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

VIA EMAIL: comments@acus.gov

Re: Comments on Immigration Adjudication Draft Report

Dear Committee Members,

The American Immigration Lawyers Association (AILA) commends the Administrative Conference of the United States (ACUS) for undertaking such an extensive study of potential improvements to immigration removal adjudications within the Executive Office for Immigration Review (EOIR). AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, United States citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. AILA appreciates the opportunity to comment on interim report and believes that our members' collective expertise provides experience that makes us particularly well qualified to offer views that will benefit the public and the government.

The immigration adjudications process is in need of significant improvements, and we welcome the Committee's effort to help ensure that cases before the EOIR are adjudicated as fairly and efficiently as possible. We appreciate the opportunity to provide comments on the interim draft of the report dated April 16, 2012, (hereinafter "interim report"), and note that our comments are by no means exhaustive. There are a number of recommendations that we support in the interim report but do not discuss below; for example, we believe that an asylum officer should be authorized to approve qualified asylum applications in the expedited removal context.¹ Likewise, there are recommendations that we believe should be revised but do not discuss below; namely, recommendations in which we feel other organizations are in a better position to offer more specific critiques.

¹ See 40 INTERIM DRAFT [4/16/12]; Proposed Recommendation 28 [4/19/12].

Stipulated Removal Orders²

AILA recognizes that stipulated removal orders, when used appropriately, can help reduce DHS costs and the time immigrants spend in detention. However, we are concerned that the recommendations in the interim report do not adequately protect the due process rights of noncitizens being asked to sign stipulated orders—particularly those who are *pro se*. The overwhelming majority of individuals being asked to sign stipulated removal orders do not have a lawyer and have no criminal history.³ For noncitizens who have claims to remain in the United States, who do not understand the legal ramifications of a removal order, or who do not understand what they are being asked to sign, the use of stipulated orders may violate their due process rights and result in the wrongful removal. This includes individuals eligible to remain in the U.S, such as crime victims, asylum seekers, abused or abandoned children, trafficking victims, those with U.S. citizen or LPR family members, and even U.S. citizens. As a result, we urge the Committee to recommend that stipulated removal orders not be used for *pro se* respondents, unless the respondent has requested a stipulated removal order and the judge holds an in-person hearing to review the advisals and assess the respondent’s understanding of the stipulated order.

Limited Appearances⁴

AILA fully supports the use of limited appearances in appropriate circumstances. Rule 1.2(c) of the Model Rules (as reflected in state bar rules) states “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” This “unbundling” is beneficial to all legal consumers, and immigration courts should not continue to hold clients and lawyers in matters when they have agreed to limited representation.

Additionally, allowing attorneys to limit their representation to the early stages of proceedings (i.e., bond and master hearings) would encourage *pro bono* counsel to represent more respondents, particularly detained individuals, without imposing a burden that might dissuade them from representing the respondent at all. As the interim report notes, “limited appearances within the representation-deprived removal adjudication system may be better than no representation, if the respondent understands the limits it entails.”⁵

Keeping DHS Appeals to the BIA within DHS⁶

AILA disagrees with the recommendation that DHS require all appeals of denied I-130 petitions to be submitted to the USCIS’s Administrative Appeals Office (AAO) instead of the Board of Immigration Appeals (BIA). The AAO is not an independent review body, but rather, is a component within USCIS. In contrast, the BIA is a review body completely independent of the

² See 80 INTERIM DRAFT [4/16/12]; Proposed Recommendation 11 [4/19/12].

³ Jennifer Lee Koh, Jayashri Srikantiah and Karen Tumlin, DEPORTATION WITHOUT DUE PROCESS, at 7-9 (2011), available at <http://nilc.org/pubs.html>.

⁴ See 66 INTERIM DRAFT [4/16/12]; Proposed Recommendation 20 [4/19/12].

⁵ See 66 INTERIM DRAFT [4/16/12].

⁶ See 50 INTERIM DRAFT [4/16/12]; Proposed Recommendation 14 [4/19/12].

agency that renders decisions on appeal. Because the AAO is neither independent nor legally charged as an objective administrative appeal board, AILA is concerned that it will not be able to fairly or predictably adjudicate denied I-130 petitions.

AILA is further concerned that the AAO would be unable to efficiently adjudicate I-130 appeals. The AAO is plagued by problems, including unacceptably long processing times and a pronounced lack of precedent decisions. Even significant increases in filing fees have failed to result in faster processing times.⁷ In addition, a timely appeal of a decision filed with the District Director, the Director of a Service Center, or an Overseas Field Office can sit in the that office for months or years before it is transmitted to the AAO where it languishes further.

While the recommendations suggest that the AAO create a special unit for adjudication of family-based petitions, issue precedent decisions more often, and publicize clear processing time frames, these measures will not be sufficient to safeguard against longer processing times if the AAO is charged with additional appeals. If ACUS includes this recommendation in its final report, it is imperative to staff the family-based adjudication unit with newly hired individuals, rather than pulling current AAO staff away from their already existing, and heavy, caseload. Ultimately, however, AILA recommends that jurisdiction for appellate review of I-130 petitions remains with the BIA, a body independent of the agency from whose decision the appeal is taken.

Electronic Docketing⁸

AILA applauds the recommendation that EOIR move as quickly as possible to electronic docketing. However, any electronic docketing system should be developed in consultation with attorneys and accredited representatives who will primarily be using the new system, to ensure that it is compatible with the technology available to stakeholders and consumers.

Accredited Representatives⁹

The use of the term “paraprofessional” has a broader meaning than the context in Recommendation 17, and we encourage the Committee to use a different word. There are no paraprofessional programs that provide legal representation. The EOIR Recognition and Accreditation program permits certain EOIR-recognized organizations and their accredited representatives to represent aliens in immigration proceedings. However, only lawyers and accredited representatives may provide legal representation.

⁷ In 2005, the AAO filing fee was raised from \$110 to \$385. Adjustment of the Appeal and Motion Fees To Recover Full Costs, 70 FR 50954 (August 29, 2005). Since then, the fee has steadily increased to its current fee of \$630. *See* Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 FR 4887 (February 2, 2007); U.S. Citizenship and Immigration Services Fee Schedule, 75 FR 33445 (June 11, 2010). During the period these fees increased six-fold, waiting times on many application types have doubled.

⁸ *See* 53 INTERIM DRAFT [4/16/12], Proposed Recommendation 40 [4/19/12].

⁹ *See* Proposed Recommendation 17 [4/19/12].

Incentivizing Private, Non-Government, Attorneys¹⁰

While we believe strongly in the need for safeguards to protect the rights and interests of non-citizens in removal proceedings, there is no need to create a private system for judges to reprimand lawyers. The current federal and state bar disciplinary programs provide for sanctions, including public reprimands, for incompetent and obstructive behavior. Judges should use the federal and state bar disciplinary program for private and government attorneys who fall below prescribed ethical conduct.

Video and Telephone Hearings¹¹

AILA strongly opposes the use of video teleconference technology to conduct immigration merits hearings, unless the respondent has knowingly waived his or her right to an in-person hearing. The decisions made in immigration court are weighty—for example, whether a family can remain together or whether an individual will be sent back to violence or even death in her home country. No matter how good the technology, video hearings can never be equivalent to in-person hearings. As the Committee has noted, particular concerns about video hearings include the physical separation between a lawyer and the client, difficulties with translators—exacerbated by the fact that translators often appear via phone and the inability of a television screen to transmit nonverbal cues.

AILA was disappointed by the Committee's position that continued and expanded use of video hearings is a foregone conclusion and, therefore, does not warrant further, in-depth and comprehensive study. It is no secret that EOIR is underfunded and overburdened. However, the amount of savings that video hearings might garner does not outweigh the need to protect a respondent's due process rights. The dissatisfaction expressed by a significant number of immigration judges over video hearings should raise alarm bells about the impact of video hearings on respondents' rights. Better technology and electronic docketing and case files, while important, would not address the most significant concerns immigration judges expressed about video hearings. With the rapidly expanding use of video hearings, it is vital importance that a comprehensive and in-depth study be undertaken to look at the impact of video hearings on respondents' due process rights.

Conclusion

Again, we appreciate the opportunity to comment on improvements to immigration removal adjudications within EOIR.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

¹⁰ See 85 INTERIM DRAFT [4/16/12], Proposed Recommendation 22 [4/19/12].

¹¹ See 87 INTERIM DRAFT [4/16/12], Proposed Recommendations 32-37 [4/19/12].