

## Comments on the ACUS Immigration Adjudication Study

The information posted on the ACUS website seems to be mislabeled. The study appears to be narrowly focused on *Removal Proceedings* and their associated Appellate Review by the BIA. Simply calling it “Immigration Adjudication” is far too broad and inclusive for what has been identified so far.

The study outlined thus far could more aptly be entitled along the lines of “EOIR Proceedings”, “Formal Removal Proceedings”, or “INA § 240 Proceedings”. What is currently indicated as a focus seems to be completely excluding all three DHS Immigration Agencies and the State Dept.

*The current synopsis includes:*

**Background Information:** One of the biggest challenges in mass adjudication programs is the queue of pending deportation proceedings. A study issued in August 2010 by the Transactional Records Access Clearinghouse at Syracuse University reports that the number of cases pending before immigration courts within the Executive Office for Immigration Review (EOIR) recently reached an all-time high of nearly 248,000 and that the average time these cases have been pending is 459 days. A February 2010 study by the American Bar Association’s Commission on Immigration reports that the number of cases is “overwhelming” the resources that have been dedicated to resolving them.

**Project Details:** The Conference is currently planning to study potential improvements to the procedures for **immigration adjudication**. The study will be limited to such procedures and will not address substantive immigration reform. The study may address a variety of possible ways to improve immigration adjudication and will start by identifying the most fruitful areas to target. Potential areas of improvement may include:

- **Representation.** The ABA study suggests that improving representation of noncitizens in immigration proceedings could benefit not only noncitizens, but also government decision-makers and the overall system by making cases clearer and more efficient, promoting fairer results, and, in some cases, persuading noncitizens to abandon their cases because they have no basis for relief. The Conference’s study may catalog existing barriers to representation, which may be legal, practical, technological, or financial; identify ways to overcome these barriers, including creative methods that might not require much additional funding; and estimate the costs and benefits for both private parties and the government if the barriers could be overcome.
- **Management Practices at EOIR.** The ABA study suggests numerous issues with case management at the Executive Office for Immigration Review. These issues involve both the trial-level immigration courts and the Board of Immigration Appeals. The study may consider case management at both levels.
- **Video Hearings<sup>1</sup>.** Video conferencing offers potential efficiency benefits, but critics have suggested that it may hamper communication and credibility determinations. The study may consider the best uses of video conferencing. ....

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<sup>1</sup> As VTC pertains to EOIR and *Petitions for Review*, see “**Location, Location, Location: Venue for Immigration Appeals in the U.S. Circuit Courts**” by Daniel L. Swanwick (Attorney Advisor with BIA) in *Immigration Law Advisor*, Vol. 5, No. 1 (January 2011) at: <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202011/vol5no1.pdf>

**If ALL Immigration Adjudications were included in the formulation of the study, EOIR's BIA, while a powerful voice in immigration matters, would not be found to be the agency that handles the majority of immigration adjudications.**

ACUS cites that EOIR has a caseload backlog of around one-quarter million spanning a year and a half, or so. However, USCIS handles three to four million applications and petitions per year, Customs and Border Protection (CBP) handled 163 million nonimmigrant admissions to the United States in 2009 alone, according to DHS work-load estimates.<sup>2</sup> Between Immigration and Customs Enforcement (ICE) and CBP's Border Patrol, in 2009, there were 393,000 foreign nationals removed from the United States—the seventh consecutive record high.<sup>3</sup> ICE detains around 35,000 aliens every day in detention centers around the country.

## **Background**

As of March 1, 2003, the Immigration and Naturalization Service (INS) within the Department of Justice (DOJ) ceased to exist. The Executive Office of Immigration Review (EOIR) had previously been separated from INS within DOJ. When the Department of Homeland Security (DHS) was created, INS was absorbed into it but EOIR was retained within DOJ.

The BIA was created by the Attorney General in 1940, after a transfer of functions from the Department of Labor. Reorg. Plan V (May 22, 1940); 3 CFR Comp. 1940, Supp. Title 3, 336. The BIA is not a statutory body; it was created wholly by the Attorney General from the functions transferred. A.G. Order 3888, 5 FR 2454 (July 1, 1940); see *Matter of L-*, 1 I&N Dec. 1 (BIA; A.G. 1940).

The Executive Office for Immigration Review (EOIR) was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the Board of Immigration Appeals (BIA or Board) with the Immigration Judge [IJ] function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security). Besides establishing EOIR as a separate agency within DOJ, this reorganization made the Immigration Courts independent of INS, the agency charged with enforcement of Federal immigration laws. *The Office of the Chief Administrative Hearing Officer (OCAHO) was added in 1987.*

EOIR is also separate from the Office of Special Counsel [OSC] for Immigration-Related Unfair Employment Practices in the DOJ Civil Rights Division and the Office of Immigration Litigation in the DOJ Civil Division.

As an office within the Department of Justice, EOIR is headed by a Director who reports directly to the Deputy Attorney General. Its headquarters are located in Falls Church, Virginia, about 10 miles from downtown Washington, DC.

<http://www.justice.gov/eoir/orginfo.htm>

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<sup>2</sup> [http://www.dhs.gov/xlibrary/assets/statistics/publications/ni\\_fr\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2009.pdf)

<sup>3</sup> [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf)

## **Office of the Chief Administrative Hearing Officer**

The Office of the Chief Administrative Hearing Officer (OCAHO) is headed by a Chief Administrative Hearing Officer who is responsible for the general supervision and management of Administrative Law Judges who preside at hearings which are mandated by provisions of law enacted in the Immigration Reform and Control Act of 1986 (IRCA (PDF)) and the Immigration Act of 1990 (PDF). These acts, among others, amended the Immigration and Nationality Act of 1952 (INA).

Administrative Law Judges hear [ALJs] cases and adjudicate issues arising under the provisions of the INA relating to (1) knowingly hiring, recruiting, or referring for a fee or the continued employment of unauthorized aliens, and failure to comply with employment verification requirements in violation of section 274A of the INA (employer sanctions); (2) immigration-related unfair employment practices in violation of section 274B of the INA; (3) immigration-related document fraud in violation of 274C of the INA; and (4) failure to comply with the information dissemination provisions for international match making organizations in violation of 8 U.S.C. 1375a [IMBRA]. Complaints are brought by the Department of Homeland Security, the Office of Special Counsel for Immigration-Related Unfair Employment Practices in the Department of Justice, or private individuals as prescribed by statute.

Hearings are conducted under applicable laws and regulations, as well as the general requirements of the Administrative Procedure Act. Employer sanctions and document fraud cases are subject to administrative review by the Chief Administrative Hearing Officer. All final agency decisions are subject to review in federal courts.

**<http://www.justice.gov/eoir/ocahoinfo.htm>**

The Administrative Appeals Unit (AAU) within INS became officially AAO upon publication on Nov. 22, 1994, 59 FR 60070. The prior history as to the creation of the AAU will require further research. That internal reorganization<sup>4</sup> of the Immigration and Naturalization Service was approved by Attorney General Janet Reno on January 14, 1994.

“The BIA is the creation of Attorney General...[order]...and has never been statutorily authorized. The Board traces its heritage to 1921 when the Secretary of Labor created a board to assist in performing quasi-judicial functions under the immigration and naturalization laws. In 1940, the Attorney General officially created the BIA, which for more than fifty years existed as part of the Immigration and Naturalization Service (INS), and consisted of only a chairman and four members. The BIA separated from the INS in 1983 and became part of the independent Executive Office of Immigration Review.

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<sup>4</sup> See 59 FR 60070 of Nov. 22, 1994, search for “Immigration and Naturalization Service” and view the TIFF File for the Reorganization Chart at: <http://www.gpoaccess.gov/fr/search.html>

Within the Executive Office of Immigration Review, the BIA is under direct line of supervision by the Attorney General and has authority to act on the Attorney General's behalf. Thus, when the immigration laws confer a decision to the discretion of the Attorney General, the BIA has authority to administer that discretion. The BIA has grown rapidly over the last decade to twenty-three members and more than one hundred staff attorneys in order to keep up with a heavy caseload and expanding functions.<sup>5</sup>

### **Similarities and Differences: EOIR v. USCIS and BIA v. AAO**

While there are similarities in the manner in which Administrative Adjudications are conducted (i.e., they are all under the same law: the Immigration and Nationality Act (INA) [8 USC] and the BIA and AAO rarely ever hear oral argument), there are also striking differences between DHS (especially USCIS) and EOIR. There are even differences between the various adjudications made within each agency. EOIR has two systems with two appellate courses; IJ decisions appealed to the BIA, as well as, ALJ decisions appealed to the Chief Administrative Hearing Officer.

The EOIR's Immigration Courts have live participants in an actual courtroom (or via video teleconference) while the vast majority of appellate reviews by the Board of Immigration Appeals (BIA) are usually paper-based and faceless adjudications applying different rules of evidence and different procedures. The same is true within USCIS, to a point, but the USCIS' agency review before its appellate body, the Administrative Appeals Office (AAO), varies quite a bit from EOIR's BIA.

AAO generally deals with appeals from USCIS' Service Centers where there are no interviews or examinations of applicants and petitioners. AAO performs a faceless, paper-based review of a faceless, paper-based initial adjudication. The vast majority of the many primary/initial USCIS decisions that involve interviews or examinations have a different appeal path. If a naturalization applicant is initially denied, a second hearing is performed in the same local office before another Adjudication Officer and further review is available in the federal courts after that. On the other hand, the denial of an adjustment of status application (for a green-card) plus any associated waiver can be renewed before an Immigration Judge in Removal Proceedings or if not immediately subject to Removal, a waiver can be appealed to the AAO (even from abroad when seeking an Immigrant Visa that is dependent on approval of a waiver). **The BIA and AAO are qualitatively different in nature and OCAHO is a minor player in the system.**

### **Administrative Adjudication**

*The process by which an Administrative Agency issues an order, such order being affirmative, negative, injunctive, or declaratory in form.*

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<sup>5</sup> Bradley J. Wyatt, *Even Aliens are Entitled to Due Process: Extending Mathews v. Eldridge Balancing to Board of Immigration Appeals Procedural Reform*, 12 Wm. & Mary Bill of Rts. J. 605 (2004), <http://scholarship.law.wm.edu/wmbrj/vol12/iss2/10>

## *Introduction*

Most formal proceedings before an administrative agency follow the process of either rule making or adjudication. Rule making formulates policy by setting rules for the future conduct of persons governed by that agency. Adjudication applies the agency's policy to the past actions [or qualifications]<sup>6</sup> of a particular party, and it results in an order for or against that party. Both methods are strictly regulated by the law of administrative procedure.

Preceding from: <http://legal-dictionary.thefreedictionary.com/Administrative+Adjudication>

## *Inquisitorial v. Adversarial Systems*

An **inquisitorial system** is a legal system where the court or a part of the court<sup>7</sup> is actively involved in determining the facts of the case, as opposed to an **adversarial system** where the judge's<sup>8</sup> role is that of an impartial referee (except for questions of law) and the prosecution<sup>9</sup> (or plaintiff in civil cases) and defendant<sup>10</sup> plead their case before a *jury who determines the facts of the case; though in some adversarial systems it is the judge<sup>11</sup>* who is both the trier of fact and law. It is important to note that even in adversarial proceedings in some jurisdictions the judge may participate in the fact finding inquiry by questioning witnesses appearing before her. The rules of admissibility of evidence may also allow the judge to act more like an enquirer than an impartial arbiter of justice.

The inquisitorial system applies to questions of procedure as opposed to questions of substantive law and is most readily used in many, but not all civil legal systems. However, some jurists do not recognize this dichotomy and see procedure and substantive legal relationships as being interconnected and part of a theory of justice as applied differently in various legal cultures. International tribunals intended to try crimes against humanity, such as the Nuremberg Trials and the International Criminal Court, have used the inquisitorial system rather than the adversarial system.

<http://www.wordiq.com/definition/Inquisitorial>

*In “inquisitorial” USCIS adjudications, the ISO (adjudication officer) renders the decision (applying controlling law (after deciding which section of the INA applies to the particular petition or application, i.e. “case”) to the facts as (s)he determines them to be) after evaluating*

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<sup>6</sup> A petitioner or applicant seeking an immigration, naturalization, or citizenship benefit or determination of such status, from the INA submits evidence and may be asked to supply testimony as part of the adjudication process especially during an adjustment of status interview or naturalization examination before USCIS **OR** a visa interview before a Consular Officer of DOS **OR** before an Immigration Judge in an EOIR Removal Proceeding.

<sup>7</sup> In a case before USCIS, one appears before *or simply submits a petition or application to* an Adjudicator.

Currently, that Adjudication Officer is referred to as an Immigration Service Officer (ISO) within USCIS.

<sup>8</sup> IJ or ISO's role.

<sup>9</sup>The Government **or** the respondent, petitioner or applicant “prosecutes” their claim (or case) for a benefit or relief under the INA.

<sup>10</sup> The Government **or** the respondent, petitioner or applicant “prosecutes” their claim (or case) for a benefit or relief under the INA

<sup>11</sup> The adjudicator, by whatever title, is the “judge” acting on behalf of the agency as the main trier of fact, i.e., “jury”.

*the submitted evidence, sometimes taking sworn testimony at an interview, and also may request specific evidence.*

*Once an applicant has met his or her initial burden of proof, he or she can be said to have made a “prima facie case.” This means that the applicant has come forward with the facts and evidence which show that, at a bare minimum, and without any further inquiry, he or she has initial eligibility for the benefit sought. This does not mean that the inquiry is over. An alien may have established initial eligibility, but it is up to USCIS to determine if there are any discretionary reasons why an application should be denied, or if there are any facts in the record (including facts developed during the course of the adjudicative proceedings, such as during an interview) which would make the applicant ineligible for the benefit. If such adverse factors do exist, it is again the applicant's burden to overcome these factors.<sup>12</sup> AAO has been applying BIA regulations and precedents to its “benefits adjudication” administrative appellate reviews in the absence of its own appellate regulations, sometime quite inappropriately.*

The **adversarial system** (or **adversary system**) is a legal system where two advocates represent their party's positions before an impartial person or group of people, usually a jury or judge, who attempt to determine the truth of the case.<sup>[1][2][3]</sup> As opposed to that, the inquisitorial system has a judge (or a group of judges who work together) whose task is to investigate the case.

The adversarial system is generally adopted in common law countries. An exception, for instance in the U.S., may be made for minor violations, such as traffic offences. On the continent of Europe among some civil law systems (i.e. those deriving from Roman law or the Napoleonic Code) the inquisitorial system may be used for some types of cases.

The adversarial system is the two-sided structure under which criminal trial courts operate that pits the prosecution against the defense. Justice is done when the most effective adversary is able to convince the judge or jury that his or her perspective on the case is the correct one. [*In “adversarial” Removal Proceedings, ICE Counsel must prove removability and if that is achieved, the burden then shifts to the alien to prove eligibility for some form of relief from removal.*]

Some writers trace the process to the medieval mode of trial by combat,<sup>[4][5]</sup> in which some litigants, notably women, were allowed a champion to represent them. The use of the jury in the common law system seems to have fostered the adversarial system and provides the opportunity of both sides to argue their point of view.

As an accused is not compelled to give evidence in a criminal adversarial proceeding, he may not be questioned by prosecutor or judge unless he chooses to do so. However, should he decide to testify, he is subject to cross-examination and could be found guilty of perjury. As the election to maintain an accused person's right to silence prevents any examination or cross-examination of that person's position, it follows that the decision of counsel as to what evidence will be called is a crucial tactic in any case in the adversarial system and hence it might be said that it is a

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<sup>12</sup> See USCIS Memo at:  
[http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2006/adopteddecaf011106.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/adopteddecaf011106.pdf)

lawyer's manipulation of the truth. Certainly, it requires the skills of counsel on both sides to be fairly equally pitted and subjected to an impartial judge. [Note: Aliens seeking some form of relief, generally, feel it is imperative to testify and for good reason. "Credible testimony" alone CAN suffice as proof in a claim for asylum, withholding of removal (WOR), or Convention Against Torture (CAT) Relief. Corroboration is desire-able (and expected when readily available) but not imperative or absolutely required.]

Wikipedia footnotes [1]-[5]:

1. <sup>^</sup> Hale, Sandra Beatriz (July 2004). *The Discourse of Court Interpreting: Discourse Practices of the Law, the Witness and the Interpreter*. John Benjamins. pp. p31. ISBN 978-1-58811-517-1.
2. <sup>^</sup> Richards, Edward P.; Katharine C. Rathbun (1999-08-15). *Medical Care Law*. Jones & Bartlett. pp. p6. ISBN 978-0-8342-1603-7.
3. <sup>^</sup> Care, Jennifer Corrin (2004-01-12). *Civil Procedure and Courts in the South Pacific*. Routledge Cavendish. pp. p3. ISBN 978-1-85941-719-5.
4. <sup>^</sup> Kirsten DeBarba (2002). "Maintaining the adversarial system: The practice of allowing jurors to question witnesses during trial". *Vanderbilt Law Review*. p. 55 no. 5 (October 1): 1521–1548. Retrieved August 15, 2007.
5. <sup>^</sup> Anne Strick, *Injustice for All* (New York: G. P. Putnam's Sons, 1977): 21.

### **[http://en.wikipedia.org/wiki/Adversarial\\_system](http://en.wikipedia.org/wiki/Adversarial_system)**

The current ACUS focus, as thus far identified is on three key areas of EOIR Removal Proceedings as follows:

- **Representation.**
- **Management Practices at EOIR.**
- **Video Hearings.**

### **Representation**

EOIR already has taken great strides in assisting willing legal professionals and voluntary advocates to gain access to aliens in need of **representation**. Contact information for licensed attorneys and eligible law students participating in the EOIR prop bono program and “accredited representatives” and “recognized organizations” is available on the agency website.

<http://www.justice.gov/eoir/statspub/raroster.htm> [Organizations and their employees.]

<http://www.justice.gov/eoir/probono/states.htm> [State by state lists of pro bono lawyers.]

<http://www.justice.gov/eoir/press/2011/ProBono10thAnniversary01262011.pdf> [Press Release marking 10th Anniversary of Pro Bono Program.]

<http://www.justice.gov/eoir/probono/GetonList.htm> [For the lawyers to apply.]

[http://www.justice.gov/eoir/statspub/raroster\\_files/WhoCanRepresentAliensFactSheet10022009.pdf](http://www.justice.gov/eoir/statspub/raroster_files/WhoCanRepresentAliensFactSheet10022009.pdf) [A guide and warning to the aliens in need of assistance.]

All “accredited representatives” must be designated by an organization that is recognized by the Board. Organizations must apply to the Board for recognition (on Form EOIR-31) as well as accreditation of its representatives (on letterhead, no form involved). The rules for qualifying organizations, requests for recognition, withdrawal of recognition, and accreditation of representatives can be found in the Code of Federal Regulations, 8 C.F.R. § 292.2 and § 1292.2.

The R&A rosters provided by EOIR are maintained by the R&A Program Coordinator, and are updated quarterly. Since changes may occur between quarterly updates affecting the status of organizations and representatives, the most up-to-date information can be obtained by contacting the R&A Program Coordinator at (703) 305-9029.

“Other qualified representatives” may be any of the following persons who meet the conditions specified in the regulations:

- Law students and law graduates of accredited U.S. law schools not yet admitted to the bar but working under the supervision of an attorney;
- Reputable individuals of good moral character who have a personal or professional relationship with the represented alien (e.g., relative, neighbor, clergy, co-worker, or friend) and who are appearing without direct or indirect payment; or
- An accredited official of the government to which the represented alien owes allegiance (e.g., a consular officer).

To apply to serve as an “other qualified representative,” persons should file a written statement with the respective immigration court attesting that they meet the criteria specified in the regulations (8 C.F.R. § 1292.1). They also must file the form required of all representatives, a “*Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court*” (Form EOIR-28) or EOIR-27 for the BIA. OCAHO has no form but relies on the older DOJ rules at 28 CFR § 68.33(c).

## **Management Practices at EOIR**

**Customer Service Initiatives:** <http://www.justice.gov/eoir/npr.htm>

EOIR has a case status system in place for the aliens and their attorneys/representatives to keep tabs on the case.

### **Case Information System**

240-314-1500 or 1-800-898-7180

Case status information available 24/7

EOIR published a proposed rule at 68 FR 75160<sup>13</sup> on December 30, 2003, entitled “**Executive Office for Immigration Review Attorney/Representative Registry**” which called for all practitioners representing aliens before the Immigration Courts and BIA to register and obtain a unique “UserID” and password for electronic case filing and docket management. The EOIR system encompassing, enhancing, and combining existing databases would allow the

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<sup>13</sup> <http://www.gpo.gov/fdsys/pkg/FR-2003-12-30/pdf/03-32019.pdf#page=1>



immigration practitioners to file and manage cases before EOIR from their desktop computers. The rule stated that law firms or other similar entities will not be issued a UserID. Practitioners working on behalf of a law firm (including attorneys, law graduates, and law students) or other entity (such as accredited representatives employed by recognized organizations) must individually register with EOIR.

That Proposed Rule called for the creation of a new paragraph in the EOIR regulations pertaining to representation of aliens in EOIR immigration proceedings:

### **8 CFR § 1292.1 Representation of others.**

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(f) *Registration requirement for attorneys and representatives.* The Director or his designee is authorized to register, and establish procedures for registering, attorneys and representatives, as defined by 8 CFR 1001.1(f) and (j), as a condition of practice before immigration judges or the Board of Immigration Appeals. Such registration procedures will include a requirement for electronic registration. The Director or his designee may administratively suspend from practice before the immigration judges and the Board any attorney or representative who fails to provide the following required registration information: practitioner name, address(es), date-of-birth, last four digits of social security number, e-mail address (if applicable) and bar admission information (if applicable). After such a system has been established, an immigration judge may, under extraordinary and rare circumstances, permit an unregistered practitioner to appear at one, and only one, hearing if the immigration judge first acquires from the attorney or representative, on the record, the required registration information. An unregistered practitioner who is permitted to appear at a hearing in such circumstances shall complete the electronic registration process immediately after the hearing at which he or she is permitted to appear.

This was followed up with a publication at 69 FR 26179 on May 11, 2004, entitled "Executive Office for Immigration Review; AAG/A Order No. 007-2004; Privacy Act of 1974; System of Records" which included:

"Pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a), notice is hereby given that the Executive Office for Immigration Review (EOIR), Department of Justice, proposes to modify "Records and Management Information System (JUSTICE/EOIR-001)," revisions last published on July 5, 2001 (66 FR 35458), full text last published October 10, 1995 (60 FR 52694).

The modifications are based, in part, on a proposed rule, published December 30, 2003 (68 FR 75160) that would amend the regulations pertaining to appearances by attorneys and representatives before EOIR. The proposed rule would allow EOIR to collect, electronically, new information from attorneys and other Immigration practitioners as a condition of practicing before Immigration Judges and the Board of Immigration Appeals. This new information will consist of the birth date, the last four digits of the

social security number, bar membership, as well as the electronic and mailing addresses, of these attorneys or representatives, for purposes of secure communications within an EOIR electronic case access and filing system.”

**Major Information Systems:** <http://www.justice.gov/eoir/efoia/foiamis.htm>

The Case Access System for EOIR (CASE) information page found on the EOIR website at above link, is dated as last updated in September 2010. There was some negative feedback on the proposal and it seems to have been stalled but it is a starting point for ACUS to follow up on.

The most recent activity found for this system was the submission of a NARA Standard Form 115 “**REQUEST FOR RECORDS DISPOSITION AUTHORITY**” by EOIR on May 8, 2009. Found at the following link:

[http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/n1-060-08-007\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/n1-060-08-007_sf115.pdf)

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

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## 2. Master file

A) **Database** -Information about each case and appeal includes identification and biographic data about the alien as well as any testimony, decisions rendered, and important dates/actions in the case. The CASE system performs tracking and management functions initiated as part of the legacy systems, but also includes information about representing attorneys and a docket listing of all documents filed in case files to reduce redundancy in data entry. The attorney information maintained in CASE allows for coordination of attorney schedules by DHS as well as hearing and judge scheduling through interactive scheduling.

Disposition: PERMANENT, cut off closed cases annually. Transfer to National Archives and Records Administration (NARA) 25 years after cut off, in accordance with 36 CFR 1228.270 or applicable regulations at time of transfer.

B) **Digital Audio Recordings** -DAR records hearings scheduled through the interactive scheduling functions of CASE. Immigration officials initiate the recording process through the DAR system and may stop and start recording throughout the proceeding or annotate/time stamp key points in the proceedings for future accessibility. Recordings of hearings include audio files for each channel recorded with xml annotations and are linked to the case data to which

they relate. Recordings were previously captured on analog tapes and filed with paper case files.

See also: <http://www.justice.gov/eoir/contact.htm>

## Video Hearings

### EOIR's Video Teleconferencing Initiative

This innovation was discussed in the linked Fact Sheet dated March 13, 2009, however, it is not new. The use of video teleconferencing has been in the repertoire of the Immigration Courts and BIA for well over a decade. 62 FR 10312-10395 (March 6, 1997). In that FR publication, INS and EOIR were implementing recent changes brought about by the 1996 immigration amendments. In 1997, the cost for new video and audio teleconferencing equipment was estimated at \$3,000,000. *Id at 10329.*

“Video teleconferencing (VTC) is an electronic form of communication that permits two or more people in different locations to engage in audio and visual exchanges. VTC technology allows court proceedings, as well as meetings and training, to be conducted efficiently and effectively, even though participants are not together at one site.

The Immigration and Nationality Act [240(b)(2)(A)(iii)] and federal regulations [8 C.F.R. 1003.25(c)] authorize an immigration judge to conduct hearings through VTC. The Executive Office for Immigration Review (EOIR) uses VTC to conduct immigration hearings for aliens, such as those who are incarcerated or detained throughout the country. VTC units have been installed at EOIR headquarters and at nearly all immigration courts and at other sites (e.g., detention centers, correctional facilities) where immigration hearings are conducted.”

<http://www.justice.gov/eoir/press/VTCFactSheet031309.pdf>

### 8 CFR § 1003.25 Form of the proceeding.

(c) *Telephonic or video hearings.* An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person. An Immigration Judge may also conduct a hearing through a telephone conference, but an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference, except that credible fear determinations may be reviewed by the Immigration Judge through a telephone conference without the consent of the alien.

[62 FR 10334, Mar. 6, 1997]

## **8 CFR § 1003.42 Review of credible fear determination.**

(c) *Procedures and evidence.* The Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the review. The testimony of the alien shall be under oath or affirmation administered by the Immigration Judge. If an interpreter is necessary, one will be provided by the Immigration Court. The Immigration Judge shall determine whether the review shall be in person, or through telephonic or video connection (where available). The alien may consult with a person or persons of the alien's choosing prior to the review. *Id.*

The majority of opposition to the use of video teleconferencing is on two bases. Those with weak cases for relief object to the speeding up of a negative conclusion to their case in the form of denial of relief and an Order of Removal. Numerous others make the rather weak argument that findings of a “lack of credibility” in an alien’s testimony are directly attributable to the lack of a face-to-face meeting between the applicants and/or any witnesses and the Immigration Judge. In reality, video teleconferencing has been a major factor, in conjunction with other streamlining efforts, in improving the efficiency of Removal Proceedings. Removable aliens naturally object and their attorneys will make whatever arguments they can no matter how weak the grounds for objections and appeals.

Recent changes to attorney/representative standards of conduct and bases for discipline have been strongly fought (tooth and nail) by the underbelly of immigration practitioners. It is a well known industry “secret” that the *vast majority* of immigration attorneys, like gynecologists in the medical profession, finished at the bottom of their class. The *exceptional* and *competent practitioners* quickly rise to the top of the field and are the ones who write the textbooks, guides, periodicals, and have the best websites and prestigious practices with wealthy clientele or join community based organizations and charitable organizations out a true zeal or a personal connection. The run-of-the-mill barely passable practitioners haunt detention centers, USCIS Office waiting rooms and are on a level with “ambulance chasers”.

### **EOIR is a Poor Focus for this Study.**

The EOIR has already taken steps to improve processing in the Immigration Courts and at the BIA. Their efforts have been effective but have also been fought vehemently by the immigration practitioners and [illegal alien] “immigrant” “advocates”. The discussions on BIA reforms and streamlining have been going on for years. One particular article of interest is by Bradley J. Wyatt, *Even Aliens are Entitled to Due Process: Extending Mathews v. Eldridge Balancing to Board of Immigration Appeals Procedural Reform*, 12 Wm. & Mary Bill of Rts. J. 605 (2004), <http://scholarship.law.wm.edu/wmborj/vol12/iss2/10>

Congressional testimony abounds on this topic, one example is: AILA Testimony on BIA Reform Cite as "AILA InfoNet Doc. No. 02020633 (posted Feb. 6, 2002)", Statement of Stephen Yale-Loehr, American Immigration Lawyers Association on The Operations of the Executive Office for Immigration Review (EOIR) Before the House Committee on the Judiciary Subcommittee on Immigration and Claims February 6, 2002 Washington, D.C.

Various individuals have posted their thoughts on the internet and most include links to other articles and studies from private and government sources, one such is: Immigration Appeals: The Need To Reform BIA Procedures Posted<sup>14</sup> on April 27, 2010 by Carlos Batara. This one has some interesting links in it. Carlos includes a link to the American Bar Association's, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (PDF),<sup>15</sup> which outlined concerns about the immigration appellate system.

Like I said, this topic and ensuing discussion is not new. Please see the AILA Comments on BIA Streamlining<sup>16</sup> Cite as "AILA InfoNet Doc. No. 98111390 (posted Nov. 16, 1998)".

**Below from, 61 FR 18899-18910 (July 1, 1996):**

“The Department of Justice has published a number of proposed rules addressing both the motion practice and the appeals process before the Board. Most recently, the Department published a proposed rule regarding these procedures in May 1995 that incorporated and expanded proposed rules published in May and June 1994. 60 FR 24573 (May 9, 1995); 59 FR 29386 (June 7, 1994); 59 FR 24977 (May 13, 1994).

In response to the above rulemakings, the Department received 71 comments. The comments addressed a number of issues, including the definition of the term “lawfully admitted for permanent residence”, the time and number limitations on motions to reopen and reconsider, the availability of an appeal where an order has been entered in absentia (particularly in exclusion proceedings), the streamlined appeals procedure, and the construction of briefing schedules for both motions and appeals.

The Department has carefully considered and evaluated the issues raised by the commenters and has modified the rule considerably. The following sections summarize the comments, set forth the responses of the Department of Justice, and explain the final provisions adopted. We note that a number of technical corrections were made to the proposed rule. These corrections include the addition of 8 U.S.C. 1282, 31 U.S.C. 9701

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<sup>14</sup> <http://www.immigrationlawandpolitics.com/2010/04/articles/immigration-law/immigration-appeals-the-need-to-reform-bia-procedures/>

<sup>15</sup> [http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration\\_reform\\_executive\\_summary\\_012510.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf)

<sup>16</sup> <http://www.aila.org/content/default.aspx?docid=5252>

and 8 CFR part 2 to the authority citation for Part 208 and the addition of 8 U.S.C. 1252a to the authority citation for Part 242....”

I urge ACUS to look up and review the previous comments and compare them to the more recent comments to see what has and what has not changed. Frivolous arguments do not go away very willingly. They usually get rehashed and couched in new catch phrases or new buzz words. Deep down, stall tactics are widely depended upon for the countless, meritless, if not outright frivolous, appeals and motions and Petitions for Review. When a case for immigration relief is doomed to failure and there is nothing left in the way of a substantive argument, baseless due process claims are the last bastion of the hopeless causes.

The BIA has put forth a plethora of information on its streamlining. A portion is found at: <http://www.justice.gov/eoir/vll/genifo/stream.htm> with over a dozen further links in 2000-2001 and more recently at <http://www.justice.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf> Even the most alien-friendly and liberal court, the 9<sup>th</sup> Circuit Court of Appeals, has weighed in and declared the BIA streamlining efforts to be constitutional, see an article about that at: <http://www.nilc.org/immlawpolicy/removpsds/removpsds125.htm> There is more to be done to improve overall Immigration Adjudication elsewhere than the currently proposed focus of the ACUS study.

The Administrative Conference of the United States’ Draft Report dated March 14, 2011, and entitled: “**AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION**”<sup>17</sup> has a some good information that also pertains to the Immigration Adjudication Study. That said, the Video Hearings Draft Report shows certain fundamental flaws and a lack of understanding of the world of Immigration Adjudication. For instance, any such study on Immigration Adjudication needs a deeper historical look and understanding.

#### *Flaw in Draft Report*

As a preliminary matter, NTAs are issued by all three DHS immigration agencies, ICE, USCIS and CBP, not just USCIS as stated in the draft report. ICE or CBP can also reinstate a prior existing Removal Order and eject an alien summarily without going through EOIR (this happens in very large numbers each year). CBP and ICE can use Expedited Removal authority to eject aliens from the U.S. CBP does this daily at ports-of-entry by issuing its own Expedited Order of Removal and only allows an alien to be seen by an Immigration Judge (IJ) in specific circumstances (claim of U.S. Citizenship, or other legal status, or a fresh request for asylum). An asylum applicant in the Expedited Removal context may be seen by a USCIS Asylum Officer before, or instead of, being referred to an IJ. If USCIS is not immediately able to see the claimant, ICE will detain them. ICE may determine that a Visa Waiver participant has overstayed their 90 day period of admission and issue a Removal Order on its own authority and that alien is not entitled to see an IJ (unless claiming asylum<sup>18</sup>) but may make a very specific

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<sup>17</sup> <http://www.acus.gov/wp-content/uploads/downloads/2011/03/Draft-Report-on-Agency-Use-of-Video-Hearings-3-24-11.pdf>

<sup>18</sup> People from Visa Waiver countries do not make good claims for asylum. (VWP includes countries such as: UK, Italy, France, Germany, Japan, Australia, Spain and similarly, Canada is in a special category all its own.)

assertion in a *Petition for Review* before a Circuit Court of Appeals as to a question of law or a Constitutional due process violation (99.99% fail and are dismissed).

### *Questionable Choices for Researchers by ACUS*

According to the ACUS website, the research consultants chosen to perform the Immigration Adjudication Study are Lenni B. Benson, a Professor of Law at New York Law School and Russell Wheeler, a Visiting Fellow, Governance Studies at Brookings Institute. Both of these choices are highly biased and have narrow foci.

Ms. Benson is an advocate for political asylum-seekers, in favor of highly liberal interpretation of the INA--always in favor of aliens seeking benefits, and in favor of increasing federal court review powers over immigration agency decisions. She believes in “outsourcing immigration adjudication” to a “blue-ribbon panel” of “industry experts” from the industries that would utilize immigrant labor, i.e. the petitioning employers or ultimate customers and end-users, rather than through the DHS agencies. She also wants to expand immigration courts<sup>19</sup> into a brand new quasi-governmental agency unto itself rather than as a part of DOJ. She is a poor choice. She has an agenda and leans towards open-borders on the one-hand and would give away asylum like candy and cater to business in order to provide as much cheap labor as they could want. The more the merrier, any way she can get it. She would bring back the Bracero Program and have it be run by the farmers.<sup>20</sup>

Mr. Wheeler is a part of the Brookings Institute. Brookings is a think-tank that proclaims itself to be “non-partisan” but that does not mean that it does not have a “position”. They do, they also are open-borders and strong advocates for the DREAM Act and AgJobs. Mr. Wheeler is a lesser known player and an admitted novice in immigration matters. In Congressional Subcommittee testimony in the House in June 2010, he said:

“My interest in immigration courts is relatively recent. While I do not bring years of study of or experience in them, I have spent a good deal of time working with federal and state courts, and observing their operations and efforts to improve their operations.”<sup>21</sup>

In the end, although he speaks voluminously, there is little substance in what he says. Wheeler, revs up to a point where I wish he would make *any* suggestion just for the sake of actually making one at all. He makes a point of telling everyone how much he knows but has yet to share what *any* of that knowledge actually consists of. The only time he approaches an idea he then says it can’t work, would never be passed by Congress, or simply won’t be done.

***In the end, ACUS has chosen a biased advocate and a defeatist to shoot her down. Why?***

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<sup>19</sup> Read her article at: [http://law.psu.edu/\\_file/Urgent%20Priority.pdf](http://law.psu.edu/_file/Urgent%20Priority.pdf)

<sup>20</sup> <http://are.berkeley.edu/APMP/pubs/agworkvisa/braceroagreement42.html>

<http://www.ccrh.org/comm/moses/primary/bracero.html>

[http://americanhistory.si.edu/onthemove/themes/story\\_51\\_5.html](http://americanhistory.si.edu/onthemove/themes/story_51_5.html)

<http://www.pbs.org/kpbs/theborder/history/timeline/17.html>

[http://www.unco.edu/cohtmlp/pdfs/Bracero\\_Program\\_PowerPoint.pdf](http://www.unco.edu/cohtmlp/pdfs/Bracero_Program_PowerPoint.pdf)

<sup>21</sup> [http://www.brookings.edu/testimony/2010/0617\\_immigration\\_review\\_wheeler.aspx](http://www.brookings.edu/testimony/2010/0617_immigration_review_wheeler.aspx)

## *Legislative and Agency Histories*

While naturalization began to be addressed through Congressional actions with the *Naturalization Act of 1790*, then various “head taxes” were collected from boatloads of new arrivals sporadically at the state and then federal levels, the *Page Act of 1875* barred “undesirables”, the first serious regulation of immigration did not begin until the *Immigration Act of 1891*, which established a Commissioner of Immigration in the Treasury Department. Over the years, these matters were later transferred to the purview of the United States Department of Commerce and Labor after 1903, the Department of Labor after 1913, and the Department of Justice after 1940. Finally, DHS was established in 2003.

A chart<sup>22</sup> depicting the evolution of the federal immigration agencies can be found on [www.uscis.gov](http://www.uscis.gov) It starts with the first “Bureau of Immigration” (1891-1906), the “Bureau of Immigration & Naturalization” (1906-1913), the earlier split agencies of the “Bureau of Immigration” and the “Bureau of Naturalization” (1913-1933), note that the “Division of Information and Distribution” was carved out of those earlier other agencies and existed from 1907-1921 as a part of the Department of Labor and changed into the U.S. Employment Service (also in DOL) as of 1921. The two “Bureaus” were combined into the Immigration and Naturalization Service (INS) within the Department of Justice from 1933-2003.

A “Board” was created out of a portion of DOL in 1921 to deal with the immigration-related aspects of the authority of the Secretary of Labor. That “Board” was transferred over to the Attorney General in 1940 and he created the Board of Immigration Appeals (BIA) in 1940 by an internal agency reorganization of the INS. The Executive Office of Immigration Review (EOIR) was created in January 1983 to house the BIA and Immigration Courts. I could not pin down exactly when the official title of the Officers who had presided over deportation and exclusion hearings changed from *special inquiry officer* (who was an Immigration Officer within INS assigned to the task) to Immigration Judge (IJ). The terms were used interchangeably for a period of time before the title was officially altered through subsequent regulatory change. Also, at some point, the INS created the Administrative Appeals Unit (AAU) within INS which became the Administrative Appeals Office (AAO) on Nov. 22, 1994, 59 FR 60070. The prior history as to the creation of the AAU will require further research. That internal reorganization<sup>23</sup> of the Immigration and Naturalization Service was approved by Attorney General Janet Reno on January 14, 1994.

Currently, there are three Administrative Immigration Appellate Authorities: the BIA and Chief Administrative Hearing Officer (Chief’s and ALJ decisions published/posted as OCAHO Decisions), within EOIR (DOJ), and the AAO within USCIS (DHS). AAO is the one that needs professional guidance in writing regulations that set appropriate standards and procedures.

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<sup>22</sup> [http://www.uscis.gov/USCIS/Resources/USCIS\\_Historical\\_Library/WhenceUSCIS.pdf](http://www.uscis.gov/USCIS/Resources/USCIS_Historical_Library/WhenceUSCIS.pdf)

<sup>23</sup> See 59 FR 60070 of Nov. 22, 1994, search for “Immigration and Naturalization Service” and view the TIFF File of the Reorganization Chart at: <http://www.gpoaccess.gov/fr/search.html>



## **8 CFR CHAPTER V--EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE**

### **§ 1001.1 Definitions.**

(1) The term *immigration judge* means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

An IJ presides over Removal Proceedings in Immigration Court. An Administrative Law Judge [ALJ], within OCAHO, presides over employment-related INA §§ 274A, 274B and 274C violation cases and IMBRA<sup>24</sup> information dissemination violation cases. ALJs often issue summary judgments pleaded on the briefs, subsequent motions and replies to them supplemented by telephone conferences but only occasionally hold actual in-person hearings with oral testimony.

**Please Shift the Focus of the *Immigration Adjudication Study* to something that is in need--  
USCIS' AAO Needs Reform Now!**

### **AAO Standard of Review and Guiding Principles**

The technical standard of review under which the AAO reviews cases is not codified in statute or regulation or published on the public AAO website. The AAO reviews all cases on a *de novo* basis, pursuant to Second and Ninth Circuit Court of Appeals decisions (See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989); *Spencer Enterprises Inc. v. US*, 229 F.Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003)). This standard of review and case law authority is stated in AAO decisions, and was provided to the Ombudsman's office in response to a formal Ombudsman's query submitted to the USCIS' AAO.

Additionally, **in the response to the CIS Ombudsman on December 19, 2005<sup>25</sup>**, USCIS indicated that a regulatory rule was in development, excerpt below, and re-iterated that assertion at a stakeholder meeting on Oct 20, 2010, also excerpted further below.

“Although this standard of review is apparent in case law and in AAO decisions, USCIS is currently seeking to publish this standard of review in the Federal Register as part of USCIS Interim Rule 1615-AB24: "Administrative Appeals Office: Procedural Reforms to Improve Efficiency." Once published, title 8 of the Code of Federal Regulations will be amended to read in part: "[t]he AAO reviews *de novo* any question of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction."

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<sup>24</sup> International Marriage Broker Regulation Act of 2005 [§ 833 of Pub. L. 109-162]

<sup>25</sup> [http://www.dhs.gov/xlibrary/assets/CISombudsman\\_RR\\_20\\_Administrative\\_Appeals\\_USCIS\\_Response-12-19-05.pdf](http://www.dhs.gov/xlibrary/assets/CISombudsman_RR_20_Administrative_Appeals_USCIS_Response-12-19-05.pdf)

8 C.F.R. 8 103.3(h)(2)(i) of USCIS Interim Rule 1615-AB24. In addition, the supplementary information defines the term in plain language, noting that "the term de novo means that the AAO reviews a case as if the original decision never took place. In a de novo review, the AAO is not required to give deference to or take notice of the findings made in the original decision." USCIS Interim Rule 1615-AB24 at page 14"

The **anticipated USCIS Interim Rule 1615-AB24**: "Administrative Appeals Office: Procedural Reforms to Improve Efficiency" **has not materialized since 2005**.

The AAO is in dire need of reform in critical areas. The relatively new Chief of AAO has reiterated that new regulations are in the works but that was announced previously (years ago) and nothing ever came of it. On October 20, 2010, the Administrative Appeals Office (AAO) and the Office of Public Engagement (OPE) hosted the first ever national stakeholder engagement regarding the AAO.

It took until 02/04/2011, for USCIS to post the barely 4 ½ page "Executive Summary" found at: <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=09df1980a9aaa210VgnVCM100000082ca60aRCRD&vgnnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD> which states, in part:

#### **"USCIS Policies**

Some stakeholders asked USCIS to reconsider the following policies:

- In the case of a Form I-140 that is denied by USCIS and subsequently appealed to the AAO, current USCIS policy states that the related Form I-485 must be denied. One stakeholder commented that the Form I-485 should be considered pending while on appeal.
- In the case of a petition that has been denied by USCIS and is subsequently appealed to the AAO, USCIS policy states that Service Centers will hold a subsequent filing in abeyance pending the outcome of the appeal. This means that if a petition is denied and the petitioner appeals that decision to the AAO and also submits a second petition to USCIS, the Service Center will temporarily put this petition aside and not make a decision on it until the appeal is withdrawn or a decision is made on the appeal. At least one stakeholder commented that this policy leaves petitioners with no recourse.
- One stakeholder asked after the engagement about addressing accrual of unlawful presence while a case is pending before the AAO.

The AAO stated that it is working to publish a proposed regulation that will help streamline the appeals process and give the public a much better understanding of what to expect when they file an appeal. **The proposed AAO regulation, to be published for public comment soon**, will address the third issue noted above and may provide an opportunity for stakeholders to comment on other policies, such as the first and second issues noted above." **[Remember that this remark is dated 10/20/2010.]**

Given that it took 3 ½ months to post a very watered down, pathetic 4 ½ page summary of a short meeting, it leaves one wondering *exactly how does USCIS's AAO define the word "soon"*. Will that be within months, years or decades?

ACUS should refocus on something that actually needs help to achieve reform. AAO was only a minor player living in the shadow of the BIA for a long time. AAO "borrowed" from the BIA's regulations and has never had any of its own. The AAO and BIA are qualitatively different and AAO needs new regulations specific to its actual role in benefit granting organization, USCIS that does not issue Orders of Removal.

*Interpretation of Immigration and Nationality Law:*

The Board of Immigration Appeals (BIA) and various federal courts have set precedents and later discarded, revised, narrowed or otherwise distinguished the holdings in certain lines of cases along a similar and often evolving topic. This is nothing new, it has happened since the common law began. It is how the common law came to be. Although we in the United States rely primarily on statutory law, certain common law principles remain in our legal system, at least the few that have survived since 1789. The judicial branch adheres quite rigidly to the principle of "*stare decisis*" which is Latin for "to stand by that which is decided." It is the principal that the precedent decisions<sup>1</sup> are to be followed until such time that they are overturned either by the court that set it or a higher authority.

The Executive Office for Immigration Review started a monthly newsletter<sup>26</sup> in January 2007, in which "[t]he [stated] purpose of this publication is to disseminate developments in immigration law to the Board and the Immigration Judges in a timely, concise and user-friendly format every month. Each issue of the Advisor will report on developments in the federal Courts, precedent decisions of the Board, legislative and regulatory updates, and other developments in the law."

The following is also from the inaugural issue:

"[The U.S. Supreme] Court addressed the intersection of circuit Court *Chevron*<sup>27</sup> deference and *stare decisis* and concluded that an agency is not bound by circuit Court precedent when the agency acts within its area of expertise to formulate a reasonable agency interpretation of an ambiguous statutory provision. *Nat'l. Cable & Telecomm. Assoc. v. Brand X Internet Serv.*, 545 U.S. 967 (2005) [Brand X]. Although *Brand X* involved FCC rulemaking, its reasoning would appear to apply as well to the Board's authority to issue precedent decisions addressing the meaning of ambiguous or open-ended provisions of immigration law in situations in which the Courts have already spoken. In the immigration context, the Second Circuit has described *Brand X* as standing for the proposition "that a Court's earlier construction of a statute trumps an agency's more recent construction only if the original interpretation by the federal Court was

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<sup>26</sup> *Immigration Law Advisor* at: [http://www.justice.gov/eoir/vll/ILA-Newsletter/lib\\_ila.html](http://www.justice.gov/eoir/vll/ILA-Newsletter/lib_ila.html)

<sup>27</sup> Footnote 4, in original: In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that when the statute is silent or ambiguous, and the issue is within the domain of agency expertise, a Court must defer a reasonable agency interpretation, and may not substitute to its own construction that it finds preferable.

thought to be premised on the unambiguous terms of the statute.” *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 170 (2d Cir. 2006) amending and superseding 448 F.3d 180 (2d Cir. 2006), and quoting from *Yuaniang Liu v. United States Dep’t of Justice*, 455 F.3d 106, 117 (2d Cir. 2006).” *Immigration Law Advisor Vol. 1, No. 1 p. 6. (Jan. 2007*<sup>28</sup>*)*.

### *Division of Power:*

In the U.S. Constitution, the Congress has the highest authority over matters of immigration and naturalization<sup>29</sup>. Congress has over the years codified decisions of the courts and the administrative agencies and has also nullified prior statutes, administrative branch regulations, and both judicial and administrative precedents by new legislation. The new legislation then becomes amenable to interpretation by the executive branch agency that is empowered to enforce it and the courts who can review the executive interpretations or the underlying constitutionality of the statutes. It’s a wonder that anyone can keep track of what the law actually is at any given moment, let alone make a career out of it. Oh, that’s right, merely trying to keep track of it, is itself, the career and that keeps things interesting.

Administrative agencies with adjudicative authority have statutes and regulations as well as both judicial and administrative precedents to deal with, collectively “rules”. The IRAC method is employed in most, if not all, agency or judicial adjudicative decisions. IRAC stands for: Issue, Rule, Analysis and Conclusion. That is the method by which the controlling law is applied to the facts of the case to reach a decision on the matter at hand. Decisions of Appellate Bodies may be case specific, of limited scope and thereby “unpublished” and non-precedent or if of particular use in clarifying an issue of first impression or novelty or complexity, they may become “published” as “binding precedent” to guide the decisions in future similar cases. So then certain holdings of particular adjudicative decision become rules themselves.

Under the Administrative Procedures Act (APA) [5 USC] the executive agencies of which United States Citizenship and Immigration Services (USCIS) is one, rules are made by various means. There is the formal “rule making” through notice in the Federal Register with comment and revisions as needed. There may be a very specific “order” issued through “adjudication” as a result of an “agency proceeding”. Particular orders may become precedents on a topic. The BIA had been the highest administrative appellate body over matters involving immigration law. As an arm of Executive Office of Immigration Review (EOIR) which is under the Attorney General (AG), the BIA appears to remain the generally accepted final arbiter of immigration law interpretation for most such matters within the executive branch of government.

### **INA § 103 [8 USC § 1103] Powers and duties of the Secretary, the Under Secretary, and the Attorney General**

(a) Secretary of Homeland Security

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<sup>28</sup> <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%20Vol%201/vol1no1rsv.pdf>

<sup>29</sup> The U.S. Supreme Court begrudgingly acknowledges that the Executive Branch shares almost equally this authority as the enforcer of the laws.

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided*, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(g)\* Attorney General.-

(1) *In General*.-The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

(2) *Powers*.-The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.

\*Section 1102(3) of Public Law 107-296, added a new subparagraph (g).

Following the creation of the Department of Homeland Security (DHS), there was a shift in authority and the AAO became part of USCIS within DHS while the BIA and OCAHO, within EOIR, remained a part of DOJ. Now the AAO, *through consultation with* the BIA and AG can have its precedents published in the I&N Decisions, officially known as the “*Administrative Decisions Under Immigration and Nationality Laws of the United States*.” The publication of those decisions is controlled by the Attorney General via EOIR and the BIA. DHS via the USCIS’ AAO can contribute to those decisions. 8 CFR § 103.3(c). OCAHO Decisions are available in bound volumes, entitled “*Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States*” pursuant to 5 USC § 552(a)(2).

The AAO has just recently published two precedents as of October 20, 2010, but had not contributed anything since 1998, when it issued four precedents all on the controversial EB-5 Immigrant Investor Program in the context of immigrant petitions for those visas amid a hailstorm of litigation plus one other shortly thereafter, *Matter of NY State Dept of Trans*, 22 I&N Dec. 215 (BIA 1998), pertaining to National Interest Waivers in I-140 Petitions.

#### *Administrative Appellate Jurisdiction and Authority in Immigration Matters*

The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation Number 0150.1

(effective March 1, 2003). Delegations that pertain to the Secretary's powers under the INA are covered at least in part by 8 CFR Parts 2 and 100, but gaps remain to be filled. These DHS Delegation Memos remain elusive even though they specifically describe jurisdictional authority. Practitioners and their clients (applicants and petitioners) don't always know how, where, or to whom, they should file their various applications, petitions, motions, or appeals.

A FOIA request was submitted 3/14/11, to Department of Homeland Security for Delegation Memos 0150 and 0150.1, Delegation to the Bureau of Citizenship and Immigration Services [now USCIS] and DHS Delegation Number 7030.2, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement [ICE] because they are quoted liberally in various administrative appellate decisions, certain court cases<sup>30</sup> and in other publicly available documents such as replies to the CIS Ombudsman, the ICE-E-Verify MOA<sup>31</sup> and the Privacy Impact Assessment on USCIS Citizenship & Immigration Data Repository (CIDR) etc. That request was then forwarded to USCIS and ICE, respectively, on 3/22/11.

General information as to the structure of DHS Delegations are found at:

[http://www.dhs.gov/xlibrary/assets/foia/mgmt\\_instruction\\_112\\_03\\_001\\_issuing\\_delegations\\_of\\_authority.pdf](http://www.dhs.gov/xlibrary/assets/foia/mgmt_instruction_112_03_001_issuing_delegations_of_authority.pdf)

The BIA currently has jurisdiction over those subjects listed in 8 CFR § 1003.1. While the scope of appellate review is codified as to matters before the BIA, the AAO does not have **current** corresponding regulations and is ruled by a combination of court recognized authority as noted below, borrowed BIA regulations, and selected passages from the APA as to scope of review. The AAO repeatedly cites similar language in its decisions on the scope of its review but it is still vague, inconsistent in applying it, and incorrect in applying appropriate standards at times.

“The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); see also *Janka v. US. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g., *Dor v. INS*, 89 1 F.2d 997, 1002 n. 9 (2d Cir. 1989).”

The AAO exercises appellate jurisdiction over the matters described in 8 CFR § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with two exceptions: (1) petitions for approval of schools and the appeals of denials of such petitions are the responsibility of Immigration and Customs Enforcement; and (2) applications for S nonimmigrant status are the responsibility of the Office of Fraud Detection and National Security of U.S. Citizenship and Immigration Services.

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<sup>30</sup> *Broadgate et. al. v USCIS* 09-cv-1423 (GK) {and the reply brief: No. 10-00941} (D.D.C. dismissed Aug. 13, 2010).

<sup>31</sup> “DHS Delegation Number 0150.1, Delegation to the Bureau of Citizenship and Immigration Services, and DHS Delegation Number 7030.2, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement, provided USCIS and ICE, respectively, with concurrent and/or related authorities to administer and enforce employment authorization verification under section 274A of the Immigration and Nationality Act (INA) (8 U.S.C. § 1324) and other applicable law. In their respective delegations, USCIS and ICE were directed by the Secretary of Homeland Security to coordinate their responsibilities with each other.”

AAO has its “current” appellate jurisdiction posted as a chart by form number on the USCIS website at the following link:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=e0a21eeaf28e6210VgnVCM100000082ca60aRCRD&vgnnextchannel=dfe316685e1e6210VgnVCM100000082ca60aRCRD>

“The AAO does not have appellate jurisdiction over an appeal from the denial of an application for adjustment of status under section 245(a) of the Immigration and Nationality Act (the Act). 8 C.F.R. § 245.2(a)(5)(ii).”<sup>32</sup> An application for adjustment of status (I-485) may be renewed before an IJ in Removal Proceedings. The regulation at 8 CFR § 245.2(a)(5)(ii) states, in pertinent part: “No appeal lies from the denial of an application [to adjust status under section 245 of the Act] by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240.”

“The AAO has jurisdiction to review denials of applications for adjustment of status filed by aliens seeking the *bona fide marriage exemption* and aliens in U or T nonimmigrant status. Section 245(e), (1) and (m) of the Act, 8 U.S.C. § 1255(e), (I), (m); 8 C.F.R. §§ 245.1(c)(8)(viii), 245.23(i), 245.24(0)(2). The AAO has no jurisdiction to review denials of applications for adjustment of status under section 245(a) of the Act. 8 C.F.R. § 245.2(a)(5)(ii).”<sup>33</sup>

AAO retains jurisdiction pertaining to an Application for Status as Permanent Resident Pursuant to Section 13 of the Act of September 11, 1957, 8 U.S.C. § 1255b. [Diplomats on “A” visas and semi-diplomatic government employees on “G” visas seeking adjustment of status.]

#### *Powers Beyond AAO’s Authority:*

“The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a “statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy,” the creation of appeal rights for any additional adjustment application denials meets the definition of an agency “rule” under section 551 of the Administrative Procedure Act (APA) [5 USC § 551]. The granting of appeal rights has a “substantive legal effect” because it is creating a new administrative “right,” and it involves an economic interest (the fee and costs). “If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive.” *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1<sup>st</sup> Cir. 1992) All substantive or legislative rule making requires notice and comment in the Federal Register.”<sup>34</sup>

“The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of *equitable estoppel* so as to preclude a component part of USCIS from undertaking a lawful

<sup>32</sup> [http://www.uscis.gov/err/A1%20-%20Certification/Decisions\\_Issued\\_in\\_2010/Apr262010\\_01A1245.pdf](http://www.uscis.gov/err/A1%20-%20Certification/Decisions_Issued_in_2010/Apr262010_01A1245.pdf)

<sup>33</sup> *Id.*

<sup>34</sup> [http://www.uscis.gov/err/A5%20-%20Denial%20of%20Adjustment%20for%20not%20Establishing%20Bona%20Fide%20Marriage%20Exemption/Decisions\\_Issued\\_in\\_2009/May202009\\_01A5245.pdf](http://www.uscis.gov/err/A5%20-%20Denial%20of%20Adjustment%20for%20not%20Establishing%20Bona%20Fide%20Marriage%20Exemption/Decisions_Issued_in_2009/May202009_01A5245.pdf)

course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). *Res judicata* and *estoppel* are equitable forms of relief that are available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 103.1 (f)(3)(E)(iii) (as in effect on February 28, 2003) [and subsequent amendments, this includes N-600's]. Accordingly, the AAO has no authority to address the petitioner's *equitable estoppel* and *res judicata* claims."<sup>35</sup>

“Even if the applicant's assertions regarding the delays in his father's naturalization and his own application were true, the AAO is without authority to apply the doctrine of equitable estoppel to approve an application for derivative citizenship *nunc pro tunc*.”<sup>36</sup>

AAO can accept appeals from USCIS Service Center Directors as to numerous denials and revocations of petitions but not I-130 petitions for an immigrant visa for an alien relative; and various applications for other benefits that include appeal rights by statutory or regulatory authority; and may review **any** decision within the authority of the Service Center Director on certification of an initial, proposed, or preliminary, decision.

AAO can accept appeals from USCIS District or Field Office Directors as to numerous denials and revocations of petitions but not I-130 petitions for an immigrant visa for an alien relative; and various applications for other benefits that include appeal rights by statutory or regulatory authority; and may review **any** decision within the authority of the District or Field Office Director on certification of an initial, proposed, or preliminary, decision.

AAO can accept Motions to Reopen and/or Reconsider on its own Decisions, such Motions may be filed by either the applicant or petitioners (claimant for a right, privilege, or benefit under the INA); or a Service Center, District, or Field Office Director; or any USCIS Officer acting on behalf of and in the name of any such Director.

AAO may accept an appeal or motion pertaining to the Determination of a Bond Breach made by any authorized ICE Director or Officer/Agent-In-Charge.

The Former INS' AAU accepted cases pertaining to issues that are now outside the authority of USCIS and as such are now within the jurisdiction of other DHS or DOJ components:

- USCIS' FDNS now has certain authority that INS' AAU and USCIS' AAO previously had.
- ICE now has certain authority that INS' AAU previously had.
- EOIR now has certain authority that INS' AAU previously had.

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<sup>35</sup> A non-precedent AAO Administrative Decision pertaining to an *I-140, Immigrant Petition for Alien Worker*, as a Member of the Professions Holding an advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2). See: [Apr282009\\_01B5203.pdf](#) on [www.uscis.gov](http://www.uscis.gov)

<sup>36</sup> From the most recent non-precedent AAO Decision on an N-600 at: [May192010\\_01E2309.pdf](#) at [www.uscis.gov](http://www.uscis.gov)



**Code of Federal Regulations, TITLE 8--ALIENS AND NATIONALITY [8 CFR]  
CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT  
OF JUSTICE  
PART 103--POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF  
SERVICE RECORDS-**

**§ 103.1 Delegations of authority [The former regulation that has been replaced by unpublished DHS Delegation Memos.]**

(f) Executive Associate Commissioner for Programs  
(3) Associate Commissioner for Examinations.  
(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(I) Decisions of district directors regarding withdrawal of approval of schools for attendance by foreign students under Sec. 214.4 of this chapter; **[ICE function.]**

(Q) Administration cancellation of certificates, documents, and records under Sec. 342.8 of this chapter; **[In conjunction with 8 CFR 340.1(e) this is voided as *ultra vires* by the permanent injunction in *Gorbach v. Reno*]**

(U) Applications by organizations to be listed on the Service listing of free legal services program and removal therefrom under Part 292a of this chapter; **[BIA function.]**

(GG) A self-petition filed by a spouse or child based on the relationship to an abusive citizen or lawful permanent resident of the United States for classification under section 201(b)(2)(A)(i) of the Act or section 203(a)(2)(A) of the Act; **[Concurrent jurisdiction with EOIR.]**

(NN) Application for certification for designated fingerprinting services under Sec. 103.2(e) of this chapter. **[No longer done—replaced by ASCs, Consulates, and U.S. Military.] [(NN) has been re-used for newer N-600's under 320 and 322 (CCA) w/i AAO jurisdiction.]**

(OO) Applications for T nonimmigrant status under Sec. 214.11 of this chapter. **[FDNS.]**

**PART 340—REVOCATION OF NATURALIZATION**

**§ 340.1 Reopening of a naturalization application by a district director pursuant to section 340(h) of the Act.**

(e) *Appeals.* (1) The applicant may appeal an adverse decision under paragraph (d) of this section to the Office of Examinations, Administrative Appeals Unit. Any appeal shall be filed initially with the district director within thirty (30) days after service of the notice of decision. Such appeal shall be filed in accordance with §103.1 and §103.7 of this chapter,

by filing the appeal on Form I-290B with the fee. Appeals received after the 30-day period may be subject to dismissal for failure to timely file. **[Void, see (Q) above.]**