that said 78 percent of the over 25,000 detainees it surveyed were in facilities that prohibited attorneys from scheduling private calls with their clients.

Even DHS-installed phone links may not ease some current barriers to communication with counsel or the necessary follow-up, such as **calling abroad** to seek documents counsel may have advised the detainee to secure. In some detention centers it is very expensive for the detainees to purchase phone cards. Detention center rules often prohibit gifts of cards and the prices are much higher than for cards commercially available outside the prison. Detainees often have to make collect calls. In some centers, **phone calls must be made in an open setting, lacking all privacy and making it very difficult to have confidential conversations.**” At pages 7-8²⁵

²⁵ *Supra.*

I agree that DHS is not likely to support secure confidential phone, video, or internet connections, especially, when you bring up international communications. However, it is not the “government expense” that is the real hindrance. It is the age in which we live. Secure lines beg to be misused, but an actual person can be followed and/or questioned. The “advocate” or anyone else coming in contact with the detained individual may not remain anonymous. It is counter-intuitive to national security for the U.S. Government to assist anyone in making confidential communications abroad from a detention facility.

In a highly publicized case, an attorney was convicted for being a conduit for communication by a detained terrorist client to extremists on the outside. One may recall the case but here is a blurb from a New York Times article²⁶ about it:

“He was known as Juror 8, for the jury box chair where he listened silently for more than six months as the convoluted evidence unfolded in the trial of Lynne F. Stewart, the radical defense lawyer accused of aiding Islamic terrorism.

The jurors argued behind closed doors in Federal District Court in Manhattan for another month before they finally agreed to convict Ms. Stewart on all five charges she faced for smuggling messages out of prison from her terrorist client, Sheik Omar Abdel Rahman.

“We found what jurors called the smoking gun,” Juror 8 said in an interview. “Lynne Stewart knew full well that violence was going to be committed,” he said, after she publicized the sheik’s words. He said the jurors also concluded that she had lied in her testimony.”

Thanks for the opportunity to comment.

Joseph P. Whalen

²⁶ <http://www.nytimes.com/2006/10/21/nyregion/21stewart.html>