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Testimony of the American Immigration Lawyers Association

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The U.S. immigration court system is in a state of crisis. Administered by the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ), this system suffers from deeply rooted problems that are eroding its capacity to fulfill its primary mission: "to adjudicate immigration cases in a careful and timely manner . . . while ensuring the standards of due process and fair treatment for all parties involved."

With trial level immigration judges dispensing a high volume of more than 350,000 matters annually, the problems with the immigration court system require urgent action. Nothing short of a structural overhaul of the entire system is needed. Until a complete reform can be implemented, however, the American Immigration Lawyers Association (AILA) recommends that DOJ and EOIR immediately implement *interim* reforms within the trial level courts and the appellate Board of Immigration Appeals (BIA). As an association with more than 11,000 active members practicing immigration law before every sitting immigration judge, AILA offers unparalleled expertise and direct experience with the functioning of the immigration court system. Through AILA's "liaison" relations with EOIR and other federal agencies that address immigration matters, AILA is frequently called upon to comment on rules and regulations that affect immigration policy.

Among the most critical problems in the current system are the extremely high caseloads of immigration judges. In 2008 the average judge handled 1,243 proceedings each year. The lack of adequate financial and other resources has not only resulted in overworked judges and staff but also compromised the system's ability to assure proper review of every case. Court statistics show that the grant rates

for cases are highly disparate among judges thus giving rise to criticism that outcomes may turn on who or which court is deciding the case rather than established principles and rules of law. Such disparities have made the immigration judiciary vulnerable to perceptions that its ranks are biased and lacking in professionalism. System-wide, there is also inadequate judicial review at the appellate level.

For example, the "streamlining" reforms at the Board of Immigration Appeals that were initially designed to increase the efficiency of the system have instead sacrificed the quality of judicial review and the quality of the Board's decisions and resulted in high appeal rates to the U.S. Courts of Appeals. Finally, those appearing before the courts, including asylum seekers, children and mentally ill respondents, frequently have no legal representation. Six out of ten respondents appear in court without legal counsel, an appallingly low rate of representation for matters that deeply impact people's lives and sometimes can make the difference between life and death.

AILA's statement is divided into four sections. First, Access to Counsel. Second, Immigration Courts. Third, the Board of Immigration Appeals. Fourth, Selection of a Fair and Balanced Judiciary. Fifth, Electronic Filing System.

I. ACCESS TO COUNSEL

Among the most serious flaws in the U.S. immigration system is its failure to ensure that every respondent appearing in immigration court proceedings is guaranteed legal counsel, including counsel paid for by the government. This responsibility does not rest exclusively with EOIR, but until a system is established to ensure counsel the immigration court system will not be able to dispense justice in a fair and meaningful way for all who appear before it. EOIR/DOJ should explore all available options to begin a program that provides counsel paid for the by the government. Such a program could start with a pilot that focuses on particular populations, such as those who are mentally incompetent or juveniles, but the long-term goal must be to expand the program to reach all respondents in immigration court proceedings at both trial and appellate levels.

AILA applauds the existing Legal Orientation Program (LOP) which now reaches the great majority of individuals who are detained. EOIR should continue the expansion of LOP to ensure that every detainee receives the legal orientation presentation that is frequently the first and only opportunity for a respondent to learn about the U.S. immigration system.

The common use by Immigration Customs and Enforcement (ICE) of detention facilities that are located in remote regions presents serious challenges to the goal of providing access to counsel. Small towns and rural areas have far fewer practicing immigration lawyers or non-profit legal service organizations. Individuals who already have legal

counsel experience great difficulty maintaining contact with their counsel when they are transferred to remote detention facilities. AILA urges EOIR and ICE to work collaboratively to establish transfer and case management protocols that will have the least detrimental impact on access to counsel and relationships with counsel.

Finally, the lack of oversight over the practice of immigration law has made it far easier for unscrupulous individuals to prey upon those needing legitimate legal services. "Notario" cases and other situations where someone misrepresents the nature of the services they are qualified to provide are among the more serious examples. EOIR currently manages the program that accredits non-lawyer professionals to represent respondents in proceedings before the immigration courts and agencies. This program is essential to facilitating the delivery of immigration legal services to thousands of people annually. AILA urges DOJ and EOIR to provide more resources to this program, to expand its capacity to monitor accredited representatives, and to discipline those who do not comply with basic standards of practice.

II. IMMIGRATION COURTS

Increased number of IJs and staff support The current number of immigration judges (IJ) is wholly insufficient to meet the current caseload levels faced by the immigration court system. In 2008, IJs completed an average of 1,243 proceedings each year and issued 1,014 decisions. By comparison, administrative law judges who adjudicate claims for veterans' benefits or social security benefits decide about half that number annually. As a result of the insufficient staffing and poor management, the number of cases awaiting resolution before the immigration courts reached a new all time high of 242,776 matters at the end of March 2010, according to the Transactional Records Access Clearinghouse (TRAC). TRAC also reports that the average length of time cases have been waiting has increased to 443 days.

Though it would be far better to implement substantial reforms in a comprehensive manner, the current crisis requires that the number of IJs and related staff be increased immediately, well ahead of other reforms. Although the President's FY2011 budget submitted to Congress in February requests an increase of about $18 million (funding the hire of 21 additional IJs and related staff), far more judges are needed than even the current budget requests. Congress should fully fund EOIR at the level requested in the President's budget and grant continued increases until sufficient staffing levels are reached.

IJ competency, neutrality and independence AILA recommends that significant steps be taken to improve not only the hiring process, but also training and retention mechanisms for incumbent IJs. Immigration judge training programs should be conducted by individuals who offer a diversity of perspectives and should include participation by academics and the private bar, as well as individuals involved with non-

profit and non-governmental organizations. Recruitment of potential IJs should be achieved by ensuring the availability of a balanced pool of candidates and must include outreach to members of the private bar, non-profit and non-governmental organizations, as well as individuals in academic institutions.

IJ Decisions AILA has long been concerned about the quality of IJ decisions, as well as the common practice of issuing oral decisions which fail to sufficiently describe the underlying reasoning for the decision. Unless waived by the parties, IJs should be required to issue in each case a written decision that clearly provides the factual and legal bases for the decision, addressing all arguments raised. Moreover, IJs are disadvantaged by not having a transcript of the hearing to facilitate review of all of the evidence prior to entry of a decision. In all cases, the immigration court system should provide written transcripts contemporaneous with the time of the IJ hearings, not merely access to recordings of the hearings. Provision of transcripts during the adjudication phase after the record is closed will permit the IJ to review the actual record, rather than having to rely on notes and written pleadings in making a decision. Furthermore, an accurate and contemporaneous record will allow the respondent to intelligently evaluate whether an appeal is warranted, and if so, to clearly indicate the reasons for appeal.

Emergency motions All emergency motions for a stay of removal involve an imminent threat of deportation, and many involve threat of deportation to conditions of torture, persecution, and other threats to life and physical safety. Emergency motions for stays deserve the same attention in immigration court as they receive in federal district courts. The immigration courts should specify a procedure for which a designated judge can be contacted day or night for an emergency motion to be adjudicated. Currently the immigration courts provide no written procedure specifying how the immigration courts should process motions for emergency stays of removal. Many courts do not have an assigned judge who hears such cases. In other situations, the lack of a designated judge or confusion over who is responsible has resulted in disagreements as to which judge should decide the motion. Similarly, denial of an emergency stay should be subject to an automatic stay, allowing the respondent to obtain review of a denial, either before the BIA or before the Federal Courts, as appropriate.

Timely hearings for detained cases Although current protocols call for scheduling detained respondents for a hearing on custody issues within three days of DHS submitting the case to the court or motion for bond, there is no guidance limiting the amount of time a matter should be pending resolution of merits on relief, much less even an initial determination of removability. Many cases involving respondents who are held in detention are scheduled for merits hearings more than six months after their initial appearance before an IJ, and in many cases without a prior finding as to whether the

individual is even removable as charged. Individuals deprived of their personal liberty have a highly compelling reason to have IJs resolve their cases expeditiously. AILA recommends that in detained cases, an initial hearing on removability be set within 14 days, unless specifically waived by the respondent. A short deadline would not prejudice DHS, as the agency has ostensibly reviewed the merits of its charges and the underlying facts prior to or upon arresting and detaining the respondent. Similarly, respondents facing continued civil detention until the resolution of their cases should be scheduled for a hearing on the merits of any relief from removal within a reasonable period, either 60 days from the initiation of the case, or alternatively no more than 30 days after a finding of removability by the IJ, unless specifically waived by the respondent.

The government's burden to prove removability under INA 240(c)(3) DHS clearly bears the burden of establishing removability, and presumably has reviewed each matter for legal and factual sufficiency prior to initiating proceedings. In practice, however, DHS is rarely required to meet its burden. IJs often avoid the threshold issue of removability, requiring respondents to proceed to the relief phase, including preparing expensive and complicated applications, prior to even considering whether the government can sustain its burden. This practice not only implicates fundamental questions of fairness and due process, but implies an improper "presumption" of deportability that undermines the independence and neutrality of the immigration courts. In the vast majority of cases, removability is not challenged. Where the respondent has not made a concession in accordance with the regulations, however, the immigration court should honor the statute and follow the appropriate procedures requiring that the government to first prove removability before requiring the respondent to demonstrate eligibility for relief. Resolving these threshold issues in a timely manner—in advance of any relief phase—will efficiently resolve cases that lack the legal or factual basis to proceed.

III. THE BOARD OF IMMIGRATION APPEALS

Standard of review AILA recommends that the BIA review factual findings made by immigration judges on a "substantial evidence" standard and that legal rulings, procedural decisions, and applications of law to fact be reviewed *de novo*. Since 2002, the BIA has applied a stricter "clearly erroneous" standard of review. Such a high standard prevents the BIA from correcting mistakes made by IJs who are under enormous pressure to dispense with high caseloads. By comparison, a "substantial evidence" standard would require the BIA to give less deference to the IJ's factual findings as compared to the clearly erroneous standard, permitting (or actually requiring a review of the sufficiency of those findings) without encouraging wholesale reinterpretation of the evidence (as would be encouraged by a *de novo* review standard). Instead, a "substantial evidence" standard serves as a sufficient check upon errors in fact finding by immigration judges and does not tie the hands of any appellate review.

In all cases, the BIA should be expected to review the entire record on appeal to ensure that all respondents, represented or unrepresented, are not ruled removable by an IJ when in fact they are not so removable or are eligible to seek discretionary relief from removal, as opposed to simply relying on a concession of removability that may have been entered. BIA review responsibility should not be limited only to issues raised by the appellant, but should include any issue or potential issue necessary to maintain the integrity of the removal process. Simply put, the scope of authority exercised on review by the BIA should be sufficient to ensure that the ultimate decision rendered is a fair and correct one.

Affirmances without opinion AILA applauds the recent steps the BIA has taken to reduce the practice of issuing "affirmances without opinion." In order to reduce the rate of affirmances without opinion, however, the BIA has greatly increased the number of very brief decisions. Such conclusory opinions are not necessarily better than an affirmance without opinion. Abbreviated decisions which fail to fully articulate the reasons for the decision are even more difficult to review, requiring a hybrid review of both the IJ and BIA decisions, making meaningful review by the Circuit Courts elusive at best, and often resulting in unnecessary remands for a new decision or further proceedings. Except in very limited circumstances, the BIA should issue full written opinions that explain the basis for the decision and address each relevant legal issue raised by the parties.

Single member review The BIA regulations should be amended to make review by three-member panels the default practice and to require three-member panels in all "non-frivolous merits cases that lack obvious controlling precedent." Single member review should be permitted only in purely ministerial or minor procedural motions, as well as motions unopposed by DHS.

Automatic stay of removal after the BIA issues a final order Once the BIA has made a final determination on a case, the respondent has the legal right to seek review of the order and a stay of removal at the Circuit Court within 30 days. Unfortunately, given the complexity of such review, and no interim limitation on the respondent's removal unless a stay is granted, respondents are often deprived of a meaningful right to seek judicial review. The BIA should adopt a rule that prohibits DHS from executing a final order prior to a respondent having the opportunity to seek review and/or a judicial stay, unless specifically waived by the individual. In addition, an automatic stay of removal should be granted upon the filing of a motion to reopen with either the BIA or an IJ. The stay should remain in effect throughout the process of judicial review of such motion. The automatic stay could be waived by the non-citizen after a knowing and voluntary advisal of his or her right to file a PFR or motion to reopen.

Detained cases Currently, detained aliens commonly wait up to a year while their appeals to the BIA are being reviewed. The BIA should establish a deadline of three months for resolving cases involving detained individuals.

Bond appeals The BIA currently decides bond appeals contemporaneously with appeals related to the case in chief, either as to removability or eligibility for relief. Bond appeals directly raise the personal liberty interest of the respondent to be freed from detention. While the bond appeal is pending, the respondent has no recourse but to remain in detention often for long periods of many months. By contrast, in federal and state courts matters affecting liberty issues are more expeditiously addressed. AILA recommends that the BIA set a 10-day deadline for the IJ to create and forward a bond memorandum (which memorializes the basis for the decision in lieu of a formal record), as well as conform to a 14-day deadline in which the BIA must decide bond appeals after briefing has been completed.

Precedent AILA has long urged the BIA to issue precedent decisions on a regular basis to ensure national uniformity in the adjudication of similar legal issues and consistent treatment of discretionary circumstances. This guidance is even more critical in view of the disparate results between different IJs and in different jurisdictions. To this end, the BIA should increase the annual number of precedent decisions issued.

AILA cautions, however, that issuance of a particular decision as a precedent is ill-advised when the respondent is not represented by counsel (or was not represented by competent counsel). The inherent deficiencies in such a record impugn the value of such a case as a basis on which to interpret the statute or to illustrate the law as applied. Accordingly, AILA recommends that the BIA should not issue precedent in cases where the respondent is not represented by counsel, where the record reveals potential ineffective assistance or other error by counsel, or alternatively, that the BIA should be required to seek relevant *amici curae* in reviewing such cases. The BIA should also establish a system to ensure that respondents in cases where precedent will be established receive adequate counsel including counsel provided at government expense.

IV. SELECTION OF A FAIR AND BALANCED IMMIGRATION JUDICIARY

Criteria It is obvious that there should be strong qualification and skill requirements for appellate and trial judges, however, AILA specifically recommends that a minimum of 10 years of immigration law experience be required for trial and appellate level judges. Moreover, the emphasis should be on trial and appellate expertise, not merely related immigration law experience. Recruitment of potential IJs should be achieved by ensuring the availability of a balanced pool of candidates and must include outreach to members of the private bar, non-profit and non-governmental organizations, as well as individuals in

academic institutions.

Independent screening panel The process of hiring and selection for Immigration Judges (IJ) and members of the Board of Immigration Appeals (BIA) should involve a meaningful element of public input. One example is the use of a neutral, appointed hiring panel that includes representative participation by the private bar, members of academic institutions, and non-governmental organizations. In 1995, DOJ hired eight new BIA members using a selection committee composed of non-governmental academics and experts as well as DOJ and EOIR officials who worked together to handle the initial vetting of applicants for BIA positions and select candidates to be interviewed by DOJ. EOIR should establish such a panel for BIA and immigration judge selection. Given the volume of positions that need to be filled at the trial court level, a neutral panel should first screen and identify a pool of candidates from which the CIJ may choose. Measures should be taken to ensure that the hiring process for trial court judges is not delayed as a result of using a neutral panel in the process.

V. ELECTRONIC FILING SYSTEM

The appellate and trial courts must implement an electronic filing system, similar to other federal and state courts. Without such a system, the high volume of cases has resulted in frequent delays, needless confusion and lost filings, and has severely disadvantaged individuals' ability to timely file with the immigration court or BIA. Detained respondents should be provided access to support electronic filing. Fee collection for certain motions and applications—as well as requests for fee waivers for indigent individuals—should be supported as part of any online system. Until a complete electronic filing system can be implemented, priority should be given to the immediate implementation of an electronic system for filing of notices of appeals, motions to reopen and emergency stays of removal, including payment (or arrangements for later submission payment) of any required fees.