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March 31, 2011

OLP Regulatory Docket Clerk
Department of Justice
950 Pennsylvania Avenue, NW, Room 4250
Washington, DC 20530

Submitted via www.regulations.gov

Re: Reducing Regulatory Burden; Retrospective Review under EO 13563, 76 Fed. Reg. 11163 (Mar. 1, 2011)
OLP Docket No. 150

Dear Clerk:

In response to your request for comments regarding the Department's review of its existing regulations, the American Immigration Council wishes to highlight several issues we previously have brought to the attention of the Executive Office for Immigration Review (EOIR). We urge the Department to take this opportunity to address the need for regulatory reform in the following areas:

Departure Bar to Motions to Reopen. Current regulations, 8 C.F.R. § 1003.2(d) and 8 C.F.R. § 1003.23(b)(1), bar a noncitizen from pursuing a motion to reopen or motion to reconsider with the Board of Immigration Appeals or the Immigration Courts after he or she has departed or has been removed from the United States. On August 6, 2010, the American Immigration Council, along with the National Immigration Project of the National Lawyers Guild, the Post-Deportation Human Rights Project, Vakhtang Pruidze, Ramon Espinal Prestol, and Isela Guadalupe Pinto-Reyes, submitted a petition for rulemaking asking the Department to amend existing regulations to strike the departure bar to motions to reopen and reconsider (Attachment A). At the time the petition was submitted, three courts of appeals had struck down and/or questioned the validity of the departure bar.¹ Since that time, two more courts have found the departure bar unlawful.² We ask the Department to rule on the petition for rulemaking and withdraw the departure bar from the regulations.

¹ *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Martinez Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). *But see Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009).

² *Luna v. Holder*, Nos. 07-3796, 08-4840, 2011 U.S. App. LEXIS 4066 (2d Cir. Mar. 3, 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011).

www.americanimmigrationcouncil.org

Ineffective Assistance of Counsel Claims. 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 American Immigration Council and the American Immigration Lawyers Association submitted a letter to EOIR detailing recommendations for the new rules on ineffective assistance of counsel (Attachment B). Given the integral role lawyers play in immigration proceedings and the fact that a lawyer’s misconduct or mistake can result in his or her client’s deportation and even permanent banishment from the U.S., it is important for the Department to adopt clear, yet flexible standards to ensure that noncitizens are afforded the right to effective assistance of counsel. 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 will reduce the number of ineffective assistance claims, and recommends revisions to the regulatory system and framework. We ask the Department to issue proposed rules consistent with our recommendations.

Immigration Court Procedures for Noncitizens with Mental Disabilities. In June 2010, the Board of Immigration Appeals sought *amicus* briefing to address nine multi-part questions relating to procedures for adjudicating cases involving noncitizens with mental disabilities. These questions reflected an appreciation of the complexity of the issues and a desire to resolve what has been an unsettled, confusing and – for those involved – critically important aspect of the removal adjudication process. The American Immigration Council, along with the American Immigration Lawyers Association, submitted a brief in response to the questions (Attachment C); however, at the outset of the brief, we proposed that these issues would be better addressed through a rulemaking process.³ Not only is rulemaking preferable to adjudication given the complexity of the issues, the inadequacy of any one case as a forum to construct a comprehensive system that will be responsive to a variety of fact-specific variables, and the need to consult experts from outside the legal community, but such a process would allow EOIR to reassess and amend current regulations. As our *amicus* brief explains, current regulations have proven inadequate, unworkable, and potentially in conflict with due process and the ethical obligations of lawyers. We urge the Department to initiate a rulemaking process to establish fair removal procedures for noncitizens with mental disabilities.

Employment Authorization Asylum Clock. The Immigration and Nationality Act (INA) requires asylum applicants to wait 150 days after filing an application to apply for a work permit. However, due to problems with the Employment Authorization Document (EAD) asylum clock – a clock which measures the number of days after an applicant files an asylum application before the applicant is eligible for work authorization – applicants often wait much longer than the legally permitted timeframe to receive a work permit. Many of these problems result from inconsistent and overly broad interpretations by Immigration Judges of what constitutes “delay requested or caused by the applicant,” which, pursuant to 8 C.F.R. 208.7(a)(2), causes the clock to stop. For example, when a respondent requests a continuance to seek counsel, Immigration

³ Subsequently, the Department of Homeland Security withdrew its appeal, so the Board of Immigration Appeals did not reach the merits of the case. However, we understand that the Board currently is considering these issues in other cases.

Judges often stop the clock until the next hearing date, which may be many months later and long after the applicant was able to secure counsel. In February, 2010, the American Immigration Council and Penn State Law's Center for Immigrants' Rights issued a comprehensive report, *Up Against the Clock: Fixing the Broken Employment Authorization Asylum Clock* (Attachment D) examining the laws, policy, and practice of the EAD asylum clock. The report recommends solutions to asylum clock problems that will ensure asylum applicants become eligible for employment authorization without unnecessary delays and closer to the timeframe outline in the INA. We encourage the Department to consider regulatory amendments that would remedy EAD asylum clock problems.

* * *

We thank you for the opportunity to comment on the Department's regulatory review process and for your attention to these issues. Should you have any questions regarding our comments, please do not hesitate to contact me at 202-507-7522 or bwerlin@immcouncil.org.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Beth Werlin". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Beth Werlin
Deputy Director, Legal Action Center
American Immigration Council

Attachment A

PETITION FOR RULEMAKING TO AMEND REGULATIONS GOVERNING MOTIONS
TO REOPEN AND RECONSIDER REMOVAL PROCEEDINGS FOR NONCITIZENS WHO
DEPART THE UNITED STATES

SUBMITTED TO
THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

August 6, 2010

On Behalf of:

National Immigration Project of the National Lawyers Guild; American Immigration Council;
Post-Deportation Human Rights Project; Vakhtang Pruidze; Ramon Espinal Prestol; and Isela
Guadalupe Pinto-Reyes

I. STATEMENT OF PETITION

Petitioners (National Immigration Project of the National Lawyers Guild, American Immigration Council, Post-Deportation Human Rights Project Vakhtang Pruidze; Ramon Espinal Prestol; and Isela Guadalupe Pinto-Reyes) hereby petition the Department of Justice, Executive Office for Immigration Review to initiate a rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), to amend existing regulations governing the adjudication of motions to reopen and motions to reconsider immigration cases. The current regulations, 8 C.F.R. § 1003.2(d) and 8 C.F.R. § 1003.23(b)(1), bar a person from pursuing a motion to reopen or motion to reconsider with the Board of Immigration Appeals (BIA or Board) or the Immigration Courts after he or she has departed or has been removed from the United States. The Attorney General has ultimate authority over the administration of the Executive Office for Immigration Review (EOIR), which houses both the Board and the Immigration Courts, pursuant to 8 U.S.C. § 1103(g). EOIR has said that it welcomes written suggestions regarding potential revisions to the departure regulations.¹

II. SUMMARY OF PETITION

As organizations that advocate for the fair and just administration of immigration laws and as noncitizens who seek the right to have their claims adjudicated, petitioners have a direct interest in ensuring that noncitizens are not unduly prevented from exercising their statutory right to pursue motions to reopen and reconsider. The existing regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) do exactly this: they preclude noncitizens who depart or are removed from the United States from exercising their statutory right to pursue motions to reopen and motions to reconsider before the Board or immigration judges, respectively.

Striking the departure bar is consistent with Congress's intent when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). When it enacted this statute, Congress took the significant step of codifying the right to file motions to reopen and reconsider. Simultaneously, Congress repealed the departure bar to judicial review, evidencing its intention to permit noncitizens to file petitions for review after their departure. Furthermore, Congress also simultaneously enacted other provisions related to removal and voluntary departure, all of which are irreconcilable with the regulatory departure bar on motions to reopen and reconsider. Notably, since its codification, the Supreme Court twice has recognized that motions to reopen are an "important safeguard" for noncitizens.

The courts repeatedly have held that one of Congress's goals in enacting IIRIRA was to encourage prompt removal and departure from the United States upon the completion of immigration proceedings. Yet, the regulations have created an incentive for noncitizens with removal orders to ignore such orders and remain here – because complying with the order would mean foreclosing an opportunity to exercise their statutory right to file a motion to reconsider or reopen, a right that is especially compelling if factual or legal circumstances change. Thus,

¹ See AILA-EOIR Liaison Meeting Agenda (March 25, 2010) at 9-10 (question #8) available at <http://www.justice.gov/eoir/statspub/eoiraila032510.pdf> (last visited August 6, 2010).

contrary to Congress's intentions, the departure bar actually undermines the goal of encouraging compliance with removal orders.

Nothing in the INA supports EOIR's position that it lacks jurisdiction over motions to reopen after a person has departed. In fact, through IIRIRA, Congress has made clear that immigration judges and the BIA have authority to issue decisions in cases where the person is outside the United States. Thus, not only is EOIR's position regarding its own jurisdiction in conflict with the current immigration statute, but as the Supreme Court has said, it is unlawful for an agency to contract its own jurisdiction by regulation.

Further, over the past several years, the departure bar has been the subject of litigation in several courts of appeals, and now is the focus of two petitions for certiorari. At least two courts have invalidated the bar, one court has upheld it, and others have created exceptions to its application in certain situations. Challenges to the bar are pending in at least four circuits. Given the fractured state of the bar's application, there is an overriding lack of uniformity in its application. Striking the bar would restore uniformity.

It also would restore EOIR's authority to adjudicate motions to remedy deportations wrongfully executed, whether intentionally or inadvertently, by DHS. At present, immigration judges and the BIA are powerless to adjudicate motions to correct wrongful deportations, even under the most egregious circumstances.

In sum, the agency's historical justifications for the bar are even less compelling today than they have even been, given the post-IIRIRA developments mentioned above and the Supreme Court's recognition of the critical role motions to reopen and reconsider play in the fair and just administration of immigration law.

III. STATEMENT OF INTEREST

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and persons working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws, including noncitizens in immigration proceedings and persons who have been removed. The National Immigration Project budgets significant funds and staff time to providing technical assistance on motions to reopen and motions to reconsider to attorneys, legal representatives and noncitizens in removal proceedings. The National Immigration Project also has filed amicus briefs to assist the federal courts of appeals in examining the validity of the existing regulatory bar to review of motions to reopen or reconsider after a person departs the United States. Through its membership network and litigation efforts, the National Immigration Project is acutely aware of the problems faced by noncitizens outside the United States seeking reopening or reconsideration of their removal proceedings, which point to the need to amend the existing regulations.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process,

and constitutional and human rights in immigration law and administration. The Council's Legal Action Center has established itself as a leader in litigation, information-sharing, and collaboration among immigration litigators across the country. The Legal Action Center works with other immigrants' rights, civil rights, and human rights organizations and immigration attorneys throughout the United States to promote the just and fair administration of our immigration laws and the accountability of immigration agencies. The Legal Action Center budgets significant funds and staff time to working with legal advocates to protect the right to seek reopening and reconsideration of removal orders. The Legal Action Center has appeared as amicus curiae in numerous cases addressing the existing bar to motions to reopen and reconsider after a person has departed or has been removed from the United States.

The Post-Deportation Human Rights Project (PDHRP), based at the Center for Human Rights and International Justice at Boston College, offers a novel and multi-tiered approach to the problem of harsh and unlawful deportations from the United States. It is the first and only legal advocacy project in the country to undertake the representation of individuals who have been deported from the United States. The PDHRP also aims to conceptualize the new field of post-deportation law, not only by providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members, but also through research, legal and policy analysis, media advocacy, training programs, and participatory action research. Its ultimate goal is to introduce correct legal principles, predictability, proportionality, compassion, and respect for family unity into the deportation laws and policies of this country.

The following individual petitioners are noncitizens who seek reopening or reconsideration and who have departed the United States either before or after the filing such motion:

Vakhtang Pruidze is a 26-year old native of Russia. He was admitted to the United States lawfully on August 15, 1997 and later became a lawful permanent resident. His parents, brother and wider family are all lawful permanent residents or U.S. citizens. An immigration judge ordered Mr. Pruidze removed based on a possession of marijuana offense under Michigan law, and the Board of Immigration Appeals affirmed. The Department of Homeland Security deported Mr. Pruidze on April 29, 2009. On May 12, 2009, the Michigan court vacated the conviction that formed the sole basis of Mr. Pruidze's removability. The Board of Immigration Appeals, however, refused to reopen his case. The only reason cited by the Board in its decision was 8 C.F.R. § 1003.2(d), the post departure bar, because Mr. Pruidze no longer was in the country.

Ramon Espinal Prestol is a 48 year old native of the Dominican Republic who, before being removed in 2009, had lived in the United States since his entry in 1982. He has three U.S. citizen children. Mr. Prestol was removed on November 24, 2009. He subsequently filed a motion to reconsider with the Board of Immigration Appeals, asserting that the Board erred by failing to address his legal arguments concerning his eligibility for relief. The Board denied the motion, citing the post departure bar 8 C.F.R. § 1003.2(d).

Isela Guadalupe Pinto-Reyes is a 40 year-old native of El Salvador and mother of four United States citizen children, one of whom is severely handicapped and another who is a minor. She immigrated to the United States fleeing the civil war in the late 1970s with her immediate family,

and obtained lawful residency in the United States at age 14. She has been the victim of severe domestic abuse, developed drinking problems; and yet she overcame those problems through alcohol treatment and counseling. She has substantial equities in the United States, including a U.S. citizen mother, lawful permanent resident father, and two U.S. citizen siblings. She was unrepresented at her first immigration court hearing, which resulted in an order of removal. Under current immigration laws, as a lawful permanent resident, she would not be removable. In its refusal to reopen Ms. Pinto-Reyes' case, the Board of Immigration Appeals stated that it was "sympathetic to the fact that the respondent has longstanding and significant ties to the United States" and that it regretted having to apply the departure bar to her case.

IV. LEGAL AUTHORITY TO AMEND THE REGULATIONS GOVERNING MOTIONS TO REOPEN AND RECONSIDER REMOVAL PROCEEDINGS

The Attorney General possesses the authority to define the power of the Board of Immigration Appeals and the Immigration Courts, and to set forth procedures for Immigration Courts.² The scope of the Attorney General's authority necessarily includes amending existing regulations to comport with new legislation enacted by Congress. Moreover, Congress expressly instructed the agency to promulgate regulations to implement its codification of the motion to reopen and motion to reconsider statutes. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress instructed that "[t]he Attorney General shall first promulgate regulations to carry out this subtitle by not later than 30 days before the title III-A effective date [*i.e.* by March 2, 1997]."³ Section 304 of IIRIRA, which codified motions to reopen and motions to reconsider, is located within Title III-A of that Act.

On January 3, 1997, the Department of Justice (DOJ) promulgated proposed rules, including amendments to existing rules governing reopening and reconsideration in removal proceedings.⁴ In doing so, DOJ acknowledged a previous Presidential directive that required the agency to conduct "a page-by-page review of all regulations and to eliminate or revise those that are outdated or otherwise in need of reform."⁵ Thus, DOJ was on notice that it was required "to eliminate or revise" outdated regulations governing motions to reopen or reconsider when it codified those motions. Yet, as discussed below, over commenters' objections to the departure bar, DOJ retained the departure bar when it issued interim rules.⁶ The decision to retain the departure bar is ripe for reconsideration.

² See 8 U.S.C. § 1103(g)(2) (stating that the Attorney General can "establish such regulations" and "review such administrative determinations in immigration proceedings . . . as the Attorney General determines to be necessary for carrying out" the immigration laws).

³ IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, § 309(b) (Sept. 30, 1996).

⁴ See 62 Fed. Reg. 444 (January 3, 1997).

⁵ See 62 Fed. Reg. 444 (January 3, 1997) ("In addition, this rule incorporates a number of changes which are a part of the Administration's reinvention initiative, mandated in a directive signed by the President on March 4, 1995, requiring all heads of departments and agencies to conduct a page-by-page review of all regulations and *to eliminate or revise those that are outdated or otherwise in need of reform*") (emphasis added).

⁶ See 62 Fed. Reg. 10312, 10321 (March 6, 1997).

V. LEGISLATIVE AND REGULATORY BACKGROUND OF THE REGULATORY DEPARTURE BAR ON ADJUDICATION OF MOTIONS TO REOPEN AND RECONSIDER

The McCarran-Walter Act of 1952 established the structure of present immigration law, 8 U.S.C. § 1001 et seq.⁷ Pursuant to that Act, final orders of deportation were reviewable via a petition for a writ of habeas corpus.⁸ The former Immigration and Naturalization Service, which then acted as both the prosecutor and adjudicator of immigration cases, promulgated a regulation providing for motions to reopen and motions to reconsider before the BIA.⁹ That regulation barred the BIA from reviewing a motion filed by a person who had departed the United States.¹⁰ From the outset, the BIA understood this regulation as being jurisdictional.¹¹

In 1961, Congress amended the McCarran-Walter Act and, *inter alia*, gave the circuit courts jurisdiction to review final orders of deportation through a petition for review.¹² The 1961 judicial review provision paralleled the language of the motion regulation and barred the federal courts from reviewing deportation and exclusion orders where the person had departed the country after issuance of the order.¹³ Three months after the enactment of the 1961 laws, the DOJ issued implementing regulations in which it re-promulgated the departure bar to motions.¹⁴

From the early 1960s until 1996, the 1961 version of the judicial review provision barring review after departure remained unchanged. The statute also provided for an automatic stay of deportation while the petition was pending.¹⁵ Similarly, the language of the departure bar on

⁷ Pub. L. No. 82-414, 66 Stat. 163 (March 27, 1952) (codified at 8 U.S.C. §§ 1101-1524 (1953)).

⁸ 8 U.S.C. § 1252(c) (1953).

⁹ In 1940, the “Board of Review of the Immigration and Naturalization Service” was transferred to the Office of the Attorney General, and its name was changed to the “Board of Immigration Appeals.” See 5 Fed. Reg. 3502, 3503 (September 4, 1940).

¹⁰ 17 Fed. Reg. 11,469, 11,475 (December 19, 1952) (codified at 8 C.F.R. § 6.2). The regulatory right to file a motion to reopen or reconsider existed since 1940, but the original version of the regulation did not contain a departure bar. 5 Fed. Reg. at 3504.

¹¹ See *Matter of G- y B-* 6 I&N Dec. 159 (BIA 1954).

¹² Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651 (1961).

¹³ See *id.* (creating former 8 U.S.C. § 1105a(c) (1962)). Former 8 U.S.C. § 1105a(c) reads:

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

¹⁴ The rule re-designated 8 C.F.R. § 6.2 as 8 C.F.R. § 3.2 (1962). See 27 Fed. Reg. 96, 96-97 (January 5, 1962).

¹⁵ 8 U.S.C. § 1105a(a)(3) (1995).

motions filed with the BIA by individuals outside the country also remained unchanged.¹⁶ In 1983, DOJ created the immigration judge (IJ) position – assuming functions previously performed by the Immigration and Naturalization Service – and combined the BIA with the immigration judges to comprise a new agency, the Executive Office for Immigration Review.¹⁷ DOJ subsequently promulgated regulations governing procedures for immigration judges to adjudicate motions to reopen.¹⁸

Through the enactment of IIRIRA, Congress adopted numerous substantive and procedural changes to the immigration laws. Most significantly, Congress, for the first time, codified the right to file a motion to reopen and the right to file a motion to reconsider.¹⁹ The motion to reopen statute, 8 U.S.C. § 1229a(c)(7), provides, “An alien may file one motion to reopen proceedings under this section” Likewise, the motion to reconsider statute, 8 U.S.C. § 1229a(c)(6), provides, “[t]he alien may file one motion to reconsider a decision that the alien is removable from the United States.” As the Supreme Court held, the plain language affords noncitizens both the right to file a motion to reopen [and reconsider] and the right to have it adjudicated once it is filed.²⁰

Also through IIRIRA, Congress repealed the entire judicial review scheme of the Immigration and Nationality Act, including the departure bar to judicial review and the automatic stay of deportation that then existed, and replaced it with new judicial review provisions.²¹ Significantly, Congress did not reenact a departure bar to judicial review.²²

¹⁶ However, the departure regulation later was moved to then newly-created subsection (d). See 61 Fed. Reg. 18900 (April 29, 1996) (creating 8 C.F.R. § 3.2(d) (1997)).

¹⁷ See EOIR Background Information, <http://www.usdoj.gov/eoir/background.htm> (last visited August 6, 2010).

¹⁸ See 52 Fed. Reg. 2931 (January 29, 1987) (codified at 8 C.F.R. § 3.22 (1988)). DOJ redesignated § 3.22 as § 3.23 in 1992. See 57 Fed. Reg. 11568 (April 6, 1992).

¹⁹ IIRIRA, § 304 (adding new 8 U.S.C. § 1229a(c)(5)&(6)(1997) (recodified as 8 U.S.C. §§ 1229a(c)(6) and 1229a(c)(7) by REAL ID Act of 2005, Pub. L. No. 109-13, § 101(d), 119 Stat. 231 (May 11, 2005)). Congress also codified several of the pre-existing regulatory requirements for motions to reopen and reconsider, including numeric limitations, filing deadlines, and substantive and evidentiary requirements for motions. *Id.*; 8 C.F.R. §§ 3.2(b) and 3.2(c) (1997).

²⁰ *Dada v. Mukasey*, 128 S. Ct. 2307, 2318-19 (2008).

²¹ IIRIRA § 306 (repealing former 8 U.S.C. § 1105a and enacting new 8 U.S.C. § 1252).

²² As discussed in section VI.A of this petition, Congress also consolidated judicial review of final removal, deportation, and exclusion orders with review of motions to reopen and motions to reconsider. IIRIRA § 306(a) (enacting 8 U.S.C. § 1252(b)(6)). Furthermore, Congress adopted a 90 day period for the government to deport a person who has been ordered removed. IIRIRA § 304(a)(3) (adding new 8 U.S.C. § 1231(a)(1)). Finally, Congress replaced the pre-existing voluntary departure provision and in doing so limited the voluntary departure period to 60 or 120 days. IIRIRA § 304(a)(3) (replacing pre-existing voluntary departure provision with 8 U.S.C. §§ 1229c(a)(2)(A) and (b)(2)). These changes took effect on April 1, 1997. IIRIRA § 309(a).

Nonetheless, DOJ, in promulgating regulations implementing IIRIRA, retained the departure bar to motions to reopen and motions to reconsider filed with the BIA.²³ DOJ also extended the regulatory departure bar to motions filed with immigration judges.²⁴

In 2003, the departure regulations were moved to a new section of title 8 of the Code of Federal Regulations, without change to their content.²⁵ The current version of the BIA regulation reads:

A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.²⁶

The language of the departure bar governing motions before immigration judges is nearly identical to the language of the departure bar governing motions filed with the BIA. It reads:

A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.²⁷

VI. THE ATTORNEY GENERAL SHOULD AMEND THE MOTION TO REOPEN AND MOTION TO RECONSIDER REGULATIONS BY STRIKING THE DEPARTURE BAR IN ORDER TO MAKE THE REGULATIONS CONSISTENT WITH THE IMMIGRATION AND NATIONALITY ACT

A. Striking the departure bar would make the motion to reopen and reconsider regulations consistent with Congress's codification of the rights to file a motion to reopen and a motion to reconsider, the repeal of the departure bar to judicial review and other provisions concurrently enacted through IIRIRA.

²³ See 62 Fed. Reg. 10312 (March 6, 1997).

²⁴ See 62 Fed. Reg. at 10321, 10331 (codified at former 8 C.F.R. §§ 3.2(d) and 3.23(b)(1)(1997)).

²⁵ 68 Fed. Reg. 9824, 9830 (February 28, 2003) (redesignating 8 C.F.R. §§ 3.2(d) and 3.23(b)(1) as 8 C.F.R. §§ 1003.2 and 1003.23).

²⁶ 8 C.F.R. § 1003.2(d).

²⁷ 8 C.F.R. § 1003.23(b)(1).

The departure regulations now conflict with the motion to reopen statute and the motion to reconsider statute. The motion to reopen statute provides, “An alien may file one motion to reopen proceedings under this section...” and the motion to reconsider statute provides, “[t]he alien may file one motion to reconsider a decision that the alien is removable from the United States.”²⁸ As the Supreme Court held in *Dada v. Mukasey*, the plain language affords noncitizens both the right to file a motion to reopen [and reconsider] and the right to have it adjudicated once it is filed.²⁹ In providing these rights, the statutes do not distinguish between individuals abroad and those in the United States – both groups are encompassed in these straightforward, all-inclusive provisions.³⁰

The Supreme Court in *Dada* also emphasized the significance of Congress’s codification of the right to file a motion to reopen.³¹ Significantly, the Court found that the statutory right to file a motion to reopen is an important safeguard in removal proceedings and, absent explicit limiting language in the statute, individuals must be permitted to pursue reopening:

The purpose of a motion to reopen is to ensure a proper and lawful disposition. *We must be reluctant to assume that the voluntary departure statute was designed to remove this important safeguard for the distinct class of deportable aliens most favored by the same law.* See 8 U.S.C. §§ 1229c(a)(1), (b)(1)(C) (barring aliens who have committed, *inter alia*, aggravated felonies or terrorism offenses from receiving voluntary departure); § 1229c(b)(1)(B) (requiring an alien who obtains voluntary departure at the conclusion of removal proceedings to demonstrate “good moral character”). *This is particularly so when the plain text of the statute reveals no such limitation.*³²

²⁸ 8 U.S.C. § 1229a(c)(7)(A); 8 U.S.C. § 1229a(c)(6)(A).

²⁹ 128 S. Ct. 2307, 2318-19 (2008). Much of the case law discussed in this petition addresses the motion to reopen statute – possibly a reflection of the greater number of motions to reopen filed as compared to motions to reconsider. However, because the departure bar applies equally to both types of motions, the regulatory and legislative histories of these motions is nearly identical, and the arguments against the bar are inextricably intertwined, the case law on motions to reopen is applicable to motions to reconsider.

³⁰ The Fourth Circuit concluded that the plain language of the motion to reopen statute expressly permits noncitizens to pursue a motion post departure, noting that “[w]e find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country.” *William v. Gonzales*, 499 F.3d 329, 322 (4th Cir. 2007).

³¹ *Dada*, 128 S. Ct. at 2316 (“It must be noted, though, that the Act transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien”); *id.* at 2316 (“[T]he statutory text is plain insofar as it guarantees to each alien the right to file ‘one motion to reopen proceedings under this section’”); *id.* at 2319 (“We hold that, to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen”).

³² *Dada*, 128 S. Ct. at 2318 (emphasis added). See also *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada* and reaffirming that a motion to reopen is an “important safeguard”).

Thus, the Supreme Court confirms that the agency may not infringe on the “important safeguard” of a motion to reopen when the “the plain text of the statute reveals no such limitation.”³³ The departure regulations, however, do exactly that: they limit the availability of pursuing a motion post departure even though the statute does not include such a limitation.

Additionally, Congress made clear its intent to permit motions after a person’s departure by choosing *not to codify* the departure regulation in IIRIRA. When Congress codified the motion to reopen and the motion to reconsider in 1996, it codified numerous other preexisting regulatory limitations on motions.³⁴ Congress is presumed to have enacted the motion statutes knowing the pre-IIRIRA regulatory requirements, limitations and bars on motions to reopen and reconsider.³⁵ As the Supreme Court has aptly instructed, “do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply”³⁶ Thus, Congress’s deliberate omission of the departure bar demonstrates its intent to permit motions after departure.

Likewise, Congress’s simultaneous enactment of other provisions related to judicial review, removal, and voluntary departure evidences its intent to permit noncitizens to file motions after their departure.³⁷ Significantly, Congress explicitly repealed the former judicial review provision, which had precluded judicial review of deportation orders after the person departed the U.S.³⁸ Although the departure regulations address motions to reopen and reconsider and not judicial review, it is telling that Congress repealed the former departure bar to judicial review,

³³ See *Dada*, 128 S. Ct. at 2318.

³⁴ Specifically, it codified:

- 8 C.F.R. §§ 3.2(b)(2) and 3.2(c)(2) (1997), providing numeric limitations on motions to reconsider and reopen. See 8 U.S.C. §§ 1229a(c)(5)(A) and 1229a(c)(6)(A) (1997);
- 8 C.F.R. §§ 3.2(b)(1) and 3.2(c)(1)(1997), setting forth substantive and evidentiary requirements of motions to reconsider and reopen. See 8 U.S.C. §§ 1229a(c)(5)(C) and 1229a(c)(6)(B)(1997);
- 8 C.F.R. §§ 3.2(b)(2) and 3.2(c)(2) (1997), providing 30 and 90 day filing deadlines. See 8 U.S.C. §§ 1229a(c)(5)(C) and 1229a(c)(6)(C)(i) (1997); and
- 8 C.F.R. § 3.2(c)(3)(ii) (1997), creating an exception to the 90 day deadline where the basis of the motion is to apply for asylum based on changed country conditions. See 8 U.S.C. § 1229a(c)(6)(C)(ii) (1997).

³⁵ See *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-85 (1988).

³⁶ *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

³⁷ See *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy”) (internal citations omitted).

³⁸ See IIRIRA § 306(b) (repealing 8 U.S.C. § 1105a(c) (1996)).

which contained the same concept and similar language. Indeed, at least one court has noted that the departure bar “operates parallel to 8 U.S.C. § 1105a(c).”³⁹ If Congress repealed the judicial review departure bar to allow petitions for review from outside the United States, it logically follows that Congress’s refusal to codify the regulatory departure bar to motions also was intended to allow motions from outside the United States.

Second, Congress adopted a 90 day period for the government to deport a person who has been ordered removed.⁴⁰ Congress simply could not have intended to give noncitizens 90 days to file a motion to reopen while requiring removal within that same 90 day time period if removal automatically withdraws the motion to reopen.⁴¹

Third, Congress amended the voluntary departure statute to limit the voluntary departure period to 60 or 120 days.⁴² Congress could not have intended to grant 60 or 120 days in which to voluntarily depart if such departure would strip noncitizens of their statutory right to pursue a motion to reopen.⁴³

Fourth, Congress provided for judicial review of motions to reopen and specified that review of such motions shall be consolidated with review of the final order of removal.⁴⁴ It is inconceivable that Congress would permit judicial review of the denial of a motion to reopen, yet, by virtue of the departure bar, preclude many people from exercising the statutory right to seek such review.⁴⁵

³⁹ See *Wiedersperg v. INS*, 896 F.2d 1179, 1181 n.2 (9th Cir. 1990).

⁴⁰ IIRIRA § 304(a)(3) (codified at 8 U.S.C. § 1231(a)(1)).

⁴¹ See *Martinez Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010) (“The only manner in which we can harmonize the provisions simultaneously affording the petitioner a ninety day right to file a motion to reopen and requiring the alien's removal within ninety days is to hold, consistent with the other provisions of IIRIRA, that the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen.”)

⁴² See IIRIRA § 304(a)(3) (codified at 8 U.S.C. §§ 1229c(a)(2)(A) and (b)(2)).

⁴³ The Supreme Court in *Dada* held that one way to preserve this right is to permit a person to withdraw a voluntary departure request. See *Dada*, 128 S. Ct. at 2319-20. Significantly, however, the Court recognized the “untenable conflict” between the voluntary departure and motion to reopen rules, and noted that a “more expeditious solution” would be to allow motions post departure. *Id.* at 2320. Despite the Court’s clear doubts about the validity of the departure regulations, it could not act upon them because the departure regulations were not challenged in that case. *Id.* See also Transcript of Oral Argument at 8, *Dada v. Mukasey*, 128 S. Ct. 329 (No. 06-1181) (Chief Justice Roberts commenting, “if I thought it important to reconcile the two [motion to reopen and voluntary departure statutes], I would be much more concerned about that interpretation -- that the motion to reopen is automatically withdrawn [upon departure] -- than I would suggest we start incorporating equitable tolling rules and all that”).

⁴⁴ See IIRIRA § 306(a)(2) (codified at 8 U.S.C. § 1252(b)(6)).

⁴⁵ Where a person is removed while the petition for review of a removal order is pending, but before the BIA has adjudicated the motion to reopen, the departure bar forecloses judicial review over the motion. Similarly, even where DHS does not remove the person until after the BIA adjudicates the motion, if the circuit court grants the petition for review and remands the

Thus, not only is the departure regulation in conflict with the subsequently enacted motion to reopen and reconsider statutes, but it is irreconcilable with Congress's simultaneous enactment of these other provisions.

B. Striking the departure bar would further Congress's goal of encouraging prompt removal and departure from the United States.

The Supreme Court, has recognized that one of Congress's main goals in enacting IIRIRA – in particular its removal of the departure bar to judicial review – was to expedite physical departure from the United States.⁴⁶ Striking the departure bar would promote this objective whereas retaining it actually undermines it by putting people who fail to comply with a final order or take voluntary departure in a better situation than those who are removed and those who depart promptly. Under the existing regulations, persons who self-deport – either knowingly or unknowingly – and persons who comply with their removal orders or voluntary departure orders are categorically prohibited from seeking reopening or reconsideration of their proceedings no matter how compelling the reason. However, individuals who do not comply with a removal order can seek reopening or reconsideration.⁴⁷ Thus, striking the departure bar would be consistent with – and would actually promote – one of IIRIRA's objectives of encouraging prompt physical removal or departure from the United States.

C. Striking the bar is necessary to conform to Supreme Court and other precedent decisions addressing agency jurisdiction.

motion to the agency, the BIA presumably would invoke the departure bar and dismiss the motion despite the court's favorable ruling.

⁴⁶ See IIRIRA § 306(b) (repealing former 8 U.S.C. § 1105a, including subsection (a)(3)'s stay of deportation upon service of petition for review and subsection (c)'s departure bar); *William*, 499 F.3d at 332 n.3 (“[O]ne of IIRIRA's aims is to expedite the removal of aliens from the country while permitting them to continue to seek review . . . from abroad”); *Nken v. Holder*, 129 S. Ct. 1749, 1755 (2009) (“IIRIRA inverted these provisions to allow for more prompt removal. First, Congress lifted the ban on adjudication of a petition for review once an alien has departed”); *Martinez Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010) (citing *Nken*, finding “IIRIRA ‘inverted’ certain provisions of the INA, encouraging prompt voluntary departure and speedy government action, while eliminating prior statutory barriers to pursuing relief from abroad.”).

⁴⁷ While the 90 day deadline for filing motions to reopen generally prevents the filing and granting of late-filed motions, there are numerous exceptions to the filing deadline, including motions seeking to reopen and rescind an in absentia removal order, 8 U.S.C. § 1229a(c)(7)(C)(iii), and motions seeking reopening to apply for asylum, 8 U.S.C. § 1229a(c)(7)(C)(ii). In addition, the courts have held that the motion deadlines are subject to equitable tolling. See *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); but see *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

EOIR had taken the position that it lacks “jurisdiction” over motions filed by persons who have departed or been deported. Most recently, the agency articulated this position in the BIA’s published decision *Matter of Armendarez*.⁴⁸ In that case, the BIA reasoned that the physical removal of a person is a “transformative event” that results in “nullification of legal status.”⁴⁹ The BIA went on to say that only the Department of Homeland Security and the Department of State have responsibilities related to noncitizens outside the United States and thus “[r]emoved aliens have, by virtue of their departure, literally passed beyond our aid.”⁵⁰

However, the BIA’s statements are unfounded. As the Supreme Court has made clear in a series of post-IIRIRA decisions, the BIA does in fact, indeed must, retain jurisdiction over cases where a person has been removed.⁵¹

The Supreme Court also has made clear that it is unlawful for an agency to contract its own jurisdiction by regulation.⁵² For that reason, the Seventh Circuit Court of Appeals has invalidated the departure regulation.⁵³ Speaking specifically about the INA’s grant of authority with respect to motions, the Seventh Circuit explained:

The Immigration and Nationality Act authorizes the Board to reconsider or reopen its own decisions. It does not make that step depend on the alien’s presence in the United States. Until 1996 deportation proceedings (as they were then called), and judicial review of deportation orders, automatically halted when the alien left this nation . . . [IIRIRA] repealed [the former judicial review provisions precluding judicial review post departure]. One would suppose that this change also pulled the rug out from under *Matter of G- y B-* and similar decisions, based as they were on the earlier norm that departure ended all legal proceedings in the United States, though the Board nonetheless held in *Matter of Armendarez-Mendez* that the 1996 repealer did not affect motions to reconsider or reopen.

The fact remains that since 1996 nothing in the statute undergirds a conclusion that the Board lacks “jurisdiction”-which is to say, adjudicatory competence, see *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243, 176 L. Ed. 2d 18 (2010)

⁴⁸ 24 I&N Dec. 646 (BIA 2008) (holding that departure bar imposes a limit on the agency’s jurisdiction).

⁴⁹ *Id.* at 655-56.

⁵⁰ *Id.* at 656.

⁵¹ *Carachuri-Rosendo v. Holder*, 560 U.S. ___, 130 S. Ct. 2577, 177 L. Ed. 2d 68, 82 n.8 (2010); *Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006); *Nken*, 129 S. Ct. at 1761 (“Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return”).

⁵² *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009).

⁵³ *Marin-Rodriguez v. Holder*, No. 09-3105, 2010 U.S. App. LEXIS 14385 (7th Cir. July 14, 2010).

(collecting cases)-to issue decisions that affect the legal rights of departed aliens.⁵⁴

The BIA's decision in *Matter of Bulnes*,⁵⁵ further underscores the misunderstanding that serves as the basis for its jurisdictional holding in *Matter of Armendarez*. In *Bulnes*, the BIA found that it may review motions to reopen seeking rescission for lack of notice where the noncitizen has left the U.S. It is entirely inconsistent for the BIA to say that removal or departure is a "transformative event" barring a motion to reopen in *Armendarez* and then essentially ignore this fact in *Bulnes* and allow a person who departed the U.S. to pursue a motion to reopen.⁵⁶

Thus, the BIA's conclusion that it lacks jurisdiction over motions post departure is indefensible. In order to bring the agency in line with Supreme Court, Seventh Circuit and even its own precedent, EOIR must strike the departure bar.

D. Striking the departure bar from the regulations would create uniformity in adjudication of motions to reopen and reconsider.

The current law governing the departure bar on motions to reopen or reconsider lacks uniformity. As a result, whether the departure bar applies varies greatly depending on numerous factors including the location of the person's immigration proceedings, the basis for reopening, and whether the case sought to be reopened was conducted in absentia.

If EOIR completes removal proceedings within the jurisdiction of the Fourth or Seventh Circuit Courts of Appeals, the departure bar does not apply because those courts have invalidated the regulation.⁵⁷ If EOIR conducts removal proceedings within the jurisdiction of the Ninth Circuit Court of Appeals, an immigration judge and the Board must delve further into the facts to assess whether the departure bar applies in light of the many decisions addressing the bar in that circuit. For example, if the movant was forced to depart before the motion could be adjudicated, the departure bar does not apply.⁵⁸ If a person seeks reopening based on a vacated conviction which

⁵⁴ See *id.* at *7-8. It is undisputable that Congress vested immigration judges and the Board of Immigration Appeals with jurisdiction over motions to reopen and reconsider in removal proceedings. See 8 U.S.C. §§ 1229a (discussing authority of immigration judges); 1101(a)(47)(B) (referring to the Board of Immigration Appeals in defining final order of deportation)). See also, 8 U.S.C. § 1242(b)(6) (providing for judicial review of motions to reopen and reconsider in the courts of appeals).

⁵⁵ 25 I&N Dec. 57 (BIA 2009).

⁵⁶ The Seventh Circuit noted the discrepancies between *Armendarez* and *Bulnes*. See *Marin-Rodriguez*, 2010 U.S. App. LEXIS 14385 at *11-12.

⁵⁷ *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (finding departure bar regulation conflicts with motion to reopen statute); *Marin-Rodriguez v. Holder*, No. 09-3105, 2010 U.S. App. LEXIS 14385 (7th Cir. July 14, 2010) (finding EOIR impermissibly contracted its own jurisdiction).

⁵⁸ See *Martinez Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010). In *Martinez Coyt*, the court held that the regulation's directive that motions to reopen are withdrawn after a person departs the U.S. is invalid as applied to a person who has been "involuntarily removed." *Martinez Coyt*,

formed a key part of the proceeding, the departure bar also would not apply.⁵⁹ Finally, if the movant filed the motion after removal proceedings were completed and after departure, it is unclear whether the courts of appeals would find that the departure bar does not apply.⁶⁰

If EOIR completes removal proceedings outside the Fourth, Seventh, or Ninth Circuits, the Board of Immigration Appeals applies the departure bar.⁶¹ In all circuits, except the Tenth Circuit, the departure bar remains subject to challenge.⁶² Indeed, challenges to the regulation are before at least four circuit courts and the Supreme Court.⁶³ Petitioners expect the number of challenges before the circuit courts to increase. Moreover, unless the departure bar is amended, we anticipate the issue increasingly will be raised in petitions for certiorari to the Supreme Court.

Moreover, until recently, DHS and many immigration judges took the position that the departure bar applied to motions to reopen to rescind in absentia orders, even though those motions are filed pursuant to a separate statute, 8 U.S.C. § 1229a(b)(5)(C). The Board clarified that the departure bar does not apply in this situation when the basis for the motion is lack of notice of the hearing.⁶⁴ Also, in an unpublished case, at least one panel of the BIA has found that the

593 F.3d at 907. The Court reasoned that the regulation “completely eviscerates” the statutory right to file a motion to reopen. *Id.* Further, the only way to harmonize the statutory right to file a motion to reopen within 90 days and the statutory requirement to effectuate the removal within 90 days is to find that “the physical removal of a petitioner by the United States does not preclude the petitioner from filing a motion to reopen.” *Id.* This reasoning applies equally to a situation where a person files a motion to reopen after he or she departs or is deported. However, the court has not explicitly ruled on this issue to date.

⁵⁹ See *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981).

⁶⁰ In *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), and *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007), the Ninth Circuit read the departure bar regulations as not applying to individuals who file a motion to reopen after removal proceedings are completed. Subsequently, in *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the BIA rejected the court’s reading of the regulation and said that it would not follow *Lin* and *Reynoso-Cisneros*. The Ninth Circuit has not reconsidered its case law in light of the BIA’s decision.

⁶¹ See *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008).

⁶² See *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156-57 (10th Cir. 2009) (upholding bar). See also *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) (refusing to consider challenge where motion was not timely filed); *Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (noting that the court had not considered whether the regulatory bar violated the motion to reopen statute).

⁶³ See, e.g., *Prestol Espinol v. Attorney General*, 10-1473 (3d Cir. docketed Feb. 17, 2010); *Pruidez v. Holder*, 09-3836 (6th Cir. docketed July 9, 2009); *Marroquin v. Holder*, 10-1846 (8th Cir. docketed April 16, 2010); *Reyes-Torres v. Holder*, 09-70214, 08-74452 (9th Cir. docketed Jan. 21, 2009); *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), *petition for cert. filed* (May 7, 2009) (09-1367); *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009) *petition for cert. filed* (May 12, 2009) (09-1378).

⁶⁴ See *Matter of Bulnes*, 25 I&N Dec. 57, 58-60 (BIA 2009). Moreover, as discussed above in section VI.C., the BIA’s decision in *Bulnes* calls into question the reasonableness of its

departure bar does not preclude an IJ from adjudicating a post departure motion to reopen to rescind an in absentia order based on exceptional circumstances (ineffective assistance of counsel).⁶⁵ However, the lack of precedent on this issue renders the application of the departure bar in the in absentia context subject to different interpretations by different Board panels.

Thus, it is clear that if and when the departure bar applies to a motion to reopen or reconsider is neither uniform nor consistent. This results in different standards for different motions depending on the type of motion filed, the circuit law governing the immigration judge and the Board, and the basis of the motion. The agency should strike the departure bar to preserve uniformity in adjudication of motions to reopen and reconsider.

E. Striking the departure bar would restore EOIR’s adjudicatory authority and would promote transparency.

Striking the departure bar would restore the IJs’ and BIA’s adjudicatory authority and promote transparency. At present, EOIR is powerless to remedy wrongful deportations executed by the Department of Homeland Security.

There are numerous circumstances where a person is afforded a stay of removal while a motion is pending. For example, deportation is automatically stayed while a motion to reopen an in absentia removal or deportation proceeding is pending at the immigration court.⁶⁶ Similarly, battered spouses, children and parents who file a motion to reopen pursuant to 8 U.S.C. § 1229a (c)(7)(C)(IV) are entitled to a stay while the motion is pending. Yet, DHS sometimes violates the stay and unlawfully departs a person while these automatic stays are in place.⁶⁷ Likewise, DHS sometimes executes a deportation order despite the fact that either an IJ or the Board of Immigration Appeals has issued a stay,⁶⁸ or in violation of the person’s statutory and regulatory

decision in *Armendarez*. In *Armendarez*, the BIA finds that “[r]emoved aliens have, by virtue of their departure, literally passed beyond our aid.” *Matter of Armendarez*, 24 I&N Dec. at 656. Yet in *Bulnes*, the BIA found that it may review motions to reopen seeking rescission for lack of notice where the noncitizen has left the U.S.

⁶⁵ *In re Martin Becerra-Sanchez*, A090 637 609, 2010 WL 1747423 (BIA April 12, 2010).

⁶⁶ 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. §§ 1003.23(b)(4)(ii) (removal proceedings); 1003.23(b)(4)(iii)(C) (deportation proceedings).

⁶⁷ Regulations also provide for automatic stays of deportation during the 30 day time period for filing an appeal to the Board (unless waived), while a BIA appeal is pending, or while an appeal is before the Board by way of certification. 8 C.F.R. § 1003.6(a). *See, e.g., Madrigal v. Holder*, 572 F.3d 239, 245-46 (6th Cir. 2009) (DHS wrongly deported individual in violation of automatic stay).

⁶⁸ *See* 8 C.F.R. §§ 1003.2(f), 1003.23(b)(1)(v). *See, e.g., Singh v. Waters*, 87 F.3d 346, 349-350 (9th Cir. 1996) (holding that petitioner was unlawfully deported in violation of his statutory right to counsel where INS executed deportation order even though an immigration judge had granted a motion to reopen petitioner’s deportation proceedings and issued a stay of deportation).

right to counsel.⁶⁹ Detained immigrants also may face situations where a postdeparture motion is necessary to remedy an error by DHS.⁷⁰

While wrongful deportations are not the norm, they do occur. Yet, if DHS wrongly deport a person in violation of a stay or otherwise – regardless whether it was intentional or by mistake – the departure regulations prevent EOIR from adjudicating a motion and remedying the situation, no matter how meritorious it is.

In effect, the departure bar allows DHS to unilaterally divest noncitizens of their right to pursue a motion to reopen or reconsider before the BIA or IJ. When this occurs, the statutory right to file a motion to reopen or reconsider effectively is rendered meaningless without federal court intervention.⁷¹ As such, the departure bar frustrates the ability of the Board and IJs to take actions that are “appropriate and necessary for the disposition of the case.”⁷² Thus, striking the departure bar is necessary to restore the EOIR’s adjudicatory authority over motions to reopen or reconsider.

Striking the departure bar also would ensure that – as a practical matter – noncitizens are not deprived of the opportunity to file motions to reopen and reconsider and stay motions. DHS may deport a person as soon as the removal order becomes final as defined in 8 U.S.C. § 1101(a)(47). That is, DHS may deport a person even before he or she: (1) receives notice of the decision; (2) has a reasonable opportunity to assess whether either a motion to reconsider or motion to reopen is a viable option; and (3) has a reasonable opportunity to file a stay request with EOIR and have

⁶⁹ See, e.g., *Mendez v. INS*, 563 F.2d 956, 959 (9th Cir. 1977) (finding that deportation violated statutory and regulatory right to counsel where INS failed to provide counsel with notice of intent to deport and deported petitioner without an opportunity to contact counsel); *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984) (holding that deportation violated statutory right to counsel where INS executed deportation without notice to counsel).

⁷⁰ For example, DHS may detain a person granted voluntary departure with safeguards longer than the time period granted by the IJ or BIA. Likewise, if a detainee is granted voluntary departure (without safeguards) but the immigration judge denies bond or the immigration judge sets a bond the detainee cannot afford to post, DHS’ detention of the detainee prevents a timely departure within the voluntary departure period. In these situations, the detainee’s voluntary departure order will automatically convert to a removal order, 8 C.F.R. § 1240.26(d), and he or she will face a statutory penalty under 8 U.S.C. § 1229c(d) for overstaying the voluntary departure period. But for the departure bar, the Board or an IJ could remedy the removal order and penalties caused by DHS’s refusal to allow the person to timely depart within the voluntary departure period. For example, the Board could reopen proceedings to rescind and reissue its decision to accommodate compliance with the voluntary departure order.

⁷¹ And, even if the noncitizen has the benefit of counsel and access to the federal courts, some federal courts have been unwilling to remedy unlawful deportations. *But see Quezada v. INS*, 898 F.2d 474, 476 (5th Cir. 1990) (rejecting Ninth Circuit line of cases allowing for courts to exercise jurisdiction over unlawfully executed deportation orders); *Baez v. INS*, 41 F.3d 19, 23-24 (1st Cir. 1994) (same); *Roldan v. Racette*, 984 F.2d 85, 90 (10th Cir. 1993) (same); *Saadi v. INS*, 912 F.2d 428 (10th Cir. 1990) (per curiam).

⁷² 8 C.F.R. §§ 1003.1(d)(1)(ii); 1003.10(b).

it adjudicated. Striking the departure bar would help ensure fair play in the administrative process by allowing the noncitizen to exercise his or her statutory right to a motion to reconsider or reopen when DHS removes the person before these legal options have been explored or pursued.

Finally, striking the departure would promote transparency in the immigration system by allowing the adjudication of motions to reopen and reconsider based on DHS's unlawful actions. Eliminating the departure bar promotes exposure of such actions and restores the EOIR's ability to remedy them without forcing noncitizens, many of whom lack counsel, the financial resources, and knowledge of the legal system, to seek redress in the federal courts.

F. The agency's justification for retaining the departure bar after IIRIRA's enactment was not reasonable at the time and is even less reasonable now.

The agency did not offer any practical reason for retaining the departure bar following IIRIRA's codification of motions to reopen and reconsider. Specifically, when DOJ promulgated the post-IIRIRA regulations pertaining to motions to reopen and reconsider, the agency rejected commenters' suggestions that (1) the regulation be consistent with the repeal of the departure bar to judicial review; and (2) the regulation be amended so that departure does not constitute withdrawal of a motion to reopen.⁷³ Specifically, DOJ reasoned that it could not amend the departure bar absent a provision of INA § 242, 8 U.S.C. § 1252, supporting or authorizing it to do so.⁷⁴

The Department should not continue to stand by this flawed justification for retaining the bar. First, the Department erroneously relied on 8 U.S.C. § 1252, which involves the *federal courts'* jurisdiction to review agency decisions. The regulation at issue precludes *administrative* adjudication of motions following departure. However, to the extent that 8 U.S.C. § 1252 has bearing on the analysis, Congress's decision to repeal the departure bar on judicial review heavily weighs in favor of also striking the departure bar on administrative motions. In this way, the rules governing administrative motions would comport with the rules governing judicial review in that they would encourage departure by permitting access to the procedural protections Congress created to correct defects in removal proceedings notwithstanding departure.

Second, in response to commenters who suggested that the regulation should be amended so that departure does not constitute withdrawal of a motion to reopen, DOJ said: "The Department believes that the burdens associated with the adjudication of motions to reopen . . . on behalf of deported or departed aliens would greatly outweigh any advantages this system might render."⁷⁵ However, DOJ offered no explanation for what "burden" is associated with motions to reopen. Not all such motions are filed in order to apply for relief, nor is a subsequent hearing always

⁷³ 62 Fed. Reg. 10312, 10321 (March 6, 1997).

⁷⁴ *Id.* ("No provision of the new section 242 [8 U.S.C. § 1252] of the Act supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States").

⁷⁵ 62 Fed. Reg. at 10321.

necessary.⁷⁶ Furthermore, there is no indication that the costs of adjudicating these motions differs significantly from the costs of adjudicating motions filed on behalf of individuals present in the United States. If anything, the cost to the government is less because a person outside the country need not be monitored or detained by DHS.

Finally, given the Fourth and Seventh Circuits' nullification of the departure bar in *William* and *Marin-Rodriguez*, the Ninth Circuit's partial nullification of the bar in *Martinez Coyt* and the more recent Supreme Court decisions emphasizing the importance of motions to reopen, any justifications for retaining the bar are even more unreasonable.

VII. CONCLUSION

For the reasons set forth above, petitioners respectfully request that the Attorney General initiate a rulemaking proceeding pursuant to the Administrative Procedures Act, 5 U.S.C. § 553(e), to amend the regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b) to strike the bar on adjudicating motions to reopen and motions to reconsider when the movant departs the United States.

August 6, 2010

Respectfully submitted,

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Lawyers Guild

American Immigration Council

Post-Deportation Human Rights Project

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⁷⁶ Moreover, in the event of a hearing, a person could appear telephonically. See 8 C.F.R. § 1003.25(c).

APPENDIX A

PROPOSED AMENDMENTS TO CURRENT REGULATIONS

The following are proposed amendments to current regulations implementing the above concerns. Redactions are indicated with a strikethrough.

8 C.F.R. § 1003.2(d)

~~(d) *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.~~

8 C.F.R. § 1003.23(b)(1)

(b) *Before the Immigration Court* —(1) *In general.* An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. ~~A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.~~ The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall such limitations apply to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with §1208.22(e) of this chapter.

Attachment B



COMMUNITY EDUCATION CENTER • IMMIGRATION POLICY CENTER • INTERNATIONAL EXCHANGE CENTER • LEGAL ACTION CENTER

Thomas G. Snow
U.S. Department of Justice
Executive Office for Immigration Review
Office of the Director
5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

November 12, 2009

Dear Director Snow,

We, the American Immigration Council (formerly the American Immigration Law Foundation (AILF)) and the American Immigration Lawyers Association, write to express our recommendations for the new rules on ineffective assistance of counsel that EOIR currently is considering pursuant to *Matter of Compean*, 25 I&N Dec. 1, 2 (AG 2009).¹ This letter, which we hope will assist in the rulemaking process, outlines the deficiencies of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), suggests ideas that will reduce the number of ineffective assistance claims, and recommends revisions to the regulatory system and framework. We hope this will begin a continuing dialog with EOIR to improve the administrative process and to raise the competence of the bar. We welcome any opportunities to discuss our recommendations with you and participate in the regulatory revisions.

Our recommendations are in two parts: 1) recommendations for the procedures for filing an ineffective assistance claim and for EOIR's consideration of those claims, and 2) recommendations for ameliorative measures that EOIR could take to reduce attorney and respondent mistakes and resulting ineffective assistance claims.

I. EOIR Should Be Guided by Certain Principles, to Uphold Integrity and Ensure a Fair and Full Opportunity to be Heard, with Special Consideration for the Unique and Challenging Circumstances of the Removal System

The new rules and procedures must be guided by the Department of Justice's goal of upholding the integrity of the removal process and should strive to achieve the following:

¹ The American Immigration Council and the American Immigration Lawyers Association (AILA) have been involved for many years in these matters, appearing as amicus curiae in *Matter of Compean* and *Matter of Assaad*, and submitting comments to proposed professional responsibility regulations.

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- Ensure that all noncitizens in removal proceeding have a fair opportunity to be heard – a central principle Congress codified in Section 240 of the INA;
- Promote quality representation and ensure that the immigration bar meets ethical and professional standards of practice; and
- Discourage the filing of unnecessary motions and promote judicial efficiency.

At the same time, the new procedural rules will be most effective if they acknowledge the well-documented, unique circumstances and challenges respondents and counsel face in removal proceedings, including:

- Many respondents compelled to appear in removal proceedings cannot afford an attorney and there are insufficient pro bono lawyers for all who need one;
- Many respondents are unfamiliar with our legal system and the exceedingly complex immigration laws;
- Immigration courts and the BIA handle hundreds of thousands of cases, with inadequate resources;
- The BIA’s appeal procedures are extremely detailed, requiring extensive knowledge of the record and the hearing, without an easily-accessed “discovery” system;
- Removal is often a more dire consequence than negative results in other types of civil or even criminal proceedings – to and including banishment from home, family, employment, and safety;
- Respondents are more vulnerable to unscrupulous people, less likely to seek a remedy for their victimization; and remedies are less likely to make them “whole” – that is, restore the victim’s immigration status or their opportunity to apply for that status;
- Many respondents are detained, further eroding their ability to hire and work with counsel or to represent themselves adequately; detained respondents often are moved far away from family and resources, usually without warning to themselves, their families or their attorneys.

II. The New Framework Should Include Flexible Requirements for Motions to Reopen Based on Ineffective Assistance of Counsel

Regardless whether there is a constitutional right to effective assistance of counsel, as the Attorney General has acknowledged, it is important to provide a measure of protection

for individuals who are harmed by someone else's conduct.² The *Lozada* framework, intended to provide, in part, a measure of protection, has proven unworkable in some cases and unnecessary in others.

Unfortunately, immigration judges and the BIA too often resort to an overly mechanistic application of *Lozada* that elevates form over substance; results in protracted litigation and unnecessary expenditure of resources by EOIR, respondents and counsel alike; and most significantly, deprives respondents of their only opportunity to present their cases. Simply put, *Lozada's* mandatory procedures do not adequately protect the integrity of the immigration court system. Therefore, we encourage EOIR to adopt a framework that sets forth reasonable, flexible standards for motions to reopen based on ineffective assistance of counsel and non-lawyer misconduct.

Requiring absolute compliance with a set of requirements fails to account for the particular, unique circumstances of each case and the realities of immigrants' situations. For example, in some situations, the record of proceedings on its face demonstrates ineffective assistance of counsel. Other cases may require particular documentation that may not be anticipated in a rule making process. Furthermore, impending filing deadlines or the threat of imminent removal³ may make it impossible to comply with involved requirements prior to filing the motion to reopen, particularly where current counsel may have limited access to the record.

As is the case with all motions, a person filing a motion to reopen based on ineffective assistance of counsel bears the burden of establishing that the immigration judge or BIA should reopen the case. By holding the respondent to his or her burden, EOIR will discourage baseless allegations and provide immigration judges and the BIA with

² We therefore agree with the Attorney General that it is not necessary to decide whether there is a constitutional right to effective assistance of counsel in revisiting the framework for ineffective assistance of counsel claims. *See Matter of Compean*, 25 I&N Dec. 1, 2 (AG 2009).

Moreover, regardless whether there is a constitutional right to effective assistance of counsel, providing a remedy for ineffective assistance of counsel is a good policy and the necessary corollary to EOIR's recently enhanced professional responsibility rules. *See* Department of Justice, Executive Office for Immigration Review, Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearance, 73 Fed. Reg. 76914 (Dec. 18, 2008). One of EOIR's objectives in adopting new rules was "to preserve the fairness and integrity of immigration proceedings, and increase the level of protection afforded to aliens in those proceedings by defining additional categories of behavior that constitute misconduct." *Id.* at 76915.

³ Motions generally must be filed within 90 days of the order of removal. INA § 240(c)(7)(C)(i). In addition, the BIA has held that an individual loses his opportunity to file a motion to reopen after he has been deported from the United States. *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008); *see also* 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1).

standards for evaluating claims. A complicated set of mandatory filing requirements is not needed.

A. EOIR Should Not Require Respondents to File Bar Complaints

We urge EOIR to exclude any bar complaint requirement from its rules for ineffective assistance of counsel claims. The bar complaint requirement is one of the most contentious and problem-ridden aspects of *Matter of Lozada*, and importantly, it is not needed to further the BIA's intended objectives, namely, to increase confidence in the claim; reduce the likelihood that a hearing will be needed; help police the immigration bar; and protect against possible "collusion" between the client and the lawyer. *Matter of Rivera*, 21 I&N Dec. 599 (BIA 1996). Each of these intended benefits is addressed below.

First, instead of increasing confidence in the claim, the bar complaint requirement has contributed to the filing of baseless and frivolous state bar complaints.⁴ Filing a complaint against a lawyer who is disbarred or is no longer practicing is an unnecessary burden to the complaining party and to the state. In addition, filing a bar complaint before an immigration judge or the BIA has made a determination that counsel was at all ineffective is premature and may be insufficient to trigger any action on the part of the state bar. Thus, the bar complaint requirement unnecessarily strains the state bars. Some state bars are so inundated with *Lozada*-based complaints against immigration lawyers that it is difficult or impracticable for them to identify meritorious complaints and impose sanctions.⁵

Even if the state bar does investigate the allegations, it is unrealistic for EOIR to wait for the state to conclude its investigation before adjudicating a motion to reopen. Thus, it is very unlikely the state's findings will be available to corroborate the respondent's claims.

Second, there are other, more effective ways in which to test the validity of a claim and reduce the likelihood that a hearing will be needed. For example, as discussed below, we recommend that in most cases, the respondent notify his or her allegedly ineffective lawyer of the claim and allow him or her to respond. Immigration judges and the BIA also can request additional information when it would assist them in adjudicating a claim.

⁴ See *Matter of Compean*, 24 I&N Dec. 710, 737 (AG 2009), *vacated*, 25 I&N Dec. 1 (AG 2009) (citing Comment filed by the Committee on Immigration & Nationality Law, Association of the Bar of the City of New York (Sept. 29, 2008), in response to the *Proposed Rule for Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances*, 73 Fed. Reg. 44,178 (July 30, 2008)).

⁵ See *id.* Most attorneys representing respondents before EOIR are competent and dedicated professionals. The potential that a previous client would file a baseless complaint for purposes of a motion to reopen based on ineffective assistance of counsel may dissuade lawyers from representing respondents before EOIR.

Furthermore, it is important to recognize that in many cases, counsel's ineffectiveness is clear on the record, and therefore there is no further need to test the validity of the claim.

Third, requiring a state bar complaint is not necessary to police the immigration bar. Since first adopting the bar complaint requirement in *Matter of Lozada*, EOIR has expanded its role in promoting professionalism and disciplining lawyers who fail to meet minimum standards of professional conduct. In 2000, it overhauled its professional standard and discipline regulations,⁶ and in 2008 it further enhanced its police powers, expanding the list of sanctionable grounds.⁷ Importantly, under 8 C.F.R. § 3.102(k), EOIR may sanction a lawyer who engages in conduct that constitutes ineffective assistance. Thus, EOIR has ample procedures in place to police the bar without requiring a state bar complaint. Furthermore, we do not suggest that respondents be precluded from filing an appropriate state bar complaint.

Fourth, the BIA's contention that the bar complaint is needed to protect against collusion is unfounded. The BIA suggested in 1996 that there was widespread "collusion between an alien and counsel in which 'ineffective' assistance is tolerated, and goes unchallenged by an alien before disciplinary authorities, because it results in a benefit to the alien in that delay can be a desired end, in itself, in immigration proceedings."⁸ The Board, however, did not demonstrate that collusion was a serious problem. In opining that collusion was a problem, it cited only three cases, none of which involved a claim of ineffective assistance of counsel or collusion.⁹ While these cases do demonstrate how delay may benefit a respondent, over the past twelve years Congress and EOIR have sought to minimize the benefits of delay tactics.¹⁰ Therefore, concerns about delay are less relevant today than in the past. Even assuming that some lawyers would

⁶ See Department of Justice, Executive Office for Immigration Review, *Professional Conduct for Practitioners – Rules and Procedures*, 65 Fed. Reg. 39513 (June 27, 2000).

⁷ See Department of Justice, Executive Office for Immigration Review, *Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearance*, 73 Fed. Reg. 76914 (Dec. 18, 2008).

⁸ See *Matter of Rivera*, 21 I&N Dec. 599, 604 (BIA 1996).

⁹ See *id.* at 604 (citing *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Reid v. INS*, 766 F.2d 113 (3d Cir. 1985); *Cheng Fan Kwok v. INS*, 381 F.2d 542 (3d Cir. 1967), *aff'd*, 392 U.S. 206 (1968)).

¹⁰ For example, immigration court case completion goals and BIA regulations set deadlines for adjudicating cases; the "stop time rule," says that the accrual of residence and physical presence terminates either upon the initiation of removal proceedings or the commission of a crime that renders a person removable; and filing a petition for review no longer automatically stays the removal pending court of appeal's review. See Memorandum on Case Completion Goals from Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge to all Immigration Judges and Court Administrators (April 26, 2002), available at <http://www.aila.org/content/default.aspx?bc=8735|17026|9002>; 8 C.F.R. § 1003.1(e)(8); INA § 240A(d); compare former INA § 106(a)(3) (1996) with INA § 242.

purposefully provide ineffective assistance – based on an agreement with the client that the conduct would go unchallenged – in order to delay proceedings, it does not necessarily follow that the ineffective lawyer would then assist the former client in filing a motion to reopen based on the ineffectiveness. Such action would disclose the lawyer’s unethical conduct and would subject him or her to potential disciplinary action by EOIR and his or her state bar.

Further, the decision to file a bar complaint is distinct from the decision to file a motion to reopen based on ineffective assistance of counsel and may take into account different considerations. As the Fourth Circuit recognized in *Figeroa v. U.S. INS*, 886 F.2d 76, 78-79 (4th Cir. 1989), the fact that the aggrieved individual took “no action” against his former counsel did not indicate that the representation was effective:

Figeroa is an adolescent alien who speaks no English and who has only a third grade education. He is no doubt unaware of any action he might be able to take against Tellez, such as filing either a complaint with the state bar or a legal malpractice claim. Additionally, Figeroa’s new counsel probably recognized that neither a disciplinary proceeding nor a civil action against Tellez would have provided petitioner with much assistance in terms of his deportation proceedings. Their energies were properly directed at stopping the deportation, rather than pursuing Tellez.

For these reasons, we recommend that the new rule not require a respondent to file a bar complaint, but leave it to the discretion of the victim to make the decision.

B. EOIR Should Not Require that Respondents File a Detailed Attorney-Client Affidavit in Every Case

In many cases, an affidavit setting forth the lawyers’ responsibilities and what action the lawyer did or did not take will aid the immigration judge or the BIA in adjudicating the motion and may be the primary evidence in support of the claim. However, we disfavor a strict requirement that a “detailed” affidavit be filed in every case. Such a requirement unnecessarily leads to mechanistic denials for failure to comply even where other evidence and/or the record of proceedings itself sufficiently establishes the attorney-client relationship and the ineffectiveness. Therefore, if the evidence and/or the record establishes ineffective assistance, then the respondent has satisfied his burden.

C. EOIR Should Not Mandate that Respondents Always Notify the Prior Representative

Generally, respondents alleging ineffective assistance of counsel should notify their prior lawyers about the allegations. Not only does this help ensure the integrity of the process, but it serves to protect lawyers against false accusations. Nonetheless, we recommend that the new framework incorporate flexible procedures for providing notification to the former lawyer and also include exceptions where notification would be futile.

In some situations, the client and/or his or her current lawyer may be able to provide advance notification to the attorney and may even obtain a signed declaration from the prior lawyer in advance of filing the motion. Where the same lawyer continues to represent the respondent in a claim against himself or herself, it is reasonable to expect the inclusion of such a declaration in the initial filing.¹¹ This declaration may corroborate the respondent's allegations in the motion and would obviate the need for any further notification.

In other situations, notification would be futile because the ineffectiveness is clear from the record, for example, where a lawyer enters an appearance and fails to appear for a hearing. Likewise, notification may be futile where the lawyer is not reachable or already has been suspended from practice for providing ineffective assistance. If notification would be futile, the respondent may state this in his or her motion.¹²

If notification is provided and the prior lawyer has not responded, immigration judges and the BIA should not consider the non-response an adverse factor. An IJ and the BIA may wait a reasonable amount of time for a response, if he or she thinks it is necessary to adjudicate the motion, but IJs and the BIA should exercise their discretion to grant a stay of removal in such cases.

D. EOIR Must Interpret the Required Showing of Prejudice Reasonably to Reflect the Inherent Challenges in Demonstrating Prejudice

Like other procedural and substantive elements of a motion to reopen based on ineffective assistance of counsel, the new framework should incorporate a flexible standard to assess prejudice. As discussed below, different situations call for different ways of demonstrating prejudice.

If counsel's ineffectiveness caused a respondent to forfeit the opportunity to apply for relief for which he or she is prima facie eligible, this should satisfy the prejudice requirement. Establishing more than prima facie eligibility is inappropriate at the motion stage and would often require an evidentiary hearing on the application for relief.

Likewise, where counsel's ineffectiveness results in depriving a person of the opportunity to seek administrative or judicial review of a removal order (to which he or she has a statutory and/or regulatory right), the respondent has established prejudice. To require a respondent to show that he likely would prevail at the BIA and/or the court of appeals does not make sense in this context. In the case of BIA appeals, first, it is difficult to

¹¹ We urge EOIR to recognize the propriety of a lawyer who acknowledges his or her prior deficiencies, and, at the request of the client, continues representation. *Accord Matter of Compean*, 24 I&N Dec. at 739 n. 12 (recognizing that same lawyer may represent the respondent in seeking reopening based on ineffective assistance of counsel).

¹² An immigration judge could, of course, disagree about the futility of notification, and could direct the respondent to provide notification to the prior lawyer and permit the prior lawyer to respond.

predict how the BIA might decide an issue, especially where there is no precedent decision on point. Second, even where precedent indicates that the BIA would deny an appeal, a respondent may nonetheless need to file a BIA appeal to exhaust administrative remedies in order to seek judicial review. There are ample examples of courts of appeals overruling BIA decisions – even BIA precedents. Thus, there is no way to accurately predict how a court of appeals will rule in any given case, and therefore, such predictions should not be used to determine prejudice. For the same reason, where counsel’s ineffectiveness causes a person to forfeit the right to seek judicial review, he has established prejudice that warrants reissuance of the decision.

Other situations will require a more involved approach to assessing prejudice. For example, if a respondent applied for relief, but failed to submit certain key evidence, or filed an appeal brief, but left out some arguments, the immigration judge or the BIA will need to more fully consider the effect that the ineffectiveness had on the proceedings.¹³ If the IJ or BIA determines that even if the respondent had submitted the evidence or made the appeal arguments, undoubtedly the outcome of the case would have been the same, the respondent has not established prejudice.

However, if the respondent can show that the ineffectiveness may have affected the outcome of proceedings, he or she has established prejudice. This standard will allow the IJ or the BIA to assess whether reopening is warranted given the facts of the case, and also takes into account the limitations of establishing the harm to the client at the motions stage of the proceedings, particularly without needing a hearing.

For example, where a lawyer has been incompetent, the record may not reflect what a competent lawyer would have done, or the research a competent lawyer would have performed to demonstrate that the respondent is not removable or warrants relief. Although the motion can attempt to show what a competent lawyer would have done, realities, such as limited access to the record of proceedings, particularly if the prior lawyer is not cooperative or is unavailable, and impending filing deadlines, may make demonstrating this difficult or impossible. Requiring conclusive proof that the hearing or the result would have been different is unreasonable in this context. A prejudice standard patterned on Federal Rule of Civil Procedure 60(b) (discussed below in Section III, B) responds to these inherent challenges. Further, IJs and the BIA should be directed to use their authority to request additional evidence or deny a motion to reopen *without prejudice* where a person has not yet satisfied his or her burden of establishing prejudice.

Finally, the new rule also should reaffirm the BIA’s long standing precedent that respondents need not show prejudice where counsel’s ineffectiveness resulted in an entry

¹³ These situations also may raise the question of whether the prior lawyer was “ineffective” in the first place. IJs and the BIA, however, will have to adjudicate those questions on a case by case basis given the facts and circumstances before them.

of in absentia order of deportation or removal.¹⁴ Likewise, the BIA should continue to consider ineffective assistance of counsel claims in cases where the respondent is seeking discretionary relief.¹⁵

E. The Filing Deadline Should Be Subject to Equitable Tolling

EOIR's rule should acknowledge that the motion to reopen filing deadlines are subject to equitable tolling and that the number limitations are subject to waiver. Although the BIA has taken the position that the deadlines are not subject to tolling,¹⁶ all but one of the courts of appeals to consider this issue have reached the opposite conclusion.¹⁷ Equitable tolling of deadlines and waiver of the one-motion rule ensures that unwitting victims of ineffective assistance are not deprived their only opportunity to contest removability or apply for relief.

Deadlines should be tolled until the ineffective assistance of counsel is or should have been discovered by a reasonable person *in that situation*. While EOIR may want to incorporate a due diligence requirement, the question the IJs and the BIA should consider is “whether the claimant could reasonably have been expected to have filed earlier?”¹⁸

¹⁴ See *Matter of Rivera-Claros*, 21 I&N Dec. 599, 603 n.1 (BIA 1996) (finding that in absentia motion to reopen provision does not require showing of prejudice); *Matter of Grijalva*, 21 I&N Dec. 472, 473 n.2 (BIA 1996).

¹⁵ See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) (seeking waiver); *Matter of Lozada*, 19 I&N Dec. 637 (1988) (seeking waiver); see also *Matter of Compean*, 24 I&N Dec. at 730 (IJs and BIA have discretion to grant motion to reopen where ultimate relief sought is discretionary). To the extent some courts of appeals have rejected ineffective assistance of counsel claims because the respondent sought discretionary relief, they did so in the context of a constitutional due process claim, *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1148 (11th Cir. 1999); *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003); *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004) – a claim that need not and should not serve as the basis for EOIR's rule on ineffective assistance of counsel. Moreover, these decisions conflict with the approach of other courts, see, e.g., *Fernandez v. Gonzales*, 439 F.3d 592, 602 & n.8 (9th Cir. 2006), *Rabiu v. INS*, 41 F.3d 879, 882-83 (2d Cir. 1994), and fail to acknowledge the statutory right to apply for relief. See *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004).

¹⁶ In *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998), and *Matter of Lei*, 22 I&N Dec. 113 (BIA 1998), the Board held that the ineffectiveness of counsel does not create an “exception” to the 180-day time limit for filing a motion to reopen under former INA § 242B(c)(3)(A), and has taken the position that the deadline is not subject to equitable tolling.

¹⁷ See *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); but see *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

¹⁸ See *Pervaiz*, 405 F.3d at 490.

What actions are reasonable for a respondent in removal proceedings may be quite different from the actions we would expect an immigration judge, a lawyer or even a United States citizen more familiar with government and legal processes to take. EOIR's rule should reflect that reasonableness must account for language and cultural barriers, lack of knowledge about the immigration system, and education levels.

F. EOIR Should Permit Respondents to Supplement the Motion to Reopen after the Initial Filing

In addition to equitably tolling the deadline, the new framework should recognize the challenges of timely filing a fully-documented motion to reopen, even where the ineffective assistance of counsel is discovered prior to the filing deadline. Impending filing deadlines or the threat of imminent removal¹⁹ may make it impossible to fully document the motion to reopen. This is particularly true in ineffective assistance of counsel cases where the respondent and/or current counsel may have limited access to the record. The respondent may be unable to obtain his or her files from the former lawyer in a timely manner. Even though he or she may obtain the record of proceedings under the Freedom of Information Act, doing so takes several months – often longer than the period for filing the motion.²⁰ For that reason, EOIR's new rule should acknowledge these realities and provide the respondent an opportunity to supplement the motion after the initial filing.

G. EOIR Should Recognize the Authority to Provide a Remedy Even if the Conduct of Counsel Occurred After a Final Order of Removal

EOIR's rule should adopt the Attorney General's interim ruling that the BIA has authority to reopen cases based on ineffective assistance that occurred after the entry of a removal order.²¹ The motion to reopen statute at INA § 240(c)(7), and its implementing regulation, 8 C.F.R. § 1003.2, provides the Board with authority to reopen cases based on facts that give rise to new claims and arguments that were – by definition – “new” and may have arisen after the BIA's decision. In fact, 8 C.F.R. § 1003.2, provides the Board with even broader authority to reopen or reconsider “at any time” a case in which it has issued a decision. Moreover, EOIR's lawyer disciplinary regulations allow it to sanction

¹⁹ See *supra* note 3.

²⁰ In addition to submitting a FOIA request to EOIR, a person may file a request with DHS as well. DHS often takes months or even over a year to respond if the request does not qualify as Track 1 or Track 3. Track 1 requests are simple requests that do not require DHS to review multiple pages before providing access. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge*, 72 Fed. Reg. 9017, 9017 (Feb. 28, 2007). Track 3 is intended to expedite the FOIA process for certain individuals who are in removal proceedings. 72 Fed. Reg. at 9017-18. However, Track 3 excludes requests for cases where a final order of removal has issued. 72 Fed. Reg. at 9018.

²¹ *Matter of Compean*, 25 I&N Dec. 1, 3 (AG 2009).

lawyers for conduct having nothing at all to do with the BIA, the immigration courts, immigration law, or the removal of clients.²²

H. EOIR's Ameliorative Measures Should Apply Equally to Non-Attorneys Providing Legal Services to Respondents

A respondent's inability to satisfy the bar complaint requirement sometimes has been applied to defeat valid claims of ineffective assistance by non-attorney actors. Such a result did not necessarily follow from *Lozada*, which allowed respondents to either file a complaint or explain why they did not. *Matter of Lozada*, 19 I&N Dec. 637, 639 (1988). Explaining that the respondent did not file a bar complaint because the non-attorney was not licensed by a state bar could have satisfied this requirement.

In the first *Compean* decision, Attorney General Mukasey conceded the government's "interest in ensuring that a lawyer's deficient performance does not undermine the fairness and accuracy of removal proceedings" but said that that interest

does not warrant, however, allowing a motion to reopen based on the conduct of non-lawyers (except where an alien is represented by an accredited representative pursuant to 8 C.F.R. § 1292.1(a)(4) or in the extraordinary case where an alien reasonably but erroneously believed that someone was a lawyer). The reason is that lawyers and accredited representatives are governed by rules of professional conduct and have skills, including but not limited to knowledge of immigration laws and procedures, that are directly related to furthering the interest that aliens and the Government have in fair and accurate immigration proceedings.

24 I & N Dec. 710, 729, n. 7 (AG 2009).

Respectfully, we submit that Attorney General Mukasey's reasoning does not compute. The government's and the respondents' interest in fairness and accuracy of the proceedings supports the extension of any ameliorative measure to actions of non-attorneys acting on behalf of respondents. A non-attorney operating outside the law and failing to provide competent services deprives the respondent of her day in court at least as much as a licensed attorney.

Further, exempting non-attorneys from enforcement or ameliorative measures makes little sense from a public policy perspective. Non-attorneys may be the most likely to not know or follow the rules. Not enforcing the rules against them is akin to not enforcing speed limits against people driving without a license.

Attorney General Mukasey's statement was a move in the right direction, but stopped short of an effective and realistic dividing line. Where the respondent reasonably relies

²² For example, a lawyer who is disbarred from practice by any state bar or federal court or is found ineffective by a federal court is subject to discipline. 8 C.F.R. §§ 1003.102(e) and (k).

on a non-attorney for advice or representation, adjudicators must recognize ineffectiveness claims against non-attorneys – whether the respondent believed the person to be an attorney or not.

III. EOIR Should Adopt Measures to Reduce the Number of Ineffective Assistance of Counsel Claims

Because EOIR is undergoing a comprehensive review of the *Lozada* framework, it is appropriate to look beyond the specific procedures for adjudicating ineffective assistance of counsel claims and consider some of the underlying problems that have led to the proliferation of *Lozada* motions. Already, EOIR has revised its professional conduct rules and has recommitted itself to promoting and demanding quality representation in order to protect the rights of noncitizens in removal proceedings. *See* Department of Justice, Executive Office for Immigration Review, Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearance, 73 Fed. Reg. 76914 (Dec. 18, 2008). But in addition to setting standards for lawyers, EOIR should look to its own procedures and consider whether they adequately safeguard the rights of respondents and whether they can be amended to better protect the integrity of the removal system and reduce the volume of *Lozada* motions.

A review of many of EOIR’s filing procedures reveals a system that fails to forgive even minor and inadvertent mistakes made by both lawyers and pro se respondents. As a result, the procedures fail to ensure that all people in removal proceedings have a fair and full opportunity to be heard and to have their cases considered on the merits, as Congress has mandated in INA § 240. EOIR’s procedures should acknowledge the unique circumstances and challenges of removal proceedings, discussed above in Section I, should demonstrate reasonable expectations for the circumstances and resources of the system’s users.

In that vein, we submit the following changes to the immigration courts and the BIA’s procedures. These changes will help reduce the number of ineffective assistance of counsel claims; will reduce the number of motions to reopen for ineffective assistance and other reasons; will reduce the amount and duration of litigation in the administrative and federal courts over procedural and clerical mistakes; and will go a long way to ensuring that all people in removal proceedings have their day in court.²³

A. EOIR Should Adopt a “Lodging” / Deficiency Rule for Documents

²³ Our proposed changes should apply whether a respondent is represented or not. For example, the proposed “excusable neglect” rule also could be invoked by a respondent to cure some error caused by the respondent, whether represented or not. However, as these recommendations are proposed to reduce the number of ineffective assistance claims, we focus on errors by representatives.

EOIR should adopt a rule similar to the practice employed by the Supreme Court and lower federal courts that allows for the “lodging” of documents that are timely filed but deficient as to some requirement. Specifically, Supreme Court Rule 14.5 says:

If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk’s letter will be deemed timely.²⁴

By contrast, EOIR’s presumptive procedure is to reject timely filings that do not comply with even non-material requirements. Specifically, 8 C.F.R. § 1003.3(a)(1) says that an appeal is not properly filed unless it is received at the Board within 30 days, with all required documents, fees or fee waiver requests, and proof of service.

Both the BIA Practice Manual and the Immigration Court Practice Manual provide almost no flexibility for addressing even minor errors related to filing. For example, the failure to provide proof of service on the opposing party is a “common” reason for the Board to reject a filing. BIA Practice Manual, 3.1(c). If the Board rejects a filing and the corrected filing is not made within the *original* deadline, the filing is “defective.” *Id.* at 3.1(c)(ii) (parties who wish to “correct” a defect and “refile after a rejection must do so by the original deadline”). An untimely appeal will be dismissed and an untimely motion will be denied. *Id.* A party submitting an untimely filing must file a motion asking the Board to accept the filing with documentary evidence to support the motion, including evidence such as affidavits and declarations under penalty of perjury. *Id.* at 3.1(c)(iii). The Board has discretion whether to accept late filings and the Manual advises that the BIA “rarely” accepts and considers untimely briefs. *Id.* at 4.7(d).

Likewise, the Immigration Court Practice Manual states that filings should be rejected outright if they are not accompanied by proper proof of service, for example, or if a signature is missing or improper. Immigration Court Practice Manual, 3.1(d). Even more demanding, it states that filings by an attorney that do not have a cover page, are not two-hole punched, are not paginated, properly tabbed, or do not have a proposed order will be rejected. *Id.*; Memorandum from Mark Pasierb, Chief Clerk of the Immigration Court, to All Immigration Judges, et al., Part II(A) (June 17, 2008) (hereinafter *Pasierb Memo*).

If the filing is defective, the Immigration Court “should reject filings upon receipt and return filings to the party.” *Pasierb Memo*, Part II(A). If counsel is not able to correct the error and resubmit the filing before the deadline, the filing may be considered

²⁴ Likewise, Federal Rule of Civil Procedures 5(d)(4) says “The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice” and Federal Rule of Appellate Procedure 25(a)(4) says, “The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.”

untimely. Immigration Court Practice Manual, 3.1(b). Although an IJ may still accept an untimely filing, it is within the judge's discretion to accept the filing. Immigration Court Practice Manual, 3.1(d)(ii); Memorandum (OPPM) from David L. Neal, Chief Immigration Judge, to All Immigration Judges, et al. at 2 (June 20, 2008) (filings may not be rejected upon receipt for untimeliness; only a judge has the authority to make determinations regarding timeliness).²⁵

Often, ineffective assistance of counsel claims begin when a minor and/or inadvertent filing error occurs, and there is no clear remedy. If EOIR's rules permitted documents to be "timely lodged" as long as the deficiencies are corrected within a specified time, they would prevent many ineffective assistance of counsel claims stemming from *de minimus* errors.

Already, there is EOIR precedent for "lodging" documents. EOIR's asylum regulation, 8 C.F.R. § 1208.4(a)(5)(v), anticipates the situation where an asylum applicant files the application before the one-year filing deadline, but the application is rejected as not properly filed. If the applicant refiles "within a reasonable period thereafter," this qualifies as an "extraordinary circumstance" excusing the failure to meet the asylum one-year filing deadline.

The asylum application "lodging" rule is an improvement over the EOIR's general "sudden death" rule, however, the Supreme Court's rule has one major advantage: certainty. Lawyers remedying defective filings know they have only 60 days to act and they know that if they do remedy the deficiency within that time, the Court will accept the document as timely filed. Under the asylum application-filing rule, the lawyer does not know what the IJ will consider to be a "reasonable period."

Therefore, we urge EOIR to adopt a "document lodging" regulation and procedure, using as a model the Supreme Court's rule 14.5. Documents will be considered "timely lodged," but not "filed" if they are deficient. The IJ and BIA clerk's offices should retain the documents, saving EOIR the trouble and costs of mailing back the documents to the respondent or lawyer. EOIR only has to notify the respondent or lawyer that the filing was deficient and that he or she has 60 days from the date of letter to remedy the deficiencies or have the filing rejected.

²⁵ In comments filed in September 10, 2008 in response to the Immigration Court Practice Manual, the American Immigration Lawyers Association noted that, "The requirement that the defect be corrected within the original deadline is not realistic, especially if the original filing is by mail and the Court returns the filing by mail. As a result, especially for practitioners in outlying areas, it will often not be possible to make the correction and return the filing in a timely fashion." Letter from AILA to the Chief Immigration Judge, *Comments on the EOIR Practice Manual* (Sept. 10, 2008) at 7 available at <http://www.aila.org/content/default.aspx?docid=26457>. AILA further noted that the remedy for an untimely filing – a motion under § 3.1(d)(iii) – would require affidavits and declarations and would mean additional work for respondents, attorneys, and IJs. *Id.*

B. EOIR Should Adopt the Federal Rules’ “Excusable Neglect” Standard

Many errors can be remedied at an early stage, and by doing so, EOIR would avoid contributing yet another ineffective assistance case to its workload. Toward this end, in addition to the framework for handling ineffective assistance claims and adoption of the document “lodging” rule, EOIR should again follow the federal courts’ lead by adopting an “excusable neglect” rule. We contemplate that in practice, this rule would apply in immigration court and at the BIA. The rule would be invoked by the attorney who made the error. If the IJ or BIA determines not to relieve the person of the error or neglect, the respondent then would determine whether to file an ineffective assistance claim.

Specifically, Rule 60 (b)(1) of the Federal Rules of Civil Procedure provides:

b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect.

A motion for Rule 60(b) relief must be made within one year from the entry of the order or judgment, or the date of the proceeding. FRCP 60(c)(1). In the immigration context, many errors are not discovered for quite some time after the events. Therefore, the one-year limitation would be reasonable here as well.

The Supreme Court has clarified that the test for excusable neglect is “at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s admission.” *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 394-95 (1993). In *Pioneer*, the Court provided a non-exhaustive list of factors which may be considered, including: the danger of prejudice to the non-movant; the length of the delay and its potential impact on judicial proceedings; the reason for the delay; and whether the movant acted in good faith. *Id.* Courts have granted relief on the basis of both substantive and procedural mistakes made by counsel.²⁶

Importantly for the immigration context, the federal courts have not required the movant to show that a different result would be reached upon reconsideration. Rather, most courts require parties to show only that the requested relief would not be “an empty

²⁶ See *Odishelidze v Aetna Life & Casualty Co.*, 853 F2d 21 (1st Cir. 1988) (lower court abused discretion in denying Rule 60(b) relief where plaintiff’s complaint failed to properly state diversity jurisdiction, but sufficient evidence was included to support jurisdiction and defense counsel did not contest jurisdiction); *Kotlicky v. United States Fidelity & Guar. Co.*, 817 F2d 6 (2d Cir. 1987) (lower court abused discretion in denying Rule 60(b) relief where plaintiff’s counsel did not receive notice in time to appear at deposition).

exercise or futile gesture.”²⁷ In order to show that the relief requested would not be futile, the moving party must show a “potentially meritorious claim” or defense which, if proven, would permit a finding for the moving party.²⁸ Several circuits have rejected a definition of “meritorious” which would require a showing of a likelihood of success, adopting a standard instead which requires only a “hint of a suggestion” which, if proven at trial, would constitute a complete defense.²⁹

C. EOIR Should Adopt the “Mailbox” Rule for Filings

EOIR’s current regulations state that the filing date for the notice of appeal and other filed documents is the date the document is *received* by EOIR. See 8 C.F.R. §§ 1003.3(a)(1), 1003.38(c), 1240.15, 1240.53(a). This rule leaves respondents and their counsel with very little effective control over timely filing. The attorney may mail or send via private delivery a notice of appeal that would be timely filed if delivered within a reasonable amount of time or even the “guaranteed” time, only to have the carrier or delivery service fail to deliver on time. Not surprisingly, there has been considerable litigation, including on the question whether a private carrier’s failure to deliver as promised is an exceptional circumstance.³⁰ That lawyers must now anticipate and plan for possible failures of private delivery services to timely deliver increases, rather than decreases, the possible ineffectiveness claims to be filed against them. Adopting the “mailbox rule” will properly put the responsibility where the lawyer has more control – over the actual mailing, rather than the delivery, of the documents.

The U.S. Supreme Court applies the “mailbox rule” to all filings³¹ and the Circuit Courts apply the mailbox rule for the filing of briefs.³² Significantly, both the Supreme Court

²⁷ See, e.g., *Pease v. Pakhoed Corp.*, 980 F.2d 995, 998 (5th Cir. 1993); *Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992); *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990); *Beshear v. Weinzapfel*, 474 F.2d 127, 132 (7th Cir. 1973); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969).

²⁸ See *Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995).

²⁹ *Thompson v. American Home Assur. Co.*, 95 F.3d 429 (6th Cir. 1996); *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 374 (D.C. Cir. 1980); *Moldwood Corp. v. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 243 (3d Cir. 1951).

³⁰ See *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006); *Liadov v. Mukasey*, 518 F.3d 1003 (8th Cir. 2008).

³¹ Supreme Court Rule 29.2 says, “A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days.”

and the other federal courts apply an even more flexible rule for filings by prisoners because prisoners' control over the processing of their filings ceases as soon as they give the filings to prison personnel.³³

Both DHS and EOIR have rules governing filing asylum applications with DHS that incorporate the mailbox rule flexibility. Specifically, 8 C.F.R. §§ 208.4(a)(2)(ii) and 1208.4(a)(2)(ii) say that an asylum application is considered to have been filed on the date it is received by DHS, except that:

In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date.

See also Nakimbugwe v. Gonzales, 475 F.3d 281, 284-85 (5th Cir. 2007) (asylum application mailed before the deadline but received after the deadline was timely filed).

These rules should be extended to the filing of all types of filings with EOIR. If EOIR extends the asylum application mailbox rule to all filings with EOIR, respondents and their attorneys will have control over compliance with filing deadlines. We anticipate this change will reduce the number of ineffective assistance of counsel complaints and the litigation resulting from filing delays.

D. EOIR Should Extend the Period for Filing a Notice of Appeal with the BIA to 60 Days

Currently, respondents must file their Notice of Appeal of an IJ decision at the BIA within 30 days from the IJ's decision. 8 C.F.R. §§ 1003.38(b), 1240.15, and 1240.53(a). Unlike notices of appeal and petitions for review in other contexts, which are a simple one-paragraph notices,³⁴ to avoid summary dismissal of the appeal, the EOIR-26 Notice

³² FRAP 25(a)(2)(B) says that a brief or appendix is timely filed if, on or before the last day for filing, it is mailed to the clerk by first class mail or other class of mail that is at least as expeditious, or "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days."

³³ *See* Supreme Court Rule 29.2 (document "is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid"); FRAP 25(a)(2)(C) (document must be "deposited in the institution's internal mailing system on or before the last day for filing"); *Houston v. Lack*, 487 U.S. 266, 270 (1988) (pro se petitioner's notice of appeal is deemed filed from the time a prisoner delivers it to prison authorities for forwarding to the district court).

³⁴ *See, e.g.*, FRAP 3(c) (requiring that notice of appeal of specify the parties taking the appeal, designate the judgment or order appealed from, and name the court to which the appeal is taken); INA § 242(c) (requiring that a petition for review or for

of Appeal must “specifically identify the findings of fact, the conclusions of law, or both, that are being challenged ... supporting authority must be cited ... [or] the specific facts contested must be identified [or] the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged.” 8 C.F.R. §§ 1003.3(b), 1003.1(d)(2)(i). If the Notice of Appeal does not comply with these requirements, a single BIA member may summarily dismiss the appeal. 8 C.F.R. § 1003.1(d)(2)(i).

This hurdle is especially high if the respondent is pro se or was represented at the hearing by a lawyer who was paid only for the removal hearing. Many respondents retain a lawyer for the removal hearing only through considerable financial sacrifice. Respondents may have been pro se before the IJ but want to retain counsel for the appeal to the BIA. At that point, the respondent must decide to and have sufficient funds to retain counsel for the next stage and / or identify new counsel who will need to try to review the record and complete a properly detailed and accurate Notice of Appeal, and send it in time for its arrival at the BIA within 30 days.

Many ineffective assistance claims begin when lawyers attempt to and fail to comply with the narrow 30-day Notice of Appeal deadline. The unique challenges faced by respondents in removal proceedings – the lack of counsel appointed and paid by the government, the scarcity of pro bono counsel, the requirement that Notices of Appeal be detailed – and the goal of reducing the volume of ineffective assistance claims all call for a 60-day period for filing a notice of appeal.

E. IJs and the BIA Should Send a Copy of Their Decisions to Respondents and Inform Respondents of the Right to Appeal or Seek Review and the Relevant Deadlines

EOIR already has instituted a positive change to make sure all respondents – even those who are represented – have personal knowledge of appeal deadlines. Specifically, EOIR announced on December 19, 2008 by news release that as of March 1, 2009, it would provide a copy of the BIA’s final decisions to all respondents in immigration proceedings, regardless of whether the respondent is represented by counsel. This is an excellent practice and helps assure that respondents and their representatives are timely communicating about and acting to meet relevant deadlines. This practice should be codified into regulation and applied to written immigration court decisions as well.³⁵

We also urge EOIR to formally adopt the current, sound practice of notifying respondents of the date that their appeal is due to the BIA. Current regulations require immigration

habeas corpus of an order of removal contain a copy of the underlying order and state whether a court has upheld the validity of that order).

³⁵ As IJs usually issue oral decisions, the administrative burden of mailing even represented respondents a copy of the IJ decision will be minimal.

judges to give notice to a party affected by a decision of “the opportunity for filing an appeal.” 8 C.F.R. § 1003.3(a)(1). In addition, 8 C.F.R. § 1240.13(d) requires IJs to advise respondents of the provisions of 8 C.F.R. § 1240.15. The latter regulation sets out the 30-day filing deadline, defines the “filing date,” states in summary form the requirements for the Notice of Appeal, and cross references to other regulations. As far as we know, there is no requirement that IJs inform the respondent of the actual due date of the Notice of Appeal. Although IJs generally use a form for notifying respondents of their appeal rights and the form does allow the IJ to indicate the filing deadline, we urge EOIR to formalize the practice by including a due-date notice requirement in the regulations.

Further, the BIA’s written decisions should include notice that the respondent may have the right to petition for review of the decision, and that any such petition for review may have to be filed in federal court within 30 days of the date of the BIA’s decision. Even this short, generally-worded paragraph will put respondents on notice that they may have legal rights and must act on them quickly.

EOIR previously considered our suggestion for the BIA to provide notice of these rights, and said that such advisals could be implemented administratively without the need for a regulation.³⁶ At that time, the Department of Justice said that it would give the matter further consideration.

³⁶ “The Department has also considered the suggestion that the Board notify aliens of their right to file a petition for review within 30 days of the Board’s dismissal of the alien’s appeal. This advisal is beyond the scope of this rule, as it would require the Board to include such an advisal in every decision, not just those involving voluntary departure. However, such an advisal can be implemented administratively without the need for a regulation. The Board historically has not given such a notice, but the Department will give further consideration to the matter administratively.” Department of Justice, Executive Office for Immigration Review, *Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review*, 73 Fed. Reg. 76927, 76933 (Dec. 18, 2008).

We hope that our recommendations assist you in your review of the current ineffective assistance of counsel framework and the development of new regulations. As mentioned above, we welcome the opportunity to discuss our recommendations with you further. Please contact Nadine Wettstein at (202) 507-7523 or Beth Werlin at (202) 507-7522 with any questions you might have or if you would like to schedule a meeting to discuss these recommendations. Thank you for your consideration.

Respectfully Submitted,

American Immigration Council (formerly
American Immigration Law Foundation)
American Immigration Lawyers Association

cc: Brian M. O'Leary
David L. Neal
Robin M. Stutman
Jennifer Barnes
Peter Vincent
Thomas Perez

Attachment C



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

June 24, 2010

American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005-3141

Federation for American Immigration Reform
25 Massachusetts Avenue, NW, Suite 330
Washington, DC 20001

In re: *Matter of L-T-*

Dear Counsel:

The Board of Immigration Appeals is currently reviewing the above-referenced case. The Board is requesting supplemental briefing by the parties and by *amicus curiae* on the following issues:


1. What circumstances trigger the need for an Immigration Judge to make a competency assessment? If the parties stipulate to incompetency, should there still be a competency examination to determine the extent of the problem? How should the Immigration Judge indicate on the record the reasons for doing so?
2. When is a competency exam necessary for an Immigration Judge to determine a respondent's "incompetency" under section 240(b)(3) of the Act? Is such an exam necessary to allow the Immigration Judge to develop appropriate "safeguards"?
3. Does an Immigration Judge have the authority to order the Department of Homeland Security (DHS) to conduct a competency examination? Is the DHS the appropriate entity to conduct such an examination? Does the answer to either of these questions vary depending on the respondent's custody status?
4. If an Immigration Judge orders the DHS to submit a competency report to the Immigration Court, under what circumstances, if any, can the DHS withhold it?
5. Who has the authority to appoint a legal representative, guardian, or custodian (see 8 C.F.R. §§ 1240.4, 1240.43, 103.5a(c)(2))? The Immigration Judge? DHS? What limitations, if any, exist as to who that individual can be?

6. If a respondent is found to be incompetent, refuses representation, and has not provided sufficient information for the identification of a relative or friend, what "safeguards" can the Immigration Judge prescribe?
7. Is termination of proceedings an appropriate safeguard? Administrative closure?
8. If a respondent is found to be incompetent and proceedings do not move forward, what happens to a respondent who is in custody and without care?
9. Can an incompetent alien represent himself?

Briefs should be filed directly with Terry L. Smith at the Board of Immigration Appeals, Post Office Box 8530, Falls Church, VA 22041, with proof of service on all parties, no later than July 15, 2010. The Board will serve the Respondent and his attorney in this matter. In addition, please attach a copy of this letter to the front of your brief.

The Board wishes to thank you for your help in this matter.

Sincerely,



Terry L. Smith
Paralegal Specialist

Enclosures: Redacted Immigration Judge's Decision
Redacted Department of Homeland Security's Appellate Brief

bcc: Respondent
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Attorneys for *Amici Curiae*

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA**

In the Matter of:)
)
L-T-)
)
In removal proceedings)
)
)
)

File No: Redacted

**BRIEF *AMICUS CURIAE* OF THE AMERICAN IMMIGRATION COUNCIL,
THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE
PENNSYLVANIA IMMIGRATION RESOURCE CENTER**

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On June 24, 2010, the Board of Immigration Appeals requested supplemental briefing to address various procedural issues regarding the treatment of mentally disabled respondents in removal proceedings. The Board granted *Amici Curiae*'s request for an extension until September 14, 2010. *Amici Curiae* American Immigration Council, American Immigration Lawyers Association and the Pennsylvania Immigration Resource Center respectfully submit the following in response to the Board's request. Section I of this *amicus* brief will address certain preliminary questions; section II will address questions 4, 6 and parts of questions 1, 2, 3 and 7 of the BIA's request; section III will address question 9 and parts of question 5; and section IV will address the remaining parts of question 5.

INTERESTS OF *AMICI CURIAE*

The American Immigration Council ("AIC") (formerly the American Immigration Law Foundation) was established in 1987 as a not-for-profit educational and charitable organization. AIC works to promote the just and fair administration of our immigration laws and to protect the constitutional and legal rights of immigrants, refugees and other non-citizens. To this end, AIC engages in impact litigation and appears as *amicus curiae* before administrative tribunals and federal courts in significant immigration cases on targeted legal issues.

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States and overseas. AILA's members regularly practice before the immigration courts and federal courts. AILA's members have a strong interest in ensuring that their clients' rights are protected by the Board of Immigration Appeals and the federal courts.

The Pennsylvania Immigration Resource Center (“PIRC”) is a non-profit legal services organization that provides legal information to non-citizens detained by the Department of Homeland Security (“DHS”) at the York County Prison and the Berks Family Shelter through a federal Legal Orientation Program contract. PIRC also provides pro bono referrals for indigent detainees as well as legal representation for survivors of torture and individuals with mental disabilities in removal proceedings at the York Immigration Court.

Amici Curiae have a substantial interest in the issues presented in this case as they impact whether non-citizens with mental disabilities are provided a meaningful opportunity to be heard during the removal adjudication process. In light of their extensive experience in immigration law and practice, *Amici Curiae* are well-placed to assist the Board in understanding the rights of non-citizens in removal proceedings and the challenges under the current statutory and regulatory framework, and to suggest an alternative to deciding all of the issues presented.

I. THE BOARD SHOULD NOT ISSUE A PUBLISHED DECISION IN THIS CASE, AND ITS DECISION SHOULD BE LIMITED TO THE FACTS PRESENTED.

Amici Curiae urge the BIA to decide this case in an unpublished decision and refrain at this juncture from setting forth broad policies and procedures regarding the treatment of mentally disabled respondents in removal proceedings. The BIA has requested supplemental briefing to address nine multi-part questions relating to procedures for adjudicating cases involving respondents with mental disabilities. These questions reflect an appreciation of the complexity of the issues and a desire to resolve what has been an unsettled, confusing and – for those involved – critically important

aspect of the removal adjudication process. Nonetheless, because mental incompetence arises in different degrees and affects individuals in different ways,¹ *Amici Curiae* believe that a single respondent's case, which does not raise fully all the issues that need to be resolved, is not the proper forum for deciding these complicated issues with such far-reaching implications. For the reasons discussed below, rulemaking procedures would be a more appropriate way to resolve these issues.

Just over a year ago, *Amici Curiae* and approximately sixty organizations and individuals wrote to Attorney General Eric Holder outlining proposed modifications to existing regulations and immigration court practices in removal proceedings for respondents with mental disabilities and requesting that the Department of Justice initiate a process for discussing these recommendations. *See* Letter to Eric Holder, Atty. Gen. (July 24, 2009), *available at* <http://www.legalactioncenter.org/sites/MentalDisability-7-24-09.pdf>. Specifically, the letter stated:

We strongly recommend that the DOJ revise and expand the existing regulations and policies regarding removal proceedings We therefore urge you to hold discussions on these recommendations with disability rights advocates, mental health professionals, legal experts, social service providers and legal professionals who represent non-citizens in removal proceedings, and other stakeholders.²

¹ *See* section III.B, *infra*, regarding this point, which was the basis for the Supreme Court's recent decision in *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

² In response to a subsequent inquiry from AILA about whether EOIR is considering the regulatory changes and other guidance recommended in this letter, EOIR said:

EOIR is committed to ensuring due process and fair treatment for all individuals in removal proceedings. EOIR is sensitive to the needs of vulnerable individuals, including respondents with mental disabilities, and works with the Department of Homeland Security to ensure fundamental fairness for all individuals in removal proceedings.

See AILA-EOIR Liaison Meeting Agenda Questions and Answers, at 2 (Oct. 28, 2009), *available at* <http://www.justice.gov/eoir/statspub/eoiraila102809.pdf>.

Id. Amici Curiae continue to believe that the appropriate course of action is to engage not only the immigration law community, but also disability rights advocates, mental health professionals and social service providers in a thoughtful discussion about these issues. A rulemaking process, with outreach to a broad spectrum of stakeholders and an opportunity for discussion and formal comments, is the appropriate mechanism for establishing procedures in this context.

EOIR has already taken some agency-wide steps to engage a broader community and address the challenges of protecting the rights of respondents with mental disabilities.

As EOIR reported in October 2009:

EOIR is presently focusing on providing training to all appropriate EOIR legal staff on mental health issues in removal proceedings. For example, at the recent 2009 EOIR Legal Training Conference, Dr. Melissa Piasecki led a training session that specifically focused on handling cases involving individuals with mental disabilities. EOIR is continuing to work with Dr. Piasecki to develop standards of competence in removal proceedings. We are also working with the National Judicial College to develop training on dealing with diverse populations in removal proceedings. Also, one resource addressing competency issues that is available to EOIR's legal staff is the article "Incompetent Respondents in Removal Proceedings," published in the April 2009 edition of the Immigration Law Advisor. In addition, through EOIR's Legal Orientation and Pro Bono program, EOIR is exploring how it might identify individuals with possible mental disabilities for referral to pro bono services.

See AILA-EOIR Liaison Meeting Agenda Questions and Answers, at 2-3 (Oct. 28, 2009), available at <http://www.justice.gov/eoir/statspub/eoiraila102809.pdf>. In addition, EOIR has expanded the Immigration Judge Benchbook (hereinafter "IJ Benchbook") to include a section focusing on mental health issues in immigration court. *See* Department of Justice, Executive Office for Immigration Review, Benchbook for Immigration Judges, "Mental Health Issues," available at <http://www.justice.gov/eoir/vll/benchbook/tools/MHI>.

DHS also has begun to discuss potential measures to protect the rights of detained respondents with mental disabilities. For example, in October 2009, Immigration and Customs Enforcement (“ICE”) issued a report, “Immigration Detention Overview and Recommendations,” authored by Dr. Dora Schriro, which recommended that ICE take steps to better identify and meet the medical needs of detainees with mental health issues. *See* Dept. of Homeland Security, Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations (2009), *available at* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. The report further stated that “ICE should develop specialized caseloads of aliens including those who are chronically, medically, or mentally ill or have been detained a significant length of time to improve case management and expedite removal, release or relief.” *Id.* at 22.

In addition, ICE has engaged stakeholders in its consideration of a plan to house some detainees with mental disabilities in a dedicated facility. On September 24, 2010, ICE and the DHS Office for Civil Rights and Civil Liberties will hold a “Mental Health Roundtable,” which will bring together legal advocates, medical professionals, disability rights advocates, and government officials to discuss how to identify persons with mental disabilities, how to care for them in detention facilities, and due process concerns affecting this population in the removal adjudication process. *Amici Curiae* also understand that DHS and DOJ are exploring an appointed counsel pilot project for respondents with mental disabilities, which – as discussed in section III – is critical to ensure that their removal hearings comport with due process.

Although these efforts are still in the preliminary stages and – as the questions posed by the BIA indicate – numerous questions and challenges remain, *Amici Curiae*

urge the Board to allow the ongoing consultations to continue. Initiating a formal rulemaking process regarding appropriate case adjudication procedures for respondents with mental disabilities should be the next step in this process. Not only is rulemaking preferable to adjudication given the complexity of the issues, the inadequacy of any one case as a forum to construct a comprehensive system that will be responsive to a variety of fact-specific variables, and the need to consult experts from outside the legal community, but such a process would allow EOIR to reassess and amend current regulations. As noted throughout this brief and discussed most prominently in section IV, current regulations have proven inadequate, unworkable, and potentially in conflict with due process and the ethical obligations of lawyers. The instant case can be resolved in an unpublished decision affirming the Immigration Judge's termination of proceedings, as explained in section II. However, more deliberation and discussion are required before finalizing far-reaching policies and procedures governing the adjudication of removal cases for respondents with mental disabilities.

II. WHERE, AS HERE, DHS PREVENTS THE IMMIGRATION JUDGE FROM DETERMINING WHETHER ADDITIONAL SAFEGUARDS ARE NEEDED, TERMINATION OF PROCEEDINGS IS APPROPRIATE.

In the case at bar, the Immigration Judge made every effort to prescribe safeguards to protect the respondent's right to a fair hearing, as required by section 240(b)(3) of the Immigration and Nationality Act ("INA"). *See* section III.B, *infra*. After establishing, based upon L-T-'s conduct during the hearing and reports from his lawyer, that the respondent was unable to participate meaningfully in the proceedings or to communicate effectively with counsel, the Court properly called for an evaluation of L-T-'s mental competency. Decision and Order of the Immigration Judge ("I.J.

Decision”) at 2. Such an evaluation is a prerequisite for application of 8 C.F.R. § 1240.4, which obligates an Immigration Judge to afford specific procedural protections to at least some detainees with serious mental disabilities.³ Six months later, following repeated delays in arranging for the requested examination, DHS refused to comply with the Court’s subsequent order to provide a copy of the examination report to the Court and the respondent’s counsel.⁴ I.J. Decision at 2.

DHS suggests in its appeal brief that it had no obligation to provide the Court with the evaluation report. DHS argues that respondent’s counsel could seek to obtain the report by filing a Freedom of Information Act request with the Department of Immigration Health Services. DHS Opening Appeal Brief (“DHS Brief”) at 6. However, requiring this step to obtain the evaluation would only promote further delay and prolong the respondent’s detention.

DHS also suggests that the Health Insurance Portability and Accountability Act barred production of the report. DHS Brief at 5-6. However, as the Immigration Judge’s decision explains, that statute does not prohibit DHS from releasing the respondent’s mental competence evaluation to the Court or the respondent’s counsel. I.J. Decision at 6, n.6. Even if the evaluation had been confidential or particularly sensitive, DHS could have submitted it under seal. *See id.* at 5, n.4.

³ While the Court’s request for a mental competency examination was proper under these circumstances, *Amici* believe that the examination should have been conducted by an independent psychiatrist, psychologist, licensed clinical social worker, or comparable mental health professional with appropriate experience rather than DHS, the agency that was seeking to remove the respondent from the United States.

⁴ Regarding the Court’s authority to order the production of the report, *see* INA § 240(b)(1) (permitting the immigration judge to issue subpoenas for the attendance of witnesses and presentation of evidence).

DHS also incorrectly argues that the requested mental evaluation was “an unnecessary procedure, particularly in light of the Department’s concession that the respondent is mentally incompetent, as well as the availability of a legal representative to act on his behalf” DHS Brief at 13. As discussed in section III.B, *infra*, mental incompetence is not a unitary concept, with the result that it may manifest itself differently depending on the circumstances and individuals involved. *See Indiana v. Edwards*, 128 S. Ct. 2379, 2386 (2008). Accordingly, mentally incompetent respondents have a range of capabilities and needs, and the procedural safeguards required under INA § 240(b)(3) vary from case to case. Thus, notwithstanding DHS’s concession that L-T- was mentally incompetent, a mental evaluation was still necessary. Moreover, as discussed in section IV, legal representation, while essential, may not be sufficient to ensure a fair hearing.⁵ Where a respondent is so severely incapacitated that he can neither communicate with his lawyer nor participate meaningfully in his removal proceedings, the appointment of a guardian, next friend or relative may also be required. If the requisite procedural safeguards are unavailable, termination of proceedings is the only appropriate course of action. *See* 8 C.F.R. § 245.1(c)(8)(ii)(D).

⁵ The stakes in L-T’s case were particularly high because the respondent’s conduct suggested that he wished to waive his right to counsel. Without an understanding of the respondent’s mental capacity, the Court could not assess whether the apparent waiver was “voluntary, knowing, and intelligent.” *See* 8 C.F.R. § 1003.25(b); *cf. McKaskle v. Wiggins*, 465 U.S. 168, 178-79 (1984) (appointment of standby counsel over self-represented defendant’s objection is permissible).

III. THE IMMIGRATION AND NATIONALITY ACT (“INA”) REQUIRES IMMIGRATION JUDGES TO APPOINT COUNSEL FOR UNREPRESENTED RESPONDENTS IN REMOVAL PROCEEDINGS WHO ARE NOT COMPETENT TO REPRESENT THEMSELVES.⁶

A. All Non-Citizens, Including Those with Mental Disabilities, Have a Right to a Full and Fair Hearing.

Non-citizens’ due process rights in removal proceedings are protected by the Fifth Amendment to the United States Constitution. *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985). In this context, due process requires the government to provide respondents a full and fair hearing. *See Cinapian v. Holder*, 567 F.3d 1067, 1073 (9th Cir. 2009); *Matter of D-*, 20 I. & N. Dec. 827, 831 (BIA 1994). Section 240 of the INA dictates that respondents in removal proceedings be afforded a fair hearing; specifically, it sets forth the requirements that a respondent have a reasonable opportunity to examine adverse evidence, present favorable evidence, and cross-examine government witnesses. INA § 240(b)(4)(B); *see also* 8 C.F.R. § 1240.10(a)(4).

To carry out these tasks, an unrepresented respondent must be competent to understand and participate in the proceedings. *See, e.g., Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 809 (9th Cir. 2003) (holding, in the context of post-conviction habeas proceedings, that the “capacity to communicate remains a

⁶ The authors of this brief defer to other *Amici* with expertise in psychiatry, psychology and disability rights regarding the standard of competence that would render a respondent unable to proceed *pro se*, the circumstances that should trigger a competency assessment, and the procedures for carrying out such an assessment. Despite the reference in the immigration regulations to “incompetent” respondents, neither the regulations nor existing BIA precedent define this term. Case law from other contexts makes clear that removal adjudication procedures must distinguish between people incompetent to proceed *pro se* and people incompetent to proceed at all, even with the assistance of counsel. *See Indiana v. Edwards*, 128 S. Ct. 2379.

cornerstone of due process”). Yet some respondents, because of their mental disabilities, will be unable to understand the charges against them, recall relevant biographical facts, testify credibly, compile evidence, and cross-examine witnesses without the assistance of an attorney. *See* Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System*, at 25-31 (Jul. 25, 2010), available at <http://www.hrw.org/en/reports/2010/07/26/deportation-default-0>. Without counsel, these vulnerable individuals will be deprived of a meaningful opportunity to be heard. Moreover, removal proceedings are adversarial, and DHS appoints trial attorneys to represent its interests. This only exacerbates the imbalance of power between DHS and an unrepresented incompetent respondent.

B. The INA Prescribes Safeguards for Mentally Incompetent Respondents, Which Must Include Counsel.

The INA charges the Attorney General with “prescrib[ing] safeguards to protect the rights and privileges” of any respondent whose mental incompetence makes it impracticable for him or her to be present at removal hearings. *See* INA § 240(b)(3); *cf.* *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) (comparing the ban against trials of those incapable of understanding the nature and object of proceedings to the ban against trials in absentia). Although several regulations acknowledge the need for safeguards for “incompetent” respondents, *see, e.g.*, 8 C.F.R. § 103.5a(c)(2)(ii) (obligating DHS to ensure alien is competent to accept service of Notice to Appear); 8 C.F.R. § 1240.10(c) (precluding the Immigration Judge from accepting an admission of removability from an incompetent, unrepresented respondent under certain circumstances), no regulation either requires or forecloses the appointment of counsel as a safeguard in certain cases.

As the Supreme Court recently noted, “[m]ental illness is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.” *Indiana v. Edwards*, 128 S. Ct. at 2386. Just as in the criminal context described in *Edwards*, an individual in removal proceedings may be sufficiently competent to work with an attorney to present his case, but may not have the mental capacity to represent himself. *Id.* In the removal context, the Immigration Judge must, at a minimum, appoint counsel to protect the statutory and constitutional due process rights of respondents whose mental disabilities would otherwise preclude meaningful participation in their removal hearings. As discussed in section IV, *infra*, additional procedural safeguards, including the appointment of a guardian, friend or relative, may also be required for detainees who are so severely impaired that they cannot meaningfully participate in their removal proceedings even with the assistance of an attorney.

Congress, recognizing the importance of counsel in removal proceedings, provided that non-citizens have a statutory right to 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.

INA § 292; *see also* INA § 240(b)(4)(A). The legislative history of section 292 of the INA confirms that Congress intended to confer a *right*. *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (citing H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1712).

While this statutory provision does not confer a right to appointed counsel, it also does not preclude an Immigration Judge from finding that due process requires the appointment of counsel to preserve fundamental fairness in cases where an unrepresented respondent is not competent to proceed *pro se*. Indeed, some federal courts have recognized that appointed counsel may be required to assist certain non-citizens in removal proceedings. *See, e.g., Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004) (holding in the context of unaccompanied minors in removal proceedings that “[a]bsent a minor’s knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel”); *Escobar Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) (“The Fifth Amendment guarantee of due process applies to immigration proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel despite the prohibition of section 292.”) (internal citations omitted); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975) (“The test for whether due process requires the appointment of counsel for an indigent alien is whether, in any given case, the assistance of counsel would be necessary to provide ‘fundamental fairness—the touchstone of due process.’”) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)); *United States v. Torres-Sanchez*, 68 F.3d 227, 230-31 (8th Cir. 1995) (“in some circumstances, depriving an alien of the right to counsel may rise to a due process violation”); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (“an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment” because, in some cases, “the laws and regulations determining [an alien’s] deportability [a]re too complex for a pro se alien”) (internal citations omitted).

The Supreme Court has recognized a similar need in various civil contexts where, as here, the deprivation of liberty is at stake. *See, e.g., In re Gault*, 387 U.S. 1, 41 (1967) (finding due process requires appointment of counsel for juveniles in civil delinquency proceedings); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (appointment of counsel may be required in probation revocation hearing). *See also Lassiter v. Dept. Social Servs.*, 452 U.S. 18, 25 (1981) (appointment of counsel may be required in parental rights termination proceedings even where physical liberty is not at stake). In each of these cases, the central question was whether “fundamental fairness” required the appointment of counsel. *See, e.g., Lassiter*, 452 U.S. at 26; *Gagnon*, 411 U.S. at 790. Here, a respondent with a mental disability faces prolonged detention and potential banishment from this country. Given these potential deprivations of liberty, the government must not be permitted to pursue a removal case against *pro se* respondents who do not have the capacity to represent themselves.⁷

C. The INA Does Not Prohibit the Appointment of Paid Counsel Where Necessary To Protect Due Process Rights of Indigent Respondents.

Nothing in the INA, including section 292, prohibits the appointment of paid counsel to selected individuals whose procedural rights under the statute would otherwise be compromised. The plain language of this section affords a person the right to representation by a lawyer of his or her choice, but does not establish a right to a paid lawyer. Importantly, the parenthetical “at no expense to the Government” describes only this right to representation and does not serve as

⁷ Although the Board and numerous courts of appeals have allowed removal proceedings to go forward against incompetent respondents, the vast majority of these cases involved individuals who were represented by counsel. *See, e.g., Wong v. INS*, 550 F.2d 521, 522 (9th Cir. 1977) (petitioner represented by counsel and accompanied by state court appointed conservator who testified on his behalf).

an affirmative limitation on the government’s authority to appoint paid counsel.

Accord Escobar Ruiz v. INS, 838 F.2d 1020, 1028 (9th Cir. 1988) (en banc).

Moreover, INA § 240(b)(3) requires safeguards to protect the “rights and privileges” of incompetent respondents incapable of proceeding *pro se*, which – as discussed above – include the privilege of being represented by counsel.

A federal agency is permitted to spend generally appropriated funds if it “is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of the function, and if it is not otherwise prohibited by law.” *See* 66 Comp. Gen. 356, at *8 (1987) (discussing the federal agency expenditures statute, 31 U.S.C. § 1301(a)). Paid counsel for respondents with mental disabilities is necessary and contributes materially to the immigration court’s adjudicatory function. Not only would paid counsel increase efficiency and expedite the immigration court process, but it would enable immigration judges to comply with the dictates of due process and INA § 240.⁸

⁸ Because many respondents with mental disabilities are detained, paid counsel would not only help to streamline the court’s docket, but would also shorten detention periods and thereby reduce the cost on the government. *See* American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Proceedings*, at 40 (February 2010), available at http://new.abanet.org/Immigration/PublicDocuments/aba_complete_full_report.pdf. (explaining that *pro se* litigants can cause delays in proceedings and thus impose a substantial financial burden on the government; in contrast, “. . . the presence of competent, well-prepared counsel on behalf of both parties helps to clarify the legal issues and allows courts to make more principled and better informed decisions . . . and speed the process of adjudication . . .”) (internal citations omitted); Letter to Eric Holder, Atty. Gen. (July 24, 2009), available at <http://www.legalactioncenter.org/sites/MentalDisability-7-24-09.pdf> (explaining that many respondents will remain in detention for many months while their cases are on hold because the Immigration Judge will not accept admissions of removability from mentally

To the extent that 5 U.S.C. § 3106 has been interpreted to bar the appointment of paid counsel to respondents in removal proceedings,⁹ *Amici Curiae* submit that such an interpretation is indefensible. Section 3106 requires federal agencies to refer to the Department of Justice (“DOJ”) any litigation in which the U.S. government, a government agency or employee is a party and precludes agencies from employing other counsel. It states:

Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

5 U.S.C. § 3106. This provision was intended to centralize litigation authority within the federal government and make DOJ the chief litigator for the United States. *See The Attorney General’s Role as Chief Litigator For the United States*, 6 Op. O.L.C. 47 (Jan. 4, 1982).

5 U.S.C. § 3106 has no bearing on the appointment of paid counsel for respondents in removal proceedings. Appointed lawyers would not be “employed” by the government because they would not be supervised by a government official. *See* 5 U.S.C. § 2105 (defining an “employee” as an individual who has been appointed in the civil service by, and acts under the supervision of, one of a number of enumerated government officials); *cf.* 44 Comp. Gen. 605 (Apr. 2, 1965) (stating that attorneys

incompetent respondents without representation; the result is an increase in healthcare and litigation costs).

⁹ *See* Memorandum from David Martin, General Counsel, to T. Alexander Aleinikoff, Executive Associate Commissioner, Programs, “Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings” (Dec. 21, 1995) (reading 5 U.S.C. § 3106 in conjunction with INA § 292 as prohibiting the appointment of paid counsel for respondents in deportation proceedings).

appointed to represent indigent defendants under the Criminal Justice Act of 1964 and who have received compensation for such service have not established an employer-employee relationship with the government). A lawyer appointed to handle removal proceedings would also not be representing the government's interests. In any case, section 3106 applies only to "litigation," meaning federal court litigation and has no bearing on administrative proceedings such as removal hearings.¹⁰

IV. THE BOARD MUST RECOGNIZE THAT CURRENT REGULATIONS, WHICH FAIL TO DISTINGUISH THE ROLES OF LEGAL REPRESENTATIVES FROM OTHERS AUTHORIZED TO APPEAR ON BEHALF OF INCOMPETENT RESPONDENTS, ARE INHERENTLY FLAWED.

Current regulations confuse the important role that lawyers play in representing respondents whose mental disabilities preclude them from proceeding *pro se* – which, as explained above, is critical to ensure a fair hearing – with the non-specialized support provided by guardians, relatives, friends and custodians. Although the assistance provided by guardians, relatives and friends may be helpful or even indispensable to provide due process for incompetent respondents, it cannot substitute for legal representation. In addition, the appointment of a custodial officer to appear on behalf of an incompetent respondent, which creates an irreconcilable conflict of interest, is inappropriate under any circumstances.

A. An Attorney Plays a Fundamentally Different Role than a Guardian, Friend or Relative Authorized to Appear on a Respondent's Behalf.

While an attorney helps a litigant to understand the proceedings and make more informed choices, a guardian or other individual acting in this role exercises decision

¹⁰ An alternative reading of "litigation" which included administrative proceedings would mean that DHS attorneys would have no authority to represent DHS at removal hearings.

making authority in the place of a litigant who does not have the capacity to make decisions alone. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990) (finding in the habeas corpus context, that a “next friend” may represent the interest of a party only after providing “an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf” and “must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate”) (internal citations omitted). The Model Rules of Professional Conduct specifically distinguish the function of an attorney, who is tasked with a client’s legal representation, from that of “family members or other persons,” who may exercise decision making authority on behalf of a client with mental disabilities under particular circumstances. *See* Model Rules of Prof’l Conduct R. 1.14 cmt, *available at* http://www.abanet.org/cpr/mrpc/rule_1_14_comm.html. Some sections of the immigration regulations make similar distinctions. *See, e.g.,* 8 C.F.R. § 103.2(a)(2) (permitting a legal guardian to sign an application or petition for a mentally incompetent person); 8 C.F.R. § 103.2(a)(3) (specifying that an applicant or petitioner may be represented by an attorney or BIA accredited representative).

The Board and the Attorney General have erected a comprehensive, complex, and sophisticated system governing the practice of attorneys appearing before them. *See* 8 C.F.R. §§ 292.3, 1003.101-108. The primary purpose of these regulations is to set standards and protect the public from practitioners who fail to meet those standards. *See* Professional Conduct for Practitioners – Rules and Procedures, 65 Fed. Reg. 39513, 39514 (June 27, 2000). Because guardians, friends and relatives are not subject to the

same regulatory framework, it would be incongruous to allow such individuals to provide legal representation in immigration court.

Given the different skills and obligations of guardians and attorneys, many courts have found that guardians are not qualified to provide legal representation. *See, e.g., Johns v. County of San Diego*, 114 F.3d 874, 876-877 (9th Cir. 1997) (holding that a minor could not be “represented” by a non-attorney acting as a guardian in a federal civil proceeding, and stating that “[i]t goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.”) (internal citations omitted); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972) (rejecting, in involuntary commitment context, the “state’s contention that appointment of a guardian ad litem may displace a requirement of appointed counsel” and finding it “apparent...that appointment of a guardian *ad litem* cannot satisfy the constitutional requirement of representative counsel”), *vacated and remanded on other grounds by Schmidt v. Lessard*, 414 U.S. 473 (1974); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Haw. 1976) (“appointment of a guardian *ad litem* is not a substitute for appointment of counsel”), *rev’d in part on other grounds by Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980). For the same reasons, friends and relatives do not have the requisite qualifications to provide legal representation.

Further, some respondents who suffer from mental illness have the capacity to decide what is in their best interests even though they are not competent to represent themselves. While such respondents cannot represent themselves in removal proceedings, they also should not be forced to give up their decision making authority.

See Indiana v. Edwards, 128 S. Ct. at 2386 (holding that because “[m]ental illness itself is not a unitary concept,” defendant could be competent to plead guilty but not to represent himself at trial). In such cases, the appointment of a third party to appear on a respondent’s behalf would undermine due process. *See, e.g., Neilson v. Colgate-Palmolive Co.*, 199 F. 3d 642, 651 (2d. Cir. 1999) (“Because a litigant possesses liberty interests in avoiding the stigma of being found incompetent and in retaining personal control over the litigation, the Due Process Clause of the Fifth Amendment limits the district court’s discretion with respect to the procedures used before appointing a guardian ad litem.”) (internal citations omitted); *In re Guardianship of Reyes*, 152 Ariz. 235, 236 (Ariz. Ct. App. 1986) (“The appointment of a guardian often involves significant loss of liberty similar to that present in an involuntary civil commitment for treatment of mental illness where constitutionally proof must be by clear and convincing evidence.”).

However, a respondent’s mental capacity may be so limited as to preclude him from effectively consulting with his counsel, understanding the proceedings against him, and assisting in the preparation of his case. Under these circumstances, appointment of a guardian, next friend or relative – in addition to a lawyer – may be necessary to ensure a fair hearing. In cases involving severely impaired individuals, the representation of such respondents by attorneys without the participation of a guardian may create serious ethical dilemmas for attorneys. In cases where respondents are unable to make decisions or effectively communicate their preferences and goals, an attorney is ethically prohibited from substituting her own judgment for that of her client. Model Rules of Prof’l Conduct R. 1.14(b), *available at* http://www.abanet.org/cpr/mrpc/rule_1_14.html. Without clear guidance, however, an attorney’s obligation to provide zealous representation may be

nearly impossible to fulfill. *See* 8 C.F.R. § 1003.102. Under these circumstances, the ABA Model Rules explicitly permit an attorney to “take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.” Model Rules of Prof’l Conduct R. 1.14(b), *available at* http://www.abanet.org/cpr/mrpc/rule_1_14.html. By suggesting in its appeal brief that the Immigration Judge should have required L-T’s counsel to proceed despite his inability to communicate with his client, DHS Brief at 11, DHS appears to condone unethical conduct.

To protect the interests of respondents who lack the mental capacity to consent or object to the appearance of third parties on their behalf, Immigration Judges should follow the example of federal court judges by examining the qualifications and motivations of individuals appearing as guardians, next friends or relatives in immigration proceedings. *See Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (explaining, in the habeas context that “‘next friend’ standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another” as certain prerequisites must be met); *Vargas v. Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (finding mother successfully met prerequisites of “next friend” to a son when she presented evidence of his mental incapacity and because she represented his “best interests”). Even in the absence of clear guidance as to the requisite qualifications of individuals acting in these capacities, Immigration Judges have implicit authority to question their fitness under INA § 240(b)(3).

B. Current Regulations Blur the Distinctions Between the Roles of Attorneys and Third Parties Appearing on Behalf of Respondents.

Under 8 C.F.R. § 1292, only the following individuals may represent respondents in removal proceedings: attorneys, certain law students and law graduates not yet admitted to the bar, certain reputable individuals of good moral character who have a pre-existing relationship with the respondent and appear without remuneration, representatives accredited by the Board, and certain accredited officials of the foreign government to which the respondent owes allegiance. 8 C.F.R. § 1292.1(a); *see* 8 C.F.R. § 1240.3 (“The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292.”); *see also* *Toban v. Ashcroft*, 385 F.3d 40, 46 n.7 (1st Cir. 2004) (reasoning that a non-lawyer was probably ineligible to represent the respondent because he did not fulfill the requirements of 8 C.F.R. § 1292).

Yet, another regulation, 8 C.F.R. § 1240.4, seems to blur the line between a legal representative and a guardian, next friend or relative appearing on behalf of a respondent.

This regulation states:

§ 1240.4 Incompetent respondents. When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

To the extent that 8 C.F.R. § 1240.4 permits a lawyer or a legal representative to speak *for* a respondent whose mental incompetence prevents him or her from participating in the hearing,¹¹ the regulation conflicts with the lawyer’s ethical obligation to consult with

¹¹ Notably, 8 C.F.R. § 1240.43, which applies to proceedings commenced prior to April 1997, permits only a guardian, near relative or friend to appear on behalf of a mentally incompetent respondent.

the client regarding the goals of the representation and thereby deprives the respondent of a fair hearing. *See* Model Rules of Prof'l Conduct R. 1.4, *available at* http://www.abanet.org/cpr/mrpc/rule_1_4.html (governing client-attorney communication); 8 C.F.R. § 1003.102(r)(2) (grounds for sanctions include failing to consult “with the client about the means by which the client’s objectives are to be accomplished”). Conversely, to the extent that this regulation may be construed to allow a guardian, relative or friend to serve as a legal representative, it conflicts with 8 C.F.R. § 1292. Both possible readings bolster the argument in section I, *supra*, that new rulemaking is long overdue.

C. Permitting a Custodial Officer To Appear on Behalf of an Incompetent Respondent Would Create an Irreconcilable Conflict of Interest and Violate Due Process.

Another particularly problematic aspect of 8 C.F.R. § 1240.4 is that it allows the “custodian” to act on behalf of the respondent. The regulations are ambiguous as to whether this “act[ion]” refers to legal representation or instead to action as a guardian, but in either case, it is inappropriate. Immigrants detained by DHS are held in facilities operated by DHS, a state or local government, or a private company. In any of these situations, the custodian is either employed by DHS or acting under contractual authority to detain on behalf of DHS, the very agency seeking the respondent’s removal. Under these circumstances, the appearance of a custodian on the respondent’s behalf would create an irreconcilable conflict of interest, destroy the respondent’s trust in the individual appearing on his behalf, and thereby undermine the integrity of the adjudicative process. *See* 8 C.F.R. § 1003.102(n) (prohibiting “conduct that is prejudicial

to the administration of justice or undermines the integrity of the adjudicative process”).¹²

Also problematic is that custodial officers, like most guardians, next friends and relatives, are generally not licensed to practice law or familiar with the complexities of immigration law. Without the requisite training, custodial officers would be hard-pressed to provide competent representation, assuming that the regulation refers to legal representation. *See* 8 C.F.R. § 1003.102(o) (authorizing sanctions against lawyers who do not provide “competent representation,” which requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” as well as an “inquiry into and analysis of the factual and legal elements of the problem . . .”).

The recently released supplement to the IJ Benchbook, which addresses issues arising in cases where respondents have mental health issues, encourages immigration judges to “take steps to ensure fundamental fairness inheres,” including the option of terminating proceedings. Department of Justice, Executive Office for Immigration Review, Benchbook for Immigration Judges, “Mental Health Issues,” available at <http://www.justice.gov/eoir/vll/benchbook/tools/MHI>. The IJ Benchbook specifically mentions instances where a custodian appears on behalf of an incompetent respondent:

[I]t remains an open question under the Fifth Amendment Due Process Clause whether proceedings could be terminated to assure fundamental fairness where an alien is severely or profoundly incompetent, and no person can be identified to protect his or her interests other than a DHS custodian.

¹² PIRC makes note of the practice at the York County Prison which prohibits correctional officers from serving as witnesses when inmates wish to notarize documents with a third party witness or as witnesses on behalf of immigrant detainees in removal proceedings. Such practice, regardless of whether it derives from official policy, underscores the hypocrisy of permitting correctional officers to appear on behalf of respondents in the same context where they are prohibited from serving as lay witnesses.

Id. Because the appearance of a DHS custodian on a respondent's behalf would pose an irreconcilable conflict of interest, *Amici Curiae* contend that termination of proceedings would be the only course of action that would comport with the requirements of due process in the rare circumstances where no alternative guardian is available.

CONCLUSION

For the foregoing reasons, *Amici Curiae* American Immigration Council, American Immigration Lawyers Association, and Pennsylvania Immigration Resource Center respectfully request that the BIA affirm the Immigration Judge's decision to terminate proceedings in *Matter of L-T*.

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PROOF OF SERVICE

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Attachment D

UP AGAINST THE ASYLUM CLOCK

Fixing the Broken Employment Authorization Asylum Clock



Prepared by Jesús Saucedo and David Rodríguez,
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II. Introduction

The Center for Immigrants' Rights at the Penn State Dickinson School of Law (Center) and the American Immigration Council's Legal Action Center (LAC) collaborated to write this report on the asylum clock. The goals of the report are: (1) to identify problems with the government's management of the Employment Authorization Document (EAD) asylum clock; and (2) suggest a new policy for operation of the EAD asylum clock. The report incorporates information obtained by the Center and the LAC and analyzes information from attorneys, organizations, and individuals about their experiences with the "asylum clock."

Penn State's Center for Immigrants' Rights is an immigration clinic that works to promote a modernized immigration system through representation of immigrant advocacy organizations. The mission of the Center is to represent immigrants' interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community. The Legal Action Center of the Immigration Council advocates for fundamental fairness in immigration law through targeted legal work. One of these targeted issues is the EAD asylum clock. The LAC also works with other immigrants' rights organizations and immigration attorneys across the United States to promote the just and fair administration of our immigration laws.

This paper was written by Penn State Law students David G. Rodríguez and Jesús E. Saucedo under the supervision of the Center's director, Shoba Sivaprasad Wadhia. Invaluable guidance and review were provided by LAC staff attorney Emily Creighton and LAC's Executive Director Nadine Wettstein. The LAC and Center are very grateful to immigration attorneys from Baltimore, MD, New York, NY, Chicago, IL, Los Angeles, CA, Boston, MA, Denver, CO, Seattle, WA, St. Paul, MN, Houston, TX, and Salt Lake City, UT for sharing their expertise in and experiences with the EAD asylum clock. We also thank staff at USCIS's Asylum Division and EOIR for generously providing us with information about the EAD asylum clock.

While asylum applicants are waiting for their cases to be adjudicated, they must also wait to be eligible for employment authorization. The EAD asylum clock potentially affects more than 50,000 asylum applicants every year.¹ During this time, many must support themselves or rely on others for financial assistance. However, the government's current administration of the EAD asylum clock causes asylum applicants to encounter excessive delays in receiving work authorization and in some instances, results in them never receiving one at all. Some applicants eventually are forced to work without authorization at the risk of exploitation or rely on others while they wait for a decision on their asylum case. Work authorization allows asylum applicants to support themselves and their families independently and with dignity. Improving the current asylum clock system will ensure that asylum applicants become eligible for employment

¹ See EOIR FY 2008 Asylum statistics (2008), <http://www.justice.gov/eoir/efoia/FY08AsyStats.pdf> (In 2008, there were 47,459 applicants); TRAC Immigration Affirmative Asylum Cases Received and Completed by USCIS (2004), <http://trac.syr.edu/immigration/reports/159/include/rep159table1.html> (Between 2000 and 2004 there were 250,929 applicants.). See also Department of Homeland Security Yearbook of Immigration Statistics, <http://www.dhs.gov/files/statistics/publications/YrBk08RA.shtm>; EOIR Statistics, Publications and Manuals, <http://www.justice.gov/eoir/efoia/foiafreq.htm>.

authorization without unnecessary delays and closer to the timeframe outlined in the Immigration and Nationality Act (INA).

III. Executive Summary

Until 1994, asylum applicants could file an application for asylum and work authorization concurrently, and INS could authorize employment for up to one year.² In 1994, the Department of Justice's (DOJ) Immigration and Naturalization Service (INS) amended the regulations to require asylum applicants to wait 150 days after filing a completed asylum application before applying for an EAD.³ The INS then had 30 days to adjudicate the EAD application and could not issue an EAD until the asylum application had been pending for 180 days or more.⁴ This waiting period for applicants to obtain work authorization became known as the EAD asylum clock.

In 1996, Congress amended the Immigration and Nationality Act by codifying the 180-day waiting period for EAD applications.⁵ Congress also implemented a 180-day case completion deadline for Immigration Judges (IJs) to adjudicate asylum applications.⁶ These changes created a 180-day timeframe in which USCIS and EOIR⁷ should endeavor to complete an asylum application.

USCIS and EOIR operate as if there were only one asylum clock. However the INA created two clocks: the asylum adjudication clock and the EAD asylum clock. The asylum adjudication clock measures the number of days an asylum claim has been pending adjudication.⁸ The EAD asylum clock measures the number of days after an applicant files an asylum application before the applicant is eligible for work authorization.⁹ The EAD asylum clock and the asylum adjudication clock usually are known jointly as the "asylum clock."¹⁰ The 180-day period is referred to as the 180-day clock (KLOK) by USCIS.¹¹

² 8 C.F.R. § 274a.12(c)(8) (1994). *See also* 8 C.F.R. § 208.7 (1994).

³ 8 C.F.R. § 208.7 (1994).

⁴ The Homeland Security Act of 2002 abolished the INS and moved its functions to the Department of Homeland Security (DHS). DHS is divided into three components, the United States Citizenship and Immigration Services (USCIS), United States Customs and Border Protection (CBP), and United States Immigration and Customs Enforcement (ICE). After the reforms the Department of Justice retained control over EOIR. *See* RICHARD A BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 19, (Stephanie L. Browning ed., American Immigration Lawyers Association Publication, 2009).

⁵ Immigration & Nationality Act (INA) § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

⁶ INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009).

⁷ EOIR is responsible for adjudicating immigration cases. The Office of the Chief Immigration Judge, the BIA, and the Office of the Chief Administrative Hearing Officer comprise the adjudicatory offices of EOIR.

⁸ "In [the] absence of exceptional circumstances, final administrative adjudication of the asylum application, not including an administrative appeal, shall be completed within 180 days after the date an application is filed." *See* INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009).

⁹ "An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization [EAD] prior to 180 days after the date of filing of the application for asylum." INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

¹⁰ American Immigration Law Foundation's Legal Action Center, *Practice Advisory, Employment Authorization and Asylum: Strategies to Avoid Stopping the Asylum Clock* 3 (2006), *available at*

USCIS's and EOIR's interpretation and application of the EAD asylum clock create many problems for practitioners and asylum applicants. Under the current system, both asylum officers (AOs) and IJs have the power to stop the EAD asylum clock for any delay in the adjudication process that the judge or AO determines was requested or caused by the applicant.¹² Although there are fewer reports of such problems at USCIS, asylum officers do improperly stop the clock. When IJs and AOs improperly stop the EAD asylum clock, applicants wait much longer than 150 days before they are eligible to apply for work authorization. Often the clock is stopped indefinitely.

This report focuses on the most common problems highlighted by practitioners and immigration advocates: (1) a lack of transparency in the management of the clock; (2) a lack of clarity and comprehensiveness of the government's clock policy; (3) misinterpretation of the regulations governing the clock; (4) improper implementation of the government's clock policy; and (5) problems associated with EOIR's case completion goals. These categories describe the areas of deficiency in the policy governing the functioning of the EAD asylum clock.

This report also recommends solutions to these problems. The chief recommendation is that EOIR develop better policy that is consistent with the regulations, and issue a new Operating Policies and Procedures Memorandum (OPPM) that reflects that policy.

The new EOIR policy must do five things: (1) treat the asylum clock as two separate clocks, an asylum adjudications clock and an EAD asylum clock – the two clocks should operate independently and sometimes stop at different times and for different reasons; (2) correctly interpret “delay requested or caused by the applicant” in 8 CFR § 208.7(a)(2) and 8 CFR § 1208.7(a)(2); (3) require that decisions to stop the EAD asylum clock be made on the record; (4) develop clear guidelines detailing when IJs should stop and re-start the EAD asylum clock; and (5) create a clear and consistent process for internally appealing or contesting an IJ's application of the EAD asylum clock.

EOIR should widely disseminate information about the new policy among EOIR personnel, asylum applicants, and their representatives; and should provide training to EOIR personnel on the substantive and procedural changes.

Similarly, USCIS should also implement a policy correctly interpreting the regulations relevant to the EAD asylum clock. USCIS should disseminate this policy widely. In addition, USCIS should develop a system to resolve disputes over the implementation of the asylum clock; develop ways to better transfer jurisdiction over the EAD asylum clock to EOIR; and better inform applicants about the status of their EAD asylum clock.

http://www.americanimmigrationcouncil.org/sites/default/files/lac_pa_022806.pdf [hereinafter AILF Practice Advisory].

¹¹ U.S. Citizenship and Immigration Services, Refugee, Asylum, and International Operations Directorate, Affirmative Asylum Procedures Manual 90 (2007), available at <http://www.uscis.gov/files/natedocuments/AffirmAsyManFNL.pdf> [hereinafter Affirmative Asylum Manual].

¹² 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

Lastly, we recommend that the government appoint a task force made up of EOIR staff, USCIS staff, nongovernmental organizations, and private attorneys to discuss and implement the new policies and procedures outlined in this report.

IV. Background and Legal Authority

A. Background of the Asylum Clock

Procedures for an asylum application are governed by both regulation and statute, specifically Title 8 of the Code of Federal Regulations and the Immigration and Nationality Act.¹³ Under the INA, to be eligible for asylum an applicant must show either past persecution or a well-founded fear of future harm on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁴ There are three contexts in which asylum applications can be filed.¹⁵ A noncitizen in valid nonimmigrant status can file an affirmative application for asylum with USCIS.¹⁶ A noncitizen in expedited removal proceedings can file an asylum application as a defensive action.¹⁷ A noncitizen in regular removal proceedings can file a defensive asylum application with an IJ.¹⁸

The EAD asylum clock was created in response to increasing numbers of asylum applications in the late 1980s and early 1990s.¹⁹ In fiscal year (FY) 1991, INS received 56,310 asylum applications, but completed only 16,552.²⁰ By FY 1994, the number of asylum applications dramatically increased to 143,225, and INS decided less than a third of that number.²¹ This gap contributed to a backlog of over 400,000 asylum applications by the end of 1994.²² Critics charged that many of these applications were submitted by applicants in order to obtain EADs and not for obtaining asylum.²³ Prior to 1994, it was relatively easy for asylum applicants to obtain EADs. Applicants were not required to wait 150 days before applying for work authorization.²⁴ Asylum applicants could file for asylum and an EAD concurrently, and

¹³ 8 C.F.R. § 208.1; 8 C.F.R. § 1208.1 (2009); INA § 208, 8 U.S.C. § 1158 (2009).

¹⁴ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2009); INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2009).

¹⁵ CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 34.02 (2009).

¹⁶ GORDON ET AL., *supra* note 15, § 34.02. *See* INA § 208(a), 8 U.S.C. § 1158(a) (2009); 8 C.F.R. § 208.11(a); 8 C.F.R. § 1208.11(a) (2009).

¹⁷ GORDON ET AL., *supra* note 15 § 34.02. *See* INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (2009); 8 C.F.R. § 208.4(b)(2); 8 C.F.R. § 1208.4(b)(2) (2009). This paper will not discuss the procedure or operation of the EAD clock after an applicant files an asylum application in this context.

¹⁸ GORDON ET AL., *supra* note 15 § 34.02. *See* INA § 208(a), 8 U.S.C. § 1158(a) (2009); 8 C.F.R. § 208.4(b)(2); 8 C.F.R. § 1208.4(b)(2) (2009).

¹⁹ David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 Wash. L. Rev. 725, 733 (1995).

²⁰ *Id.* at 731.

²¹ GORDON ET AL., *supra* note 15, at § 34.02.

²² *Id.*

²³ Martin, *supra* note 19 at 735.

²⁴ Affirmative Asylum Manual, *supra* note 11, at 121. *See* 8 C.F.R. § 208.7 (1994).

AOs could authorize employment for up to one year.²⁵ AOs either approved or denied asylum applications; they did not refer applications to the immigration court.²⁶

In addition, regulations that applied to asylum applicants and others provided “that interim work authorization [would be] issue[d] if no decision on an EAD application [was] forthcoming within ninety days.”²⁷ Therefore, an asylum applicant with an application pending for more than 90 days was entitled to work authorization, unless that claim was found to be frivolous.²⁸ In 1992, nearly two-thirds of asylum applicants received EADs because an interview could not be scheduled within ninety days.²⁹

During the early 1990s, three outcomes were possible after the asylum interview: (1) if the asylum claim was judged frivolous, no EAD was issued, even if the applicant appealed;³⁰ (2) if the asylum application was judged as having merit, then the applicant would be granted asylum; and (3) if the asylum claim was not deemed sufficient to merit asylum, yet non-frivolous, the person would almost always receive an EAD because of the time it took to have *de novo* consideration by an IJ and possible further review.³¹ In the last instance, the remaining adjudication of a case would almost always take longer than the 90-day waiting period required before becoming entitled to work authorization.³²

1994 Changes

In 1994, the regulations were amended to state that “an asylum applicant [would] not be eligible to apply for employment authorization based on his or her asylum application until 150 days after the date on which the asylum application [was] filed.”³³ This new language created the EAD asylum clock.³⁴ The changes were designed to streamline the asylum adjudication process by discouraging frivolous applications. In theory, the changes were important because: (1) they sought to encourage INS and EOIR to adjudicate claims promptly within the 180-day period, since, by doing so, there would be fewer EADs being adjudicated while asylum cases were pending; and (2) they would authorize INS to deny employment authorization to those whose underlying asylum applications had been denied.³⁵ DOJ hoped that the reforms would reduce the number of asylum applications filed primarily to obtain employment authorization because under the new regulations, applicants could no longer file an asylum application and an EAD

²⁵ 8 C.F.R. § 208.7 (1994).

²⁶ Affirmative Asylum Manual, *supra* note 11, at 121.

²⁷ Martin, *supra* note 19 at 734. See 8 C.F.R. § 274a.13(d) (1994).

²⁸ 8 C.F.R. § 274a.12(c)(8); 8 C.F.R. § 274a.13(d) (1994).

²⁹ Martin, *supra* note 19 at 734-35.

³⁰ Martin, *supra* note 19 at 734. See also 8 C.F.R. § 208.7 (1994).

³¹ Martin, *supra* note 19 at 734.

³² Martin, *supra* note 19 at 734. See 8 C.F.R. § 208.7(c) (1994). See also 8 C.F.R. § 274a.12(a)(5) (1994).

³³ 59 Fed. Reg. 62284, 62290 (Dec. 5, 1994) (codified as amended 8 C.F.R. § 208.7) (The amendments to 8 C.F.R. § 208.7 were first proposed in 59 Fed. Reg. 14779 (Mar. 30, 1994)). See 8 C.F.R. § 208.7(a); 8 C.F.R. § 1208.7(a) (2009).

³⁴ 59 Fed. Reg. at 62284, 62291 (Dec. 5, 1994).

³⁵ 59 Fed. Reg. at 62284.

application concurrently.³⁶ The 1994 regulatory changes, coupled with a massive backlog reduction effort, were intended to make abuse of the asylum system a thing of the past.³⁷

Now, after an interview has taken place, an AO can find an applicant either: (1) eligible for an approval of asylum; or (2) ineligible for an approval of asylum.³⁸ If an applicant in the latter category appears deportable or removable, the asylum office provides him or her a Referral Notice and initiates removal proceedings.³⁹ A referral is not a final decision in the case, and an IJ will hear the applicant's claim anew.⁴⁰

Some public comments submitted during the regulatory comment period supported the government's proposals as an appropriate balance between meeting the needs of asylum applicants and discouraging meritless claims.⁴¹ A greater number of comments criticized these provisions for imposing economic hardship on asylum applicants.⁴² The comments addressed the fact that many applicants arrive in the US with few belongings, no money, and no network of family or friends to provide them assistance.⁴³ One comment pointed out that the proposed rule was confusing because it did not specify that persons granted asylum are immediately eligible for work authorization and did not provide sufficient detail about how the 150-day waiting period would be measured.⁴⁴ Other comments expressed doubt that asylum applicants would actually receive work authorization 180 days after the filing of their applications because of the difficulty and confusion in applying the 150-day waiting period.⁴⁵ This concern in particular has proved to be prophetic.

DOJ argued that the 1994 regulations would provide legitimate refugees with lawful employment authorization. It did not address the recommendations from nongovernmental organizations that alternative means be established to adjudicate employment authorization on the basis of the merits of the claim or on the economic situation of the asylum applicant. In response to a comment that asylum applicants might find it necessary to disregard the law and work without authorization, DOJ explained that it did not believe that the solution to this problem was to loosen eligibility standards for employment authorization.⁴⁶ DOJ argued that the proposed reforms would discourage individuals from filing asylum applications solely to gain employment authorization. It also argued that the new regulations would enable INS to more promptly grant asylum and provide work authorization to those who merit relief.⁴⁷

In 1996, Congress amended the INA to reflect the language of the regulations by adding the 180-day waiting period for EAD eligibility and the 180-day deadline to adjudicate asylum

³⁶ 59 Fed. Reg. at 14780.

³⁷ Martin, *supra* note 19 at 733.

³⁸ In some situations, the AO may issue a Notice of Intent to Deny (NOID), giving a specified period of time for the applicant to rebut the reason for the proposed denial. Affirmative Asylum Manual, at 45-46.

³⁹ Affirmative Asylum Manual, *supra* note 11, at 122. See 59 Fed. Reg. at 62284.

⁴⁰ Affirmative Asylum Manual, *supra* note 11, at 122.

⁴¹ 59 Fed. Reg. at 62290.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 59 Fed. Reg. at 62290-91.

⁴⁷ 59 Fed. Reg. at 62291.

applications.⁴⁸ The statute states that “[a]n applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General.”⁴⁹ It goes on to say that, “[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.”⁵⁰

The Homeland Security Act of 2002 abolished the INS and moved its functions to DHS. DHS has three immigration-related components: USCIS, United States Customs and Border Protection (CBP), and United States Immigration and Customs Enforcement (ICE).⁵¹ EOIR continues to be an agency within DOJ.⁵² DOJ’s EOIR retained the immigration courts and the Board of Immigration Appeals (BIA).⁵³

B. Legal Authority

Statute and Regulations

- INA § 101(a)(42)(A) defines the term refugee as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...”⁵⁴
- INA § 208 governs asylum and the procedures to apply for asylum.⁵⁵
- INA § 208(b)(1)(B)(i) states that in general the “burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of this section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”⁵⁶

⁴⁸ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604, 110 Stat. 3009, 115 (1996) (codified as amended INA § 208).

⁴⁹ INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

⁵⁰ *Id.*

⁵¹ Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 451 - 471, 116 Stat. 2135, 2195- 2205 (2002) (codified as 6 U.S.C. §§ 271- 279, 291 (2002)). See RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 18 (2d ed. 2009).

⁵² See Dep’t of Justice, Exec. Office for Immigr. Rev., Background Information, *available at* <http://www.justice.gov/eoir/background.htm> (last visited Jan. 22, 2009).

⁵³ Homeland Security Act of 2002 § 1101, 6 U.S.C. § 521. See U.S. Citizenship and Immigration Services, Immigration Benefits in EOIR Removal Proceedings (Dec. 4, 2009), *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3ebc829cbf3ae010VgnVCM1000000ecd190aRCRD&vgnnextchannel=02729c7755cb9010VgnVCM10000045f3d6a1RCRD>.

⁵⁴ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2009).

⁵⁵ INA § 208, 8 U.S.C. § 1158 (2009).

⁵⁶ INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2009).

- INA § 208(d)(5)(A)(iii) describes the adjudication clock and states, “in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.”⁵⁷
- INA § 208(d)(2) describes the EAD asylum clock. It states that, “[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.”⁵⁸
- 8 CFR § 208.3 explains which form the applicant must file. The regulation states that “[a]n asylum applicant must file Form I-589, Applicant for Asylum and for Withholding of Removal, together with any additional supporting evidence in accordance with the instructions on the form.”⁵⁹
- 8 CFR § 208.7(a)(1) explains the employment authorization process for asylum applicants. It states that “the application shall be submitted no earlier than 150 days after the date on which a complete asylum application submitted in accordance with §§208.3 and 208.4 has been received. In the case of an applicant whose asylum application has been recommended for approval, the applicant may apply for employment authorization when he or she receives notice of the recommended approval.”⁶⁰
- 8 CFR § 208.7(a)(2) states that a “delay requested or caused by the applicant shall not be counted as part of [the 150-day time period], including delays caused by failure without good cause to follow the requirements for fingerprint processing. Such time periods shall also be extended by the equivalent of the time between issuance of a request for evidence pursuant to §103.2(b)(8) of this chapter and the receipt of the applicant's response to such request.”⁶¹
- 8 CFR § 208.14 gives the authority to and identifies the scenarios when an asylum officer or an immigration judge may approve, deny, refer, or dismiss an asylum application.⁶²
- 8 CFR § 274a.12(c)(8)(ii) states that when the applicant receives a letter of recommendation for asylum from the asylum office, but has not received the approval notice, the applicant must apply for an EAD.⁶³

⁵⁷ INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009).

⁵⁸ INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

⁵⁹ 8 C.F.R. § 208.3; 8 C.F.R. § 1208.3 (2009).

⁶⁰ 8 C.F.R. § 208.7; 8 C.F.R. § 1208.7 (2009).

⁶¹ 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

⁶² 8 C.F.R. § 208.14; 8 C.F.R. § 1208.14 (2009).

⁶³ 8 C.F.R. § 274a.12(c)(8)(ii); 8 C.F.R. § 1274a.12(c)(8)(ii) (2009).

C. Policy and Guidelines

USCIS Asylum Division Policy and Guidelines

USCIS has published a manual for Asylum Division staff on how to process affirmative asylum applications.⁶⁴ This manual is formally called the Affirmative Asylum Procedures Manual (AAPM). The AAPM contains USCIS written policy on the EAD asylum clock. Pages 90-91 of the AAPM explain to AOs how to handle the EAD asylum clock for affirmative asylum applicants. USCIS has control over the clock only in affirmative asylum applications because defensive applications are always filed in immigration court.⁶⁵

In addition to pages 90-91 in the AAPM, the manual contains information about tolling and re-starting the clock in many of the manual's appendices.⁶⁶ Most of the appendices are form notices and letters that are sent to applicants to inform them about the status of their asylum applications.⁶⁷ Some of the form notices include language notifying the applicant of potential actions that may stop the clock, whether a certain action tolled the EAD asylum clock and/or when the asylum clock will re-start.⁶⁸ Perhaps the most relevant form in the appendices is Appendix 20. This form explains the impact of the Refugee Asylum and Parole System (RAPS) on the EAD asylum clock.⁶⁹ Appendix 20 is a list of codes and their effect on the stopping and re-starting of the EAD asylum clock.⁷⁰ For example, when an asylum applicant requests additional time to submit documents, USCIS will enter the code "HOLD-AD" into RAPS, causing the EAD asylum clock to stop. The clock does not re-start until USCIS removes the "HOLD."⁷¹ USCIS will also use RAPS to stop the EAD asylum clock when an interview is cancelled "at fault of [the] [a]pplicant."⁷² Here, USCIS will enter code "REMC"⁷³ (Cancelled at fault of applicant)" into the system, and the EAD asylum clock will re-start "on the date of the next interview, if the applicant appears."⁷⁴

RAPS is an automated computer system used by USCIS to track "the processing of affirmative asylum and suspension/special rule cancellation applications through the affirmative asylum process."⁷⁵ Asylum Office personnel have access to update and change information in RAPS while the case is pending at the asylum office.⁷⁶ At the asylum office level, the clock query (KLOK) screen in the RAPS indicates how long the EAD asylum clock has been running, any stoppage (tolling) of the clock that has occurred at any time in the process, and the earliest

⁶⁴ Affirmative Asylum Manual, *supra* note 11, at 1.

⁶⁵ *Id.* at 90-91.

⁶⁶ *Id.* app. 20.

⁶⁷ *Id.* app. 1.

⁶⁸ *Cf.* Affirmative Asylum Manual, *supra* note 11, apps. 6-7, 8-9, 11, 51.

⁶⁹ Affirmative Asylum Manual, *supra* note 11, app. 20.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ REMC is an acronym for "remove case from schedule."

⁷⁴ Affirmative Asylum Manual, *supra* note 11, app. 20.

⁷⁵ *Id.* at 2-3.

⁷⁶ *Id.* In some cases, Service Centers have access to RAPS. See e.g., Affirmative Asylum Manual, *supra* note 11, at 7. This report does not provide a detailed description about the role of Services Centers.

possible date the applicant is eligible to apply for an EAD.⁷⁷ Essentially, the EAD asylum clock is started, stopped, or re-started based on commands entered into RAPS—the KLOK screen in RAPS is how USCIS keeps track of each applicant’s EAD asylum clock.⁷⁸ The AAPM explains that actions by an asylum applicant that will toll the EAD asylum clock “include, but are not limited to, requests to reschedule, failure to appear for the interview or pick-up appointment, and failure to provide a competent interpreter, which may result in a rescheduling of the asylum interview.”⁷⁹

AOs can also stop the EAD asylum clock if an applicant requests additional time to submit documents; fails to appear at the Application Support Center (ASC) for biometrics collection/fingerprinting within the required time period; or cancels a pick-up appointment.⁸⁰ In addition, an AO may stop the EAD asylum clock in, “[a] case in which the applicant appears eligible for an asylum grant but a final decision cannot be made because background security checks have not been completed, and a recommended approval is not permitted to be issued.”⁸¹ Asylum office personnel will enter the “HOLD-AD” code into RAPS to select whether the delay in the security check processing is due to the applicant, thereby stopping the EAD asylum clock, or is due to the government, which keeps the KLOK running.⁸² It is USCIS’s stated policy to inform asylum applicants of a decision to toll the EAD asylum clock, as well as when the EAD asylum clock will re-start, through notices sent in the mail.⁸³ Finally, RAPS contains an EOIR screen that allows asylum office personnel to see whether a particular alien-number (A-number) pertains to a case within the immigration court system, and the status of that case.⁸⁴

EOIR Policy and Guidelines

The Operating Policies and Procedures Memorandums (OPPMs) offer guidance to all EOIR staff, including IJs and immigration court personnel. OPPMs are published by EOIR in order to disseminate guidance and procedure on various immigration issues.⁸⁵ OPPM 97-6 explains EOIR’s Automated Nationwide System for Immigration Review (ANSIR) computer database.⁸⁶ ANSIR is the system used by EOIR and USCIS to schedule an applicant for a hearing before the immigration court.⁸⁷ EOIR guidance states that “when a case is adjourned or a call up date given, the reason for that adjournment must be provided by an [IJ] and then entered into ANSIR by a support staff member using a two-digit adjournment code, or a two-letter call-up code.”⁸⁸ These codes are used to stop the EAD asylum clock, but are not part of the record.⁸⁹

⁷⁷ Affirmative Asylum Manual, *supra* note 11, at 91.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Affirmative Asylum Manual, *supra* note 11, at 92-93, 104.

⁸¹ *Id.* at 43.

⁸² *Id.*

⁸³ *See e.g.*, Affirmative Asylum Manual, *supra* note 11, app. 5.

⁸⁴ Affirmative Asylum Manual, *supra* note 11, at 3.

⁸⁵ *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes, Jun. 16, 2005, available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm> [hereinafter OPPM 05-07].

⁸⁶ *See* OPPM 97-6, Definitions and Use of Adjournment and Call-up Codes, Aug. 22, 1997, available at <http://www.usdoj.gov/eoir/efoia/ocij/97-6.pdf> [hereinafter OPPM 97-6].

⁸⁷ Affirmative Asylum Manual, *supra* note 11, at 3.

⁸⁸ *See* OPPM 97-6, *supra* note 86. (These codes were revised to include changes required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

An important OPPM related to the EAD asylum clock is OPPM 05-07. This OPPM contains the most current adjournment and call-up codes.⁹⁰ OPPM 05-07 defines what “adjournment, call-up and case identification codes” are and it explains to EOIR staff how to use them. EOIR’s adjournment codes reflect the agency’s interpretation of what stops the clock.⁹¹ It includes a chart of codes listing whether an adjournment is “alien-related,” “DHS-related,” “IJ-related,” or “Operational.”⁹² An “alien-related” adjournment stops both the EAD asylum clock and the asylum adjudication clock. The OPPM explains that “[a]ll Court Administrators are instructed to review OPPM [05-07] with their support staff to insure that the adjournment, call-up and case identification codes are properly entered.”⁹³ Furthermore, the relevant OPPM states that the use of all codes should be monitored to identify any improper use of them in the automated system.⁹⁴ OPPM 00-01 states that immigration courts must have a designated person for asylum case monitoring. Specifically, “[e]ach Court Administrator should have at least one member of the Court’s personnel under their supervision designated to be responsible for tracking and monitoring asylum cases within the court to ensure the timely completion of all appropriate asylum cases within the 180-day deadline.”⁹⁵

The Immigration Court Practice Manual (ICPM) is another important part of EOIR policy on the EAD asylum clock. The manual is “provided for the information and convenience of the general public and for parties that appear before the Immigration Courts.”⁹⁶ The manual describes procedures, requirements, and recommendations for practice before immigration courts.⁹⁷ The ICPM outlines the Automated Status Query (ASQ) system that provides information to asylum applicants concerning the status of cases before the immigration court or BIA.⁹⁸

ASQ contains a telephone menu in English and Spanish where the caller must enter the applicant registration number (A-number) of the applicant involved.⁹⁹ According to EOIR, ASQ is updated within 24 hours of a change to the EAD asylum clock¹⁰⁰ Also, for cases before the immigration court, ASQ contains information regarding the next hearing date, time, and location. In asylum cases, ASQ contains the elapsed time and status of the asylum clock, and IJ decisions.¹⁰¹

⁸⁹ See OPPM 05-07, *supra* note 85.

⁹⁰ See *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Revised OPPM, 00-01, Asylum Request Processing, Aug. 4, 2000, available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf> [hereinafter OPPM 00-01].

⁹⁶ EOIR, Immigration Court Practice Manual Chapter 1, at 1 (2008), available at <http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%201.pdf> [hereinafter Immigration Court Practice Manual].

⁹⁷ *Id.* at 1.

⁹⁸ *Id.* at 12-13.

⁹⁹ *Id.*

¹⁰⁰ AILA-EOIR Liaison Agenda, Mar. 16, 2005, Question 4, available at <http://www.justice.gov/eoir/statpub/eoiraila031605.pdf>.

¹⁰¹ Immigration Court Practice Manual, *supra* note 96, at 13.

D. The Government's Stated Procedure for the EAD Asylum Clock

USCIS Asylum Division

Asylum applications are filed on DHS Form I-589.¹⁰² The asylum adjudication clock starts when a completed application is filed with the appropriate USCIS service center or asylum office.¹⁰³ The EAD asylum clock begins to run once the I-589 has been reviewed and found properly filed and complete by the service center or the asylum office.¹⁰⁴ They then give the applicant an "A-number" if they do not already have one. If directly filed with the asylum office, the application is entered into RAPS on the Case Entry (I589) screen within one business day of receipt.¹⁰⁵

An AO "may grant, in the exercise of his or her discretion, asylum to an applicant who qualifies as a refugee under section 101(a)(42) of the Act, and whose identity has been checked pursuant to section 208(d)(5)(A)(i) of the Act."¹⁰⁶ If the AO does not grant asylum to an applicant (after an interview conducted in accordance with §208.9, or if, as provided in §208.10, the applicant is deemed to have waived his or her right to an interview or an adjudication by an asylum officer) the asylum officer shall deny, refer, or dismiss the application.¹⁰⁷ The EAD asylum clock can be stopped by an AO for "[a]ny delay requested or caused by the applicant."¹⁰⁸ An applicant is ineligible for work authorization if her asylum application is denied within the 150-day period.¹⁰⁹

An application for employment authorization, Form I-765, can be submitted to the USCIS 150 days after the date on which a complete application for asylum is filed.¹¹⁰ USCIS then has 30 days to adjudicate the application for employment authorization from the date it is filed.¹¹¹

AOs are instructed to notify applicants of decisions to stop the EAD asylum clock through notice letters when the applicant causes a delay. The notices do not generally indicate the tally of the applicant's clock, but some notify the applicant of potential actions that may stop

¹⁰² An asylum applicant must file an original and two copies of the completed I-589 form. An application must include a photograph of the applicant and each dependent, three copies of all passports or other travel documents, and three copies of evidence proving the relationship for each family member listed on the form. The application must also include the signature and complete mailing address of the applicant and of anyone other than an immediate relative who helped in preparing the application. Additional supporting information and documentation may be provided. GORDON ET AL. *supra* note 15, at § 34.02 (2009). Form I-589 is *available at* <http://www.uscis.gov/files/form/I-589.pdf>.

¹⁰³ 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1) (2009).

¹⁰⁴ Affirmative Asylum Manual, *supra* note 11, at 7.

¹⁰⁵ *Id.*

¹⁰⁶ 8 C.F.R. § 208.14(b); 8 C.F.R. § 1208.14(b) (2009).

¹⁰⁷ 8 C.F.R. § 208.14(c); 8 C.F.R. § 1208.14(c) (2009).

¹⁰⁸ 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

¹⁰⁹ 8 C.F.R. § 208.7(a); 8 C.F.R. § 1208.7(a) (2009).

¹¹⁰ 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1) (2009). If the asylum application is denied by an immigration judge or an asylum officer within the 150-day period, the applicant is ineligible to apply for employment authorization. *Id.*

¹¹¹ 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1) (2009).

the clock, that the EAD asylum clock has stopped and/or when the clock will re-start. For example, a notice of scheduling of fingerprinting appointment notifies the applicant that her EAD asylum clock is stopped because she missed her fingerprinting appointment without good cause, and also informs the applicant that the EAD asylum clock will re-start once she gets her biometrics and returns to the asylum office for the rescheduled interview.¹¹² Another example is the notice for the rescheduling of an asylum interview due to interpretation problems. The notice informs the applicant that her clock will be tolled because she failed, without good cause, to produce a competent interpreter at the asylum interview. The notice also informs the applicant that if her case is referred to EOIR for failure to produce a competent interpreter, she will be ineligible for work authorization unless the applicant has exceptional circumstances or unless an immigration judge grants asylum.¹¹³ In general, a case is referred to EOIR after an AO serves a Referral Notice and a NTA to the asylum applicant, thereby referring the applicant's case to an IJ.¹¹⁴ The Referral Notice also includes the approximate date when the clock will reach 150 days and the applicant will be eligible to apply for work authorization.¹¹⁵ After a case is referred, "[t]he Asylum Office prepares a packet to file with the Immigration Court" and "[o]nce this packet has been filed with the court, the Asylum Office no longer has jurisdiction over the asylum claim."¹¹⁶ The packet sent to EOIR contains the following documents: (1) a photocopy of the I-589 that contains signatures of the applicant and AO, (2) copies of all documents in support of the I-589 application, (3) the NTA, with the original signature of the USCIS officer who signed and dated the document, (4) and a printout of the Removal screen from ANSIR showing the hearing date, time, and location, and the 150-day KLOK screen in RAPS.¹¹⁷

Currently, there is an interagency clock procedure in place to address any clock issues when cases are referred from an AO to an IJ.¹¹⁸ Specifically, USCIS Asylum Division has indicated that each asylum office and immigration court has assigned a point of contact on all EAD asylum clock related issues.¹¹⁹ USCIS has explained that "[t]he Asylum Division reached out in December [2007] to the Asylum Offices to designate EAD Point of Contacts (POCs) and EOIR [did] the same."¹²⁰ USCIS also has explained that "EOIR and the Asylum Offices have exchanged their lists with each other and the names of the POCs will not be released to the public."¹²¹

EOIR

If a case is referred to an immigration court by an AO, or if an applicant files an asylum application initially in removal proceedings, a different procedure applies. The EAD asylum clock does not run in all cases before IJs. When an asylum applicant goes to immigration court to adjudicate her case, the IJ may ask during the master calendar hearing "whether the respondent

¹¹² Affirmative Asylum Manual, *supra* note 11, apps. 5, 7.

¹¹³ Affirmative Asylum Manual, *supra* note 11, apps. 7, 9.

¹¹⁴ Affirmative Asylum Manual, *supra* note 11, at 43-44.

¹¹⁵ Affirmative Asylum Manual, *supra* note 11, app. 51.

¹¹⁶ 8 C.F.R. § 208.2(b); 8 C.F.R. §1 208.2(b) (2009). See Affirmative Asylum Manual, *supra* note 11, at 52.

¹¹⁷ Affirmative Asylum Manual, *supra* note 11, at 52.

¹¹⁸ Asylum HQ/NGO Liaison Agenda Question XIV, June 17, 2008 (On file with authors).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

wishes for the asylum clock to run.”¹²² If the applicant answers in the affirmative, then the case is handled “expeditiously,” meaning that it is scheduled for completion within 180 days of the filing.¹²³ If the respondent does not ask for the asylum clock to run, the case is scheduled as any non-asylum case and the EAD asylum clock does not run.¹²⁴

Under the regulations, the EAD asylum clock stops for any delay requested or caused by the applicant.¹²⁵ A delay in the adjudication “requested or caused” by the asylum applicant will stop the EAD asylum clock during the time the delay exists. The regulations provide two examples of what constitutes an applicant-caused delay. The regulations state that, “delays caused by failure without good cause to follow the requirements for fingerprint processing” stop the clock.¹²⁶ Also, the time between the issuance of a request for evidence under 8 CFR § 103.2(b)(8) and the receipt of a response to that request is excluded from the time accrued on the EAD asylum clock.¹²⁷

Under the regulations, if an asylum applicant fails to receive and acknowledge the receipt of an AO’s decision, the EAD asylum clock stops until the applicant appears to receive such decision or “appears before an immigration judge in response to the issuance of a charging document.”¹²⁸ Applicants who have received EADs and later appeal a denial of asylum may continue to renew their EAD throughout administrative and judicial review.¹²⁹ The EAD is renewable “for the continuous period of time necessary for the asylum officer or immigration judge to decide the asylum application and, if necessary, for completion of any administrative or judicial review.”¹³⁰

V. Categories of EAD Asylum Clock Problems

The problems with the government’s administration of the EAD asylum clock take many forms and result in an asylum applicant encountering delays in obtaining work authorization or never obtaining it at all. The EAD asylum clock is problematic in multiple jurisdictions and the American Immigration Lawyers Association (AILA) has continuously alerted EOIR of problems related to the clock.¹³¹ In many cases, applicants wait much longer than 150 days to become eligible to apply for an EAD.¹³² The most prevalent problems with the EAD asylum clock include: (1) lack of transparency in its management; (2) lack of clarity and comprehensiveness of the government’s policy; (3) misinterpretation of the regulations; (4) improper implementation of

¹²² Immigration Court Practice Manual, *supra* note 96, Chapter 4, at 71, available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

¹²⁶ *Id.*

¹²⁷ *Id.* Under the cited regulation, 8 C.F.R. § 103.2(b)(8), USCIS may make a request for evidence in conjunction with an application or petition.

¹²⁸ 8 C.F.R. § 208.9(d); 8 C.F.R. § 1208.9(d) (2009).

¹²⁹ 8 C.F.R. § 208.7(b); 8 C.F.R. § 1208.7(b) (2009).

¹³⁰ *Id.*

¹³¹ See e.g., AILA-EOIR Liaison Agenda Oct. 28, 2009, Question 27, available at <http://www.justice.gov/eoir/statpub/eoiraila102809.pdf>.

¹³² GORDON ET AL. *supra* note 15, at § 34.02.

the government's policy; and (5) problems associated with EOIR's case completion goals. These categories describe the areas of deficiency in the policy governing the functioning of the EAD asylum clock. Because some of the deficiencies are not mutually exclusive, some repetition in description is unavoidable.

A. Lack of Transparency

There is a general lack of transparency in the government's administration of the EAD asylum clock. IJs often do not inform asylum applicants that their EAD asylum clock is running, or that the IJ has stopped the clock. EOIR does not require IJs to make findings on the record when the IJ stops the clock.¹³³ As a result, the decision to stop the EAD asylum clock is made off the record and usually without notice to the applicant. Documentation from the Immigration Council and practitioner interviews reveal that applicants frequently learn that the EAD asylum clock has been stopped only when USCIS rejects their application for work authorization.¹³⁴ The result is that applicants cannot obtain EADs after the 180-day waiting period and may never obtain an EAD before the final adjudication of their asylum application.¹³⁵

AILA has asked IJs to make the determination to stop the EAD asylum clock on the record.¹³⁶ In response, EOIR has suggested that attorneys check the status of the EAD asylum clock by calling EOIR's ASQ System.¹³⁷ As explained above, ASQ provides information about the status of cases, as well as the number of days accrued on the EAD asylum clock.¹³⁸ Even with the ASQ system in place, it is evident that a problem still exists. The ASQ system is supposed to be updated every 24 hours,¹³⁹ however at least one practitioner has commented that the ASQ system is not always up to date.¹⁴⁰ In some instances, it takes weeks for the applicant's status to be updated in the ASQ system.¹⁴¹ Also, for attorneys who receive a case with a stopped clock, the ASQ system is not useful because it only provides the tally, but no information about when and why the EAD asylum clock stopped running. Therefore, the ASQ system also lacks transparency.

One attorney has commented that it can take several hours, even when looking through their own client's file, to determine when the IJ may have stopped the EAD asylum clock.¹⁴² Attorneys who receive a case with a stopped EAD asylum clock may have no client file with attorney notes to scour to find the date on which the IJ may have stopped the clock.

¹³³ AILA-EOIR Liaison Agenda Mar. 7, 2002, Question 2, available at <http://www.justice.gov/eoir/statpub/eoiraila0203.htm>.

¹³⁴ AILF Practice Advisory, *supra* note 10, at 2.

¹³⁵ Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009); Interview with Attorney A in Balt., Md. (Sept. 17, 2008) (On file with authors).

¹³⁶ AILA-EOIR Liaison Agenda Mar. 7, 2002, *supra* note 133, Question 2.

¹³⁷ AILA-EOIR Liaison Agenda Mar. 16, 2005, Question 4, available at <http://www.justice.gov/eoir/statpub/eoiraila031605.pdf>.

¹³⁸ Immigration Court Practice Manual, *supra* note 96, at 13.

¹³⁹ AILA-EOIR Liaison Agenda Mar. 16, 2005, *supra* note 137, at Question 4.

¹⁴⁰ Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009) (On file with authors).

¹⁴¹ *Id.*

¹⁴² Interview with Attorney C in Denver, Colo. (Oct. 12, 2009) (On file with authors).

Another problem that results when IJs do not put their determinations to stop the clock on the record is that applicants are not alerted to the possibility of data input error by court staff.¹⁴³ Unless and until the applicant discovers the error, she cannot contact the court administrator to investigate the reason for stopping the EAD asylum clock.¹⁴⁴ The time involved for the applicant or an attorney to discover the problem, and for the court administrator to respond, further delays the applicant's eligibility for work authorization. Moreover, clerical errors stopping the EAD asylum clock are a serious problem in EOIR.¹⁴⁵ According to the government's own estimates "errors in clocking are due to coding mistakes and the . . . error rate is 60/40, i.e. [the government is] wrong 40% of the time."¹⁴⁶

Finally, the process for contacting and communicating with POCs at an AO or an immigration court is unclear and does not appear to be working, as problems and inter-agency clock issues persist. Specifically, pro-bono attorneys have reported that they have contacted the EAD asylum clock POC in both venues several times, and have never received acknowledgment of their inquiry, nor a response to their request.¹⁴⁷

B. Lack of Clarity

There is a lack of clarity in the government's administration of the EAD asylum clock. For example, in some immigration courts it is not clear who controls this clock. Attorneys have asked on the record to have the clock re-started after an improper stoppage, only to have the IJ say she had no authority over the EAD asylum clock and that the attorney should speak to the court administrator.¹⁴⁸ In turn, court administrators have refused to correct EAD asylum clock information that was entered incorrectly, stating that it is "impossible" to re-start or correct the EAD asylum clock.¹⁴⁹ The problem sometimes has persisted even after the IJ issued an order on the record that the clock be re-started.¹⁵⁰ Reports from other courts vary. One practitioner reported: "The court administrator at the New York City immigration court accepts emails from attorneys regarding asylum clock issues and cooperates in fixing clock problems."¹⁵¹ The disparate procedures at different jurisdictions for re-starting the EAD asylum clock illustrate the lack of clarity in EOIR's administration of the EAD asylum clock. If there were clear standards and procedures for the administration of the EAD asylum clock, immigration courts would not differ so greatly in how they administer it.

It also is not clear how to re-start the EAD asylum clock. The regulations would require that once an EAD asylum clock is stopped, it is re-started when the applicant is no longer

¹⁴³ AILF Practice Advisory, *supra* note 10, at 14.

¹⁴⁴ AILA-EOIR Liaison Agenda Oct. 17, 2005, Question 3, available at <http://www.justice.gov/eoir/statspub/eoiraila101705.pdf>.

¹⁴⁵ Minutes from EOIR Quarterly Meeting, Jan. 16, 2009 (On file with authors).

¹⁴⁶ *Id.*

¹⁴⁷ Asylum HQ/NGO Liaison Agenda Question VIII, Dec. 9, 2008 (On file with authors).

¹⁴⁸ Interview with Attorney D in Chi., Ill. (Sept. 25, 2009) (On file with authors).

¹⁴⁹ AILA-EOIR Liaison Agenda Oct. 28, 2009, *supra* note 131, at Question 27. Practitioners have recently reported this problem in the Baltimore, MD. and Arlington, VA. immigration courts.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* See Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009) (On file with authors).

responsible for the delay.¹⁵² But in practice, the EAD asylum clock often remains improperly stopped.¹⁵³ The problem stems directly from the lack of clarity about when and how to re-start the clock. Although OPPM 05-07's adjournment codes detail a long list of delays that cause the EAD asylum clock to stop, they do not similarly direct IJs or immigration court staff to re-start the clock or even when re-starting the clock is appropriate. Even when practitioners follow EOIR's instructions about how to re-start or correct the EAD asylum clock, issues are not successfully resolved.¹⁵⁴ Some court administrators and immigration judges alike tell respondents that they have no power over the issue.¹⁵⁵

There is also a lack of clarity resulting from the transfer of control over the EAD asylum clock from USCIS to EOIR. A practitioner reported that some AOs always will stop the EAD asylum clock when referring cases to an IJ.¹⁵⁶ However, the EAD asylum clock should not stop if a case is referred to EOIR because referral, on its own, is not a delay requested or caused by the applicant.¹⁵⁷ Nevertheless, there is a lack of clarity in what to do when the clock is stopped by USCIS and a case is referred to EOIR. These issues have persisted even after USCIS and EOIR's attempt to resolve interagency issues by exchanging their lists of EAD clock POCs, as explained above in the Government's Stated Procedures Section.¹⁵⁸

C. Interpretation Problems

Interpretation problems occur because immigration courts and IJs have wide discretion to define "delay requested or caused by the applicant."¹⁵⁹ Different IJs will rule differently on what a delay is in order to determine whether to stop the EAD asylum clock. The regulations provide two examples of an applicant-caused delay. The two examples are: (1) "failure without good cause to follow the requirements for fingerprint processing;" and (2) "the time between issuance of a request for evidence . . . and the receipt of the applicant's response to such request."¹⁶⁰ These two situations, particularly the first one, indicate the kinds of delays that should stop the EAD asylum clock. The "good cause" language in the first example and the fact that the regulation was promulgated with the intention to prevent abuse of the asylum system, means that USCIS and EOIR should determine whether there is good cause for an applicant-caused delay before stopping the EAD asylum clock.

Further, IJs stop the EAD asylum clock based on an overly broad interpretation of the regulations. For example, IJs stop the clock after adjourning a case in order "to allow alien [sic] time to complete the required paperwork for a biometrics check or an overseas investigation."¹⁶¹

¹⁵² 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

¹⁵³ Interview with Attorney A in Balt., Md. (Sept. 17, 2009) (On file with authors); Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009) (On file with authors).

¹⁵⁴ AILA-EOIR Liaison Agenda October 17, 2005, *supra* note 144, at Question 3.

¹⁵⁵ *Id.*

¹⁵⁶ Interview with Attorney F in L.A., Cal. (Oct. 2, 2009) (On file with authors).

¹⁵⁷ Affirmative Asylum Manual, *supra* note 11, at 1.

¹⁵⁸ Interview with Attorney A in Balt., Md. (Sept 17, 2009) (on file with authors).

¹⁵⁹ 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

¹⁶⁰ *Id.* A potential third example also appears at 8 § C.F.R 208.9(d); 8 C.F.R. § 1208.9(d) for asylum applicants who fail to appear to receive and acknowledge receipt of a decision from the AO.

¹⁶¹ OPPM 05-07, *supra* note 85.

Similarly, an asylum applicant is allowed to amend or supplement the application, but the clock will stop because IJs consider this to be a delay requested or caused by the applicant.¹⁶² For example, IJs stop the asylum clock if the applicant asks for more time to gather additional evidence by entering “Code 21.”¹⁶³ None of these adjournment codes take into account the facts surrounding the delays, or whether there is good cause for the delays.

One of the most persistent interpretation problems occurs when IJs stop the EAD asylum clock when respondents decline to take the next “open date” on the court’s calendar for the merits hearing, offered during the Master Calendar (MC) hearing.¹⁶⁴ In practice, declining an offer of the next “open date” will stop the EAD asylum clock at least until the next hearing. Although attorneys often reject the offered hearing date because the offered date is less than a month after the MC hearing (an extremely short time frame for preparing a case), EOIR does not always schedule the next hearing for a reasonably prompt date mutually agreed upon by the parties. Rather, EOIR will sometimes postpone the merits hearing for many months, sometimes up to a year, after the MC hearing.¹⁶⁵ The same problem occurs when an applicant’s attorney rejects the first open date for a hearing because of a time conflict.¹⁶⁶ During this waiting period, the clock is stopped and the applicant cannot obtain an EAD.¹⁶⁷

In theory, the IJ’s reasoning for stopping the EAD asylum clock is that rejection of the proposed hearing date is an “alien caused delay.” Often times, attorneys reject the next hearing date for good cause and for legitimate reasons. In these cases, attorneys’ clients are penalized by the IJ because, according to EOIR, an attorney acts on behalf of the noncitizen and any delays caused by an attorney conflict should be considered alien-caused delays.¹⁶⁸ Again, EOIR does not always determine whether the applicant has good cause for these delays before ruling that the delay will stop the EAD asylum clock.

Further, pro bono attorneys or law school immigration clinics often must reject the first offered hearing dates because of their own scheduling challenges. EOIR guidance states, “judges should be cognizant of the unique scheduling needs of law school clinics operating on an academic calendar and pro bono programs which require sufficient time to recruit and train representatives.”¹⁶⁹ Recognizing this, the OPPM states “clinics and pro bono entities often face special staffing and preparation constraints, [therefore] judges should be flexible and are encouraged to accommodate appropriate requests for a continuance or to advance a hearing date.”¹⁷⁰ Despite this recognized need to continue a hearing, IJs’ interpretation of the OPPM

¹⁶² 8 C.F.R. § 208.4(c); 8 C.F.R. § 1208.4(c) (2009). See OPPM 05-07, *supra* note 85.

¹⁶³ See OPPM 05-07, *supra* note 85.

¹⁶⁴ AILA-EOIR Liaison Agenda Mar. 30, 2000, at Question 11, available at <http://www.justice.gov/eoir/statspub/qaaoiraila.htm>.

¹⁶⁵ Attorney A from Balt., Md. (Sept. 17, 2009) (On file with authors).

¹⁶⁶ AILA-EOIR Liaison Agenda Mar. 30, 2000, *supra* note 164, at Question 11.

¹⁶⁷ Further, as described below in the section discussing implementation problems, some IJs erroneously stop the clock permanently by considering rejection of the first available hearing date to be the applicant’s waiver of EAD eligibility.

¹⁶⁸ AILA-EOIR Liaison Agenda Mar. 30, 2000, *supra* note 164, at Question 11.

¹⁶⁹ OPPM 08-01, Guidelines for Facilitating Pro Bono Legal Services Mar. 10, 2008, page 4, available at <http://www.justice.gov/eoir/efoia/ocij/oppm08/08-01.pdf> [hereinafter OPPM 08-01].

¹⁷⁰ *Id.*

adjournment codes for rejecting the first available hearing date could cause the EAD asylum clock to stop.¹⁷¹

Some IJs interpret the regulations to stop the EAD asylum clock whenever a delay *benefits* the applicant, even if the government sought the continuance.¹⁷² This clearly is an erroneous interpretation of the regulatory language. Other courts, however, rarely stop the clock when the government asks for a delay.¹⁷³ Thus, an overly broad interpretation of the regulatory language leads to inconsistent applications of the regulations across immigration courts and among individual IJs.

EOIR's misinterpretation of the regulations also keeps the EAD asylum clock stopped even after an applicant's successful appeal. When a case is remanded to the immigration court from the BIA or federal court, the IJ will not re-start the clock or restore any time accrued while the case was on appeal. EOIR's interpretation is that the original denial makes the applicant ineligible for work authorization.¹⁷⁴ BIA precedent does not support this position.¹⁷⁵ Once on remand, the original denial is vacated, the case goes back to the trial level as if no denial was ever issued, and the respondent is restored to the same position she was in before the denial.¹⁷⁶ As the effect of a remand is that there is no longer an order denying asylum, barring applicants from getting back "on the clock" or applying for work authorization is a misinterpretation of the regulations.

The EAD asylum regulations were not intended to punish applicants who participate in the proper adjudication of their asylum claims. It is conceivable that an applicant with a frivolous asylum claim could seek delays to slow down the asylum process so he could obtain work authorization, but current EOIR interpretations punish legitimate asylum applicants.

Interpretation problems also occur at the USCIS level after claims are heard by AOs, for example, where the asylum officer stops the EAD asylum clock before referring the case to the IJ.¹⁷⁷ Here, USCIS, like EOIR, does not properly apply the good cause standard for determining when a delay stops the EAD asylum clock.¹⁷⁸ USCIS uses the good cause standard when deciding whether to toll the clock when the applicant causes a delay by failing to bring a competent interpreter to an interview; or when the applicant causes a delay by failing to appear at a scheduled biometrics appointment.¹⁷⁹ However, USCIS does not adopt the good cause standard when it stops the EAD asylum clock because the applicant did not provide sufficient evidence to

¹⁷¹ See OPM 05-07, *supra* note 85.

¹⁷² Interview with Attorney A in Balt., Md. (Sept. 17, 2009) (On file with authors).

¹⁷³ Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009) (On file with authors).

¹⁷⁴ AILA-EOIR Liaison Agenda Oct. 17, 2005, *supra* note 144, at Question 1; Interview with Attorney D in Chi., Ill. (Sept. 25, 2009) (On file with authors).

¹⁷⁵ Cf. *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981); *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987); *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1996); *Katsis v. INS*, 997 F.2d 1067 (3d Cir. 1993).

¹⁷⁶ Cf. *id.*

¹⁷⁷ Interview with Attorney F in L.A., Cal. (Oct. 2, 2009) (On file with authors).

¹⁷⁸ Affirmative Asylum Manual, *supra* note 11, at 91.

¹⁷⁹ *Id.* apps. 9, 11.

establish residence.¹⁸⁰ USCIS's failure to apply the good cause standard for all delays requested or caused by an applicant violates the text and the spirit of the regulations.

D. Implementation Problems

Implementation problems are those created when the government stops the EAD asylum clock contrary to its own policy. A common example occurs when testimony at the asylum hearing could not be completed in the allotted time.¹⁸¹ Even if the applicant has not purposefully delayed the hearing, but simply taken more than the scheduled time, the IJ may still stop the clock.¹⁸² In liaison meetings between AILA and EOIR, EOIR has conceded that the clock should not be stopped when testimony does not fit within an allotted time, "unless the reason why the hearing was protracted was due to the alien's actions."¹⁸³ However, some IJs still improperly stop the clock, finding that the respondent was the cause for the delay.¹⁸⁴

IJs also improperly implement the EAD asylum clock when they permanently stop the clock. The regulations indicate two situations when an EAD can be denied. These include: (1) when an applicant fails to appear at a scheduled hearing without exceptional circumstances; and (2) when the IJ denies the applicant's asylum claim.¹⁸⁵ The regulations do not authorize permanent clock stoppage in either of these situations.

IJs also improperly implement the EAD asylum clock, causing permanent stoppages in several other situations. Some IJs consider the rejection of the first available hearing date to be the applicant's waiver of EAD eligibility, authorizing the IJ to stop the clock permanently.¹⁸⁶ An attorney who described this problem referred to it as "two tracks" for asylum claims.¹⁸⁷ Applicants are on the "fast track" if they accept the first available hearing date and they remain eligible for work authorization. However, if they reject the first available hearing, they are placed on the "regular track," their clock is permanently stopped, and they cannot obtain an EAD.¹⁸⁸ IJs do not always explain these consequences and implications.¹⁸⁹

Further, some immigration courts stop the EAD asylum clock when there is a change of venue,¹⁹⁰ or a change of the IJ assigned to the case.¹⁹¹ Finally, some courts refuse to re-start the EAD asylum clock after it has been stopped. In these cases, a minor delay may constitute complete waiver of eligibility for an EAD.¹⁹² For example, some attorneys report encountering

¹⁸⁰ Affirmative Asylum Manual, *supra* note 11, apps. 38, 47.

¹⁸¹ AILA-EOIR Liaison Agenda Mar. 27, 2003, Question 8, available at <http://www.justice.gov/eoir/statspub/eoiraila0303.pdf>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1) (2009); 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4) (2009).

¹⁸⁶ As noted in the Interpretation Problems discussion, other IJs in this situation stop the clock until the next merits hearing date.

¹⁸⁷ Interview with Attorney A in Balt., Md. (Sept 17, 2009) (On file with authors).

¹⁸⁸ *Id.*

¹⁸⁹ AILA-EOIR Liaison Agenda Mar. 30, 2000 *supra* note 164, at Question 11.

¹⁹⁰ Interview with Attorney E in Seattle, Wash. (Sept. 17, 2009) (On file with authors).

¹⁹¹ *Id.*

¹⁹² *Id.*

uncooperative court administrators and IJs who refuse to hear persuasive arguments for restarting the EAD asylum clock or refusing to correct clock stoppages caused by clerical errors.¹⁹³

Stopping the clock in each of these situations is contrary to EOIR guidance, but applicants have little recourse to remedy the clock problem once it has occurred. EOIR has set out a loose framework for resolving clock problems in its liaison efforts with AILA. It has stated that attorneys should first contact the court administrator in order to fix a problem with the EAD asylum clock.¹⁹⁴ In a liaison meeting, EOIR has explained further:

[I]f a party believes there is a problem with the asylum clock in an individual case and that case is pending before an Immigration Judge, the first step is to try to resolve the issue locally. If the concern arises during a hearing, it should be addressed to the IJ and if the concern arises after a hearing, it should be addressed to the court administrator. If necessary, the question may also be raised with the Assistant Chief Immigration Judge having jurisdiction over the particular court.¹⁹⁵

Although this procedure for fixing the EAD asylum clock is theoretically in place, practitioners continue to report clock problems and are not able to easily resolve them through EOIR's recommended channels.

E. Case Completion Goals

The Office of the Chief Immigration Judge (OCIJ) is responsible for managing the 53 immigration courts located throughout the United States where over 200 immigration judges adjudicate immigration cases.¹⁹⁶ These immigration courts “are faced with the challenge of adjudicating their caseload (all cases awaiting adjudication) in a timely manner, while at the same time ensuring that the rights of the immigrants appearing before them are protected.”¹⁹⁷ IJs are overwhelmed by their dockets and find it challenging to meet the 180-day deadline.¹⁹⁸

EOIR evaluates the performance of the immigration courts based on the courts' success in meeting case completion goals.¹⁹⁹ Case completion goals set deadlines for the timely adjudication of immigration cases.²⁰⁰ In order to ensure that the immigration courts adjudicate

¹⁹³ Interview with Attorney C in Denver, Colo. (Oct. 12, 2009) (On file with authors); Interview with Attorney D in Chi., Ill. (Sept. 25, 2009) (On file with authors).

¹⁹⁴ AILA-EOIR Liaison Agenda Oct. 17, 2005, *supra* note 144, at Question 3.

¹⁹⁵ AILA-EOIR Liaison Agenda Oct. 28, 2009 *supra* note 131, at Question 28.

¹⁹⁶ See U.S. Government Accountability Office, Report to the Chairman, Committee on Finance, U.S. Senate, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement 2 (August 2006), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-06-771> [hereinafter GAO EOIR Study]. More recent data from EOIR states that OCIJ has more than 230 immigration judges in more than 55 immigration courts nationwide. See Dep't of Justice, Executive Office for Immigration Review, Fact Sheet: EOIR at a Glance (Dec. 14, 2009), available at <http://www.justice.gov/eoir/press/09/EOIRataGlance121409.pdf>.

¹⁹⁷ See *id.* at 2.

¹⁹⁸ See Julia Preston, *Immigration Judges Found Under Strain*, N.Y. TIMES, July 10, 2009, at A11. See also Letter from Tony G. Snow, Acting Director, Executive Office for Immigration Review, to Editors of the N.Y. Times, (July 14, 2009), available at <http://www.justice.gov/eoir/press/09/SnowToNYTimesEditor071409.pdf>.

¹⁹⁹ See GAO EOIR Study, *supra* note 196, at 20.

²⁰⁰ See *id.* at 20-21.

cases fairly and in a timely manner, EOIR has established target time frames for each of the OCIJ's 11 case types.²⁰¹ Each case type has an associated case completion goal. The case completion goal for both affirmative and defensive asylum cases is 180 days.²⁰² Therefore, asylum cases under EOIR policy and the statute have to be adjudicated within 180 days.²⁰³

EOIR holds IJs accountable for the length of time an asylum application is pending on their dockets.²⁰⁴ Given this system of accountability, IJs reasonably could be primarily or solely concerned with the adjudication deadlines and their case completion goals when stopping and starting the asylum clock (by which, almost invariably, they mean both the asylum adjudication and EAD asylum clocks). Those case completion goals may be unrealistic. By stopping the clock, IJs may believe they are better able to comply with case completion goals. In these situations IJs appear to believe they are forced to choose between meeting case completion goals and allowing the applicant's EAD clock to run. The potential consequence of case completion goal pressure is the frequent and improper stopping of the EAD clock.

VI. Proposed Solutions

A. Brief overview

The problems examined in this report stem from a misinterpretation of agency regulations; poor implementation of EOIR guidance; gaps in EOIR guidance that leave IJs and applicants in the dark about how to handle routine EAD asylum clock issues; and a lack of transparency that makes it difficult to resolve EAD asylum clock problems when they arise. The following recommendations are designed to address these problems employing the current regulatory framework.

First, EOIR should implement a new comprehensive policy interpreting the EAD asylum clock. This interpretive policy should be clear, explicit, and in accordance with the regulations in 8 CFR §208.7(a)(2). The policy should distinguish between the asylum adjudication clock and the EAD asylum clock. Second, EOIR should develop a well-defined internal appeals process for EAD asylum clock disputes. This process will allow applicants to resolve disputes over the interpretation of the new substantive policy, and also allow for the efficient resolution of clerical errors. Third, EOIR should provide for the dissemination of the new policy and appeals process. Broadly disseminating the new information will give notice of the policy changes to EOIR staff across the country, and result in consistency across immigration courts. Fourth, EOIR should provide for training of IJs, court administrators, EOIR staff, and the Assistant Chief Immigration Judges (ACIJs) to instruct these parties on implementing the new policy and appeals process. Finally, EOIR should create a task force made up of AOs, non-governmental organizations, private attorneys, and EOIR staff to discuss EAD asylum clock issues and implementation of the

²⁰¹ *See id.* at 22.

²⁰² *See id.*

²⁰³ INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009). The statute, however, provides an exception for "exceptional circumstances."

²⁰⁴ *See* GAO EOIR Study, *supra* note 196, at 20.

policy. The task force will enable these groups to collaborate in the implementation of the new policy and resolve systemic issues as they arise.

USCIS has control over the EAD asylum clock in affirmative asylum claims from the time they are filed until they are referred to immigration court. USCIS should develop ways to properly administer the EAD asylum clock. Specifically, USCIS should develop a system to better inform applicants of an AO's decision to stop the clock and to correct improper clock stoppages. USCIS should instruct AOs and/or USCIS Asylum Supervisory Officers to review the status of the EAD asylum clock before they transfer the case to EOIR to check whether a stopped clock should be re-started. When AOs determine that a stopped EAD asylum clock should remain stopped, they should provide a rationale justifying the continued stoppage, and detail when the delay should end. USCIS and EOIR should improve their communication about the EAD asylum clock. Finally, applicants should receive detailed information about the status and tally of their EAD asylum clock when their case is referred to EOIR.

B. Proposed Solutions for EOIR

Develop comprehensive new policy and procedures interpreting and applying the EAD asylum clock

This report details the pervasive problems stemming from the lack of clear guidance to immigration courts on how to interpret and apply the EAD asylum clock. EOIR must adopt a new, clear, and explicit policy. This policy will benefit both agencies and practitioners. The new policy must do five things: (1) treat the asylum clock as two separate clocks – a two-clock system means that the EAD asylum clock and adjudication clock should operate independently and sometimes stop at different times and for different reasons; (2) correctly interpret “delay requested or caused by the applicant” in 8 CFR § 208.7(a)(2) and 8 CFR § 1208.7(a)(2); (3) require that decisions to stop the EAD asylum clock be made on the record; (4) develop clear guidelines and a new OPPM detailing when it is appropriate to stop and re-start the clock; and (5) create a clear process for internally appealing or contesting an IJ's application of the EAD asylum clock.

Treat the asylum clock as two separate clocks

The asylum adjudication clock and the EAD asylum clock usually have been inappropriately treated as one asylum clock. INA provisions setting forth each of these clocks are statutorily distinct and resemble each other only in that they both have language referring to “180 days.”²⁰⁵ The two clocks serve very distinct purposes. The EAD asylum clock is intended to provide a waiting period before asylum applicants can apply for and receive authorization to work in order to reduce fraud, while preserving the privilege of work authorization as asylum applicants wait for the final adjudication of their applications.²⁰⁶ The asylum adjudication clock, on the other hand, sets a goal for the timely and efficient adjudication of asylum claims.²⁰⁷ Its primary purposes are: (1) to eliminate or minimize asylum claim backlogs so that asylum seekers do not wait years for their claims to be resolved; and (2) to maintain an efficient court system.

²⁰⁵ See, INA §§ 208(d)(2), 208(d)(5)(a)(iii), 8 U.S.C. §§ 1158(d)(2), 1158(d)(5)(a)(iii).

²⁰⁶ INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

²⁰⁷ INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009).

Finally, the asylum adjudication clock apparently is the statutory basis for the IJs' case completion goals. These goals set target deadlines for the full adjudication of asylum claims.²⁰⁸

EOIR should issue an interpretive policy recognizing the distinction between the two clocks. Effective agency policy would help prevent IJs from stopping both clocks when they should only stop the asylum adjudication clock, or vice versa.²⁰⁹ The policy also must acknowledge the importance of stopping the EAD asylum clock only when there is a delay truly "requested or caused by the applicant" without good cause, and include a presumption that the EAD asylum clock will run unless there has been such a delay.²¹⁰

Correctly interpret "delay requested or caused by the applicant"

EOIR's new policy statement should also interpret "delay requested or caused by the applicant" as it relates to the EAD asylum clock.²¹¹ The policy should be consistent with legislative intent and the governing regulations. For example, the regulatory language illustrates the type of delays EOIR envisions would stop the clock: "delays caused by failure without good cause to follow the requirements for fingerprint processing."²¹² The qualification "without good cause" suggests that not every delay requested by the applicant should stop the EAD asylum clock. Since the regulation was originally promulgated to reduce fraud and abuse of the asylum process,²¹³ the language should be interpreted in a way that furthers this intent. EOIR policy should recognize that an overly broad interpretation of the regulations unduly burdens the asylum seeker beyond the original intent of the regulations. The new EOIR policy on this issue should also expressly prohibit certain broad interpretations of the language and include a non-exhaustive list of common misinterpretations. An example of a misinterpretation is stopping the clock whenever there is any delay that benefits the applicant.

Require that decisions to stop the EAD asylum clock be made on the record

One of the central complaints of applicants and attorneys who deal with the EAD asylum clock is that current EOIR policy does not require that IJs make their decisions to stop the clock on the record.²¹⁴ Although EOIR has expressed some resistance to applying this recommendation,²¹⁵ it is vital that it be one of the central tenets of the new policy. Currently, when attorneys encounter an unexpectedly stopped EAD asylum clock, it may be very difficult to determine when and why the clock was stopped. If an IJ puts the decision to stop the clock on the record during hearing, and states the adjournment code being applied, an applicant may express opposition to that determination. This exchange could lead to quick resolutions of

²⁰⁸ *Id.* The statute also, however, provides that "exceptional circumstances" would allow deviation from the 180-day requirement.

²⁰⁹ Currently, the regulations in 8 C.F.R. § 1208.7(a)(2) allow EOIR to toll the asylum adjudication clock and the EAD asylum clock when there is a "delay requested or caused by the applicant." This report focuses on interpreting this language as it applies to the EAD asylum clock, not the asylum adjudication clock.

²¹⁰ 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

²¹¹ *Id.*

²¹² *Id.*

²¹³ See *supra* Part IV.

²¹⁴ AILA-EOIR Liaison Agenda Mar. 7, 2002, *supra* note 133, at Question 2.

²¹⁵ AILA-EOIR Liaison Agenda Mar. 16, 2005, *supra* note 137, at Question 3.

disputes between the IJ and the applicant. Even if the IJ and applicant cannot come to a resolution quickly, the applicant would know that the clock was stopped and could take additional action, such as filing a motion to re-start the clock. Requiring that decisions to stop the EAD asylum clock be made on the record also would reduce the number of errors that occur (for example, if an IJ assigns the incorrect adjournment code), because applicants would be able to voice an objection to the mistake. This reform undoubtedly would lead to fewer problems for both applicants and EOIR. It also would promote procedural fairness. EOIR should strive for transparency in proceedings, including in decisions relating to the EAD asylum clock. Making these determinations on the record encourages cooperation between IJs and applicants seeking asylum.

Develop clear guidelines and a new OPPM detailing when it is appropriate to stop and re-start the EAD asylum clock

One of the most glaring effects of EOIR's unclear guidance on the EAD asylum clock is the IJs' uncertainty about when it is appropriate to stop and re-start the clock after a delay has ended. EOIR should develop clear policy explaining when it is appropriate to stop and start the EAD asylum clock; should then issue a new OPPM with clear instructions; and should rescind OPPM 05-07.

Develop an internal appeals process to deal with EAD asylum clock disputes

EOIR should develop an internal appeals process to deal with EAD asylum clock disputes. The new policy should be clear, consistent with regulatory language and implemented properly and consistently across all immigration courts.

EOIR's internal appeals process should start when the IJ makes the determination, on the record, to stop the EAD asylum clock during a hearing. At that point, the applicant can express on the record his opposition to the determination and make arguments for why it is inappropriate to stop the clock. If the applicant does not prevail, she can then file a written motion with the court. This step of the internal appeals process incorporates EOIR's current recommendation advising applicants/attorneys to file written motions with the immigration court when they disagree with a determination to stop the EAD asylum clock.

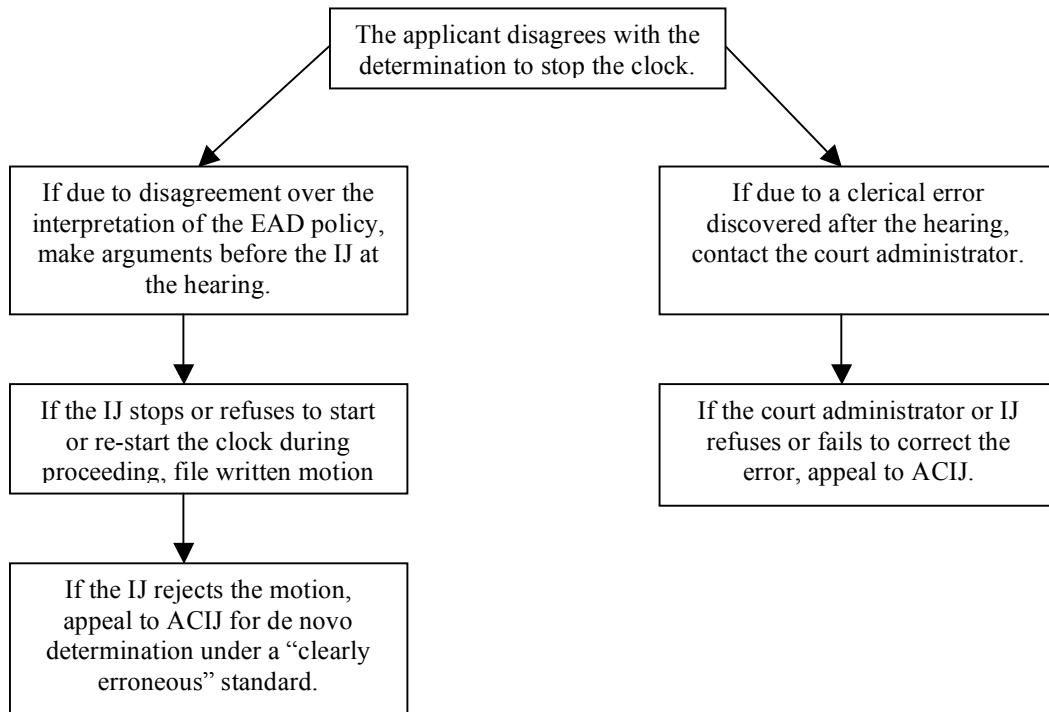
If the IJ rejects the written motion, it is imperative that the applicant have recourse to an appeal mechanism. The ACIJ should have the clear authority to review *de novo* and overrule an IJ's ruling on a "clearly erroneous" standard, and a specific time line for making the decision. Oversight of the IJs on this very limited basis and a deadline for resolution will preserve the integrity of the process and ensure procedural fairness to the applicant; it also recognizes and acknowledges the ACIJs' limited resources for adjudicating these appeals. This would be the final step of the internal appeals process for disputes over the interpretation of the new policy relating to clock stoppages.

A separate track should be available if the attorney discovers that the clock stopped due to a code-entry error. Although the new policy requiring IJs to stop the EAD asylum clock on the record should reduce the frequency of clerical errors, these errors may still occur. If the applicant

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discovers, after the hearing, that the clock was stopped because of a clerical error he should contact the court administrator. The court administrator should be able to check the adjournment code and confirm the applicant's contention. Upon discovering a clerical error, the court administrators can then contact the IJ to have the correct code entered. This may entail a review of the record to determine which code should have been entered. If the court administrator or the IJ refuses or fails to correct the mistake, the applicant should then contact the ACIJ to fix the problem. The ACIJ should be authorized to resolve problems both from the IJs and the court administrators.

Below is an outline of the internal appeals process detailed above:



This simple internal appeal process would preserve procedural fairness to the applicant and effectively resolve disputes within the immigration court. It provides for review by the ACIJ to guarantee oversight of IJs in relatively narrow circumstances and seeks to resolve conflicts using a minimally litigious framework.

Widely disseminate information about the new policy and provide for training of IJs, court administrators, and the ACIJs

The solutions outlined above will set the foundation for the resolution of the problems examined in this report, but for the changes to be effective, every IJ, court administrator, and other EOIR personnel must be aware of the new policy and appeals process. EOIR must provide for the wide dissemination of this information. The foregoing interpretive and procedural policy should be incorporated into a new OPPM and also should be published and posted in updated

versions of EOIR documents, including the following: EOIR Benchbook; EOIR Practice Manual; EOIR Fact Sheet; and EOIR Training Materials for IJs and Board of Immigration Appeals members.

EOIR also should provide training on the substantive and procedural changes to IJs, law clerks, court administrators, EOIR personnel, and the Assistant Chief Immigration Judge. The training should explain the tenets of the new policy and the role of each party in the internal appeals process. It should also instruct EOIR personnel to communicate and work with each other as the applicant moves through the appeals process.

Create a task-force made up of AOs, NGOs, private attorneys, and EOIR staff to discuss EAD asylum clock issues and implementation of the new policy

EOIR should create a task-force made up of stakeholders involved in the EAD asylum clock, including, but not limited to AOs, NGOs, private attorneys, and EOIR personnel to discuss EAD asylum clock issues and implementation of the policy. The creation of this task force would put the finishing touches on the new EOIR interpretive and procedural changes. Its two primary purposes would be to help with the implementation of new EOIR policy and to address systemic issues that arise after the policy is in place. Members of the task force could collaborate with each other and develop a system that would allow for the smooth transfer of EAD asylum clock administration from DHS to EOIR as applicants are referred to immigration court after their AO interviews. One focus of the task force could be to identify the best ways to handle the EAD asylum clock, including the possibility of shifting the burden of EAD asylum clock administration to USCIS. The recently appointed Director of USCIS Alejandro Mayorkas acknowledged the need to revisit the agency's handling of the EAD asylum when he stated during his confirmation hearing:

If I am confirmed, I commit to working with the Office of Refugee, Asylum, and International Operations to review and better understand the dilemma asylum seekers face when confronted with the workings of the “asylum clock,” and I will seek to ensure that the policies and procedures of USCIS to implement statutory mandates to prevent fraud and abuse are met while at the same time recognizing the asylum seeker’s right to retain counsel and need to prepare adequately his or her case and ensuring that an asylum seeker is not unfairly punished by the passage of time occasioned for good cause I also commit to evaluating how the “asylum clock” works and determining whether the process needs to be revised to strike the right balance between the legitimate case preparation needs of an asylum seekers and the Department’s interest in discouraging the submission of frivolous or fraudulent asylum applications in order to protect program integrity.²¹⁶

²¹⁶ Written Questions for Alejandro Mayorkas, Nominee to Serve as Director of USCIS from Chairman Patrick Leahy, Hearing before the Senate Judiciary Committee, 111th Cong., 1st Sess. (2009) (testimony of Alejandro Mayorkas).

C. Proposed Solutions for DHS

AOs should better inform applicants of the status of their EAD asylum clock

AOs should better inform applicants of the status of their EAD asylum clock. Currently, limited information about the EAD asylum clock is included in various form letters generated by the USCIS Asylum Office while an application is under its jurisdiction.²¹⁷ These form letters generally do not include a tally of the days accrued on their EAD asylum clock. The asylum clock information should be included in the letter. USCIS should include a note on each of the letters sent to applicants notifying them of the count on their EAD asylum clock and all notices should be promptly sent to applicants after USCIS identifies a delay requested or caused by the applicant without good cause. Unlike EOIR, USCIS does not have a system applicants can call for inquiries about the status of their clock.²¹⁸ Therefore, USCIS should inform applicants of each determination that will toll and re-start the EAD asylum clock, along with the count on their EAD asylum clock.

In addition, there is no way of knowing that the form notices in the appendices of the AAPM include the universe of reasons USCIS tolls the EAD asylum clock, or how promptly the notices are sent to applicants after the EAD asylum clock is tolled. USCIS should develop a list of the actions that stop and re-start the clock, all of which should be consistent with a proper interpretation of the regulations, as discussed above. The list should be posted in a conspicuous place in USCIS's website, and should be more clearly stated in the AAPM. This would enable asylum applicants, many of whom do not have attorneys, to have greater access to and understanding of USCIS policy on the EAD asylum clock. USCIS should also expand the "frequently asked questions" section in its website to address the most common EAD asylum clock-related questions.

These solutions should be coupled with a clear presumption that the EAD asylum clock is running once the applicant files a complete asylum application, and that it will continue to run unless the applicant receives notice that the EAD asylum clock is being stopped. USCIS also should provide the applicant with written notice when the EAD asylum clock re-starts after a delay has ended.

USCIS should review the status of the EAD asylum clock when it transfers the case to EOIR

The USCIS should review the status of the EAD asylum clock when it transfers jurisdiction over the individual's claim to EOIR.²¹⁹ This will avoid the dilemma some applicants face when they discover during immigration court proceedings that their EAD asylum clock was stopped by the AO and never re-started at the immigration court. It will also prompt USCIS to provide justifications for not re-starting a clock when it refers the case to EOIR, thus allowing EOIR to review the rationale and determine if and when the EAD asylum clock should re-start.

²¹⁷ See Affirmative Asylum Manual, *supra* note 11.

²¹⁸ See USCIS Customer Service Reference Guide, Ch. 3.4, available at http://www.uscis.gov/files/nativedocuments/Vol_3_File.pdf.

Develop a system to correct improper clock stoppages

USCIS should develop a system to correct improper clock stoppages. USCIS currently allows applicants to call the Asylum Office in their jurisdiction when they have problems with the EAD asylum clock.²²⁰ However, USCIS's procedure for fixing an improperly stopped clock is not clearly stated in any policy manuals and currently, the roles of the AOs, Asylum Office, and USCIS Asylum Headquarters are not clearly defined.²²¹ New policy should grant the local Asylum Offices authority over all determinations that affect the running of the EAD asylum clock. Asylum Headquarters then should have the ability to consider appeals from AO determinations and overrule those determinations on a clearly erroneous standard, similar to the standard developed in the appeals process proposed for EOIR.

D. How proposed solutions will address each category of EAD asylum clock problems

Lack of Transparency

The new policy will greatly improve current problems caused by the lack of transparency with the government's management of the EAD asylum clock. Requiring IJs to make determinations to stop the clock on the record and implementing an internal appeals process will increase the transparency of EOIR's management of the EAD asylum clock. These changes will help ensure that applicants understand the status of their EAD asylum clock at all times. The appeals process also will help IJs clearly articulate their reasons for stopping the clock and make sure the reasons conform to new EOIR policy. Similarly, requiring USCIS to include a tally of the days accrued on an EAD asylum clock on each of its letters; post detailed information about actions that stop and re-start the clock on its website; and adopt a system for correcting improper clock stoppages will also increase transparency.

Increased transparency also will help reduce the number of clerical errors that improperly cause EAD asylum clocks to stop. Applicants will be able to alert the IJ of a mistaken adjournment code at the hearing because the IJ will state the adjournment code and its justifications out loud and on the record. In addition, the internal appeals process contains a fail-safe for clerical mistakes if applicants become aware of the error after their hearing. In these situations, an applicant can contact the court administrator to correct the error. If for any reason he or she refuses to correct the error, the applicant can appeal to the ACIJ.

Lack of Clarity

The problems related to a lack of clarity in guidance will be ameliorated by a more comprehensive, explicit, and clear EAD policy. As the new policy will include instructions on how to handle frequently encountered delays, IJs will know when to stop and re-start the clock. Similarly, requiring USCIS to review the status of the EAD asylum clock and provide justifications for why a clock has been stopped will mitigate the lack of clarity that exists when a case is transferred to EOIR.

²²⁰ Asylum HQ/ NGO Liaison Agenda Question XIV, June 17, 2008 (On file with authors).

²²¹ *Id.*

Moreover, OPPM 05-07 lists a series of adjournment codes that stop the clock, but there is no similar list of codes or cues to re-start the clock.²²² EOIR's new policy memorandum will include a list of common delays and directives for appropriately re-starting the clock after the delay. For example, the list of common delays will include the delay caused when an applicant asks for a continuance to amend his application and will direct the IJ to re-start the clock once the court receives the applicant's amended application. Clarity and explicit guidance will help simplify decisions to stop and re-start the clock. For scenarios that are not on the list of common delays, the new interpretive policy will assist IJs in determining when the applicant-caused delay no longer exists.

Interpretation Problems

The new policy will address EOIR's current problems interpreting the regulations in 8 CFR § 208.7(a)(2) and CFR § 1208.7(a)(2). This report details several examples of inappropriate EAD asylum clock stoppages that are directly the result of EOIR's overly broad interpretation of *delay caused or requested by the applicant*. As a starting point, the EAD asylum clock should never stop simply because a delay *benefits* the applicant; this is not the appropriate standard set forth by the regulations. Similarly, the EAD asylum clock should never stop when the government asks for or causes a delay or continuance. New policy will make clear that these kinds of interpretations are inappropriate. This report also expresses concern that the OPPM stops the EAD asylum clock in response to actions that are part of the normal adjudication of an asylum case. For example, this report points out that the OPPM stops the EAD asylum clock when the IJ stops the clock "to allow alien [sic] time to complete the required paperwork for a biometrics check or an overseas investigation." This kind of delay should not stop the EAD clock, unless the applicant fails to comply in a timely manner without good cause.

Also, currently IJs stop the EAD asylum clock indefinitely (or sometimes, permanently) if an applicant declines the first available date for the merits hearing. In many cases, the hearing is rescheduled for over a year after the MC hearing. This policy is clearly contrary to the regulations for the reasons outlined in this report. The new policy would resolve this problem in two ways: (1) by providing clear guidelines on when to stop and re-start the clock; and (2) by correctly interpreting "delay caused or requested by the applicant."

The new policy for stopping and re-starting the clock must provide a viable solution for this widespread problem. The EAD asylum clock should not stop when an applicant has declined the first available hearing date *with* good cause. On the other hand, the new policy could specify that if the applicant rejects the first available date *without* good cause, the court will stop the clock from the date of the court-suggested first available date to the applicant's first available date. The court will re-start the EAD asylum clock on the date the applicant is available for a merits hearing. The new policy should recognize that an applicant only causes a delay until she is available for the merits hearing. If the court is backlogged and cannot reschedule a hearing until many months into the future, this should not delay the EAD asylum clock because the applicant is not causing this delay.²²³

²²² OPPM 05-07, *supra* note 85.

²²³ There also should be recognition of the special needs of law school clinics and pro bono attorneys.

Finally, requiring USCIS to develop a list of the actions that stop and re-start the clock under a “good cause” standard, coupled with a presumption that the EAD asylum clock will continue to run unless the applicant receives notice that such clock has been stopped will improve some of the interpretation problems that occur at the USCIS level.

Implementation Problems

There are problems with proper implementation of EOIR policy because of the current lack of a clearly delineated, widely understood internal appeals process. Many of the steps articulated in the appeals process proposed in this report incorporate the recommendations of current EOIR policy. However, this report emphasizes that applicants must have notice of the process in order to take advantage of it. The appeals process will prevent immigration courts from developing their own interpretation of EOIR policy by making them accountable for their actions.

The appeals process will be especially useful to applicants who face permanent clock stoppages over a temporary problem. The new policy statements will make it clear when temporary delays end and when the clock should be re-started, but if an immigration court refuses to comply with new EOIR policy, its determination can be overturned by the ACIJ.

Case Completion Goals

The case completion goals have lead IJs to find ways to stop the asylum clock to take pressure off their dockets. Treating the asylum clocks as two separate clocks will allow IJs to keep their dockets in check, while not improperly depriving applicants of work authorization. The adjudication clock is different from the EAD asylum clock in its statutory origin and purpose. This means that, under the new policy, the IJ will be able to stop the adjudication clock when adjudication must be delayed, but allow the EAD asylum clock to continue to run unless the delay is caused by the applicant without good cause.

VII. Conclusion

The problems with the EAD asylum clock are extensive, but they can be resolved. This report summarizes some of the most persistent clock problems, explains how they manifest in real world settings, and proposes solutions to fix the problems. The solutions proposed aim to resolve many of the implementation and interpretation problems attorneys and applicants face every day when dealing with stopped EAD asylum clocks. Confusing EOIR guidance on the EAD asylum clock is unfair to IJs because it leaves them exposed to criticism from applicants who must deal with inadequately defined and incomplete EOIR policy. EOIR, USCIS, and advocates must work together to implement these solutions and create a fair and predictable process for obtaining work authorization.