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Testimony of the American Immigration Lawyers Association

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Hearing on "Improving Efficiency and Ensuring Justice in the Immigration Court System"
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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."[1]

As EOIR's mission statement states, ensuring the due process rights of immigrants in removal proceedings is of the utmost importance. Yet the immigration court system continues to suffer from lack of adequate legal representation for respondents in removal proceedings, extended delays for respondents who are detained, and a lack of meaningful appellate review. Six out of ten respondents, including asylum seekers, children, and mentally ill respondents, appear before the immigration 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. For those in detention, 83 percent of respondents are unrepresented. System-wide there is inadequate judicial review at the appellate level as seen in the "streamlining" reforms at the Board of Immigration Appeals that have sacrificed the quality of judicial review and the quality of the Board's decisions.

Another critical problem is the extremely high caseloads of immigration judges and the growing backlog of immigration cases. The immigration

[1] http://www.justice.gov/eoir/orginfo.htm.

court receives a high volume of nearly 400,000 new cases annually,[2] and each immigration judge handles, on average, 1200 cases per year.[3] The lack of adequate financial and other resources has resulted in overworked judges and staff and has 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.

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.

I. IMMIGRATION COURT RESOURCES

Increased number of Immigration Judges and staff support: The current number of immigration judges (IJs) and support staff is wholly insufficient to handle the number of cases referred each year to the immigration court system. While Congress has appropriated ever increasing sums of money to DHS for immigration enforcement, the immigration court system remains severely under-funded, making it ill-equipped to accommodate the burgeoning court dockets or meet case completion timelines. Congress's inadequate funding for EOIR is the principal reason for this continuing problem.

In FY 2010, EOIR received 393,000 matters for adjudication, far more than the immigration judge corps can timely handle.[4] As a result, the backlog of unresolved cases that has long-plagued EOIR continues to grow. At the end of FY 2010, the number of cases awaiting resolution before the Immigration Court reached a new all-time high of 261,083, a 40% increase from just two years ago.[5] Wait times for case resolution have also grown. In FY 2010 it took an

[2] FY 2012 Congressional Budget Submission, Administrative Review and Appeals (ARA), Department of Justice, p. 5, available at http://www.justice.gov/jmd/2012justification/pdf/fy12-ara-justification.pdf.
[3] *Immigration Court: Troubled System, Long Waits*, ABC news, April 19, 2011, available at http://abcnews.go.com/US/wireStory?id=13336782.
[4] *See supra*, n.2.
[5] *As FY 2010 Ends, Immigration Case Backlog Still Growing*, TRAC Reports, Inc., October 21, 2010, available at http://trac.syr.edu/immigration/reports/242/.

average of 280 days to complete a case, an increase of 47 days from FY 2009.[6] For cases in which the court granted some form of immigration relief, the average was 696 days, or nearly two years.[7]

These ever-increasing case completion times have a real impact on those immigrants waiting for their cases to be resolved. For asylum seekers who fled without their families, a delay in case resolution means prolonged separation and continuous worry about the safety of their loved ones. For individuals who are detained, a delay can have a devastating emotional and financial impact on their families, while at the same time costing taxpayers millions of dollars in extra detention costs.

With the funding it has available, EOIR has made important efforts to address this crisis. In the last 18 months, EOIR has hired 38 more IJs, bringing the total to 270.[8] The court backlogs and wait times, however, are destined to grow until the Immigration Courts are given funding that is proportionate with the increases given for DHS's enforcement purposes. Last year, DHS deported just under 400,000 individuals, a record-breaking number. With nationwide deployment of Secure Communities expected by 2013, those numbers, and the numbers of immigration cases received by the court, will also increase. Although the President's FY2012 budget submitted to Congress in February requests funding to hire 21 additional IJs and related staff, far more judges and staff are needed. Even in this time of fiscal crisis, Congress should fund EOIR at the level requested in the President's budget and grant continued increases until sufficient staffing levels are reached.

Timely hearings for detained cases: A backlogged court system results in unnecessary and oftentimes prolonged detention for respondents taken into ICE custody. Although current protocols call for scheduling detained respondents for a hearing on custody issues within three days of DHS filing the NTA with the court or receipt of a motion for a bond hearing, many immigration courts are unable to meet this goal due to the high volume of cases it must handle. Thus immigrants eligible to be released on bond remain in detention for additional days or weeks, resulting in hardship to the individual and unnecessary expense to taxpayers.

For immigrants ineligible for bond, the situation is more dire. Many detained respondents are scheduled for merits hearings more than six months after their initial appearance before an IJ, and in some cases without a prior finding as to whether the individual is even removable as charged. For individuals locked away in detention centers and the families left to cope without them, detention lasting for many months causes undue strain, emotional and financial hardship,

[6] *Immigration Courts Take Longer to Reach Decisions*, TRAC Reports, Inc., November 11, 2010, available at http://trac.syr.edu/immigration/reports/244/.
[7] *Id.*
[8] *See supra,* n. 3.

and lasting damage. For asylum seekers who come to the U.S. seeking safety and freedom, prolonged detention compounds their stress and suffering and inhibits their ability to begin recovering from the physical and psychological damage inflicted by persecution and torture.

Immigration judges presiding over detained cases must have manageable dockets to prevent respondents ready to move forward with their cases from being forced to languish in detention solely due to a lack of court resources. AILA believes it is reasonable to require that an initial hearing on removability be set within 14 days, unless a delay is requested by the respondent. A short timeframe would not prejudice DHS, as the agency has ostensibly reviewed the merits of its charges and gathered the necessary evidence prior to or upon arresting and detaining the respondent. Similarly, detained respondents should be scheduled for a hearing on the merits 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 more time is requested by the respondent. We note that EOIR has established timeframes for the completion of detained cases in the 2011 High Priority Performance Goals DOJ presented to the President.

Importantly, while all respondents have an interest in timely court hearings, it is vital that EOIR affirm the authority of immigration judges to grant a respondent's reasonable request for a continuance. Respondents must be afforded time to adequately prepare their cases, which may require obtaining evidence from overseas, tracking down medical and other records, and finding expert witnesses—tasks made more difficult by detention. Special consideration should also be given to pro bono attorneys and law school clinics that often begin representing a client after multiple hearings have already occurred or may have other constraints. Ultimately, the goal should be a court system that functions efficiently to ensure that respondents do not remain in detention simply for a lack of court resources but with sufficient flexibility to protect the due process rights of respondents.

Timely BIA Decisions for Detained Respondents: Currently, detained aliens commonly wait up to a year while their appeals to the BIA are being reviewed. Although appeals filed by detained respondents are placed on a separate docket from those who are not detained, there is no deadline for when the BIA must render a decision after the parties' briefings have been filed. The BIA should establish a deadline of three months for resolving cases involving detained respondents.

Bond appeals: Currently, in most cases the BIA 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 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.

II. IMMIGRATION COURT EFFICIENCY

The Immigration Court system suffers from severe underfunding, resulting in huge backlogs, delays in case resolution, and overworked and under resourced immigration judges. Funding for additional court personnel is vital but so too is putting in place policies that promote efficiency and expending resources to create a more efficient court system that will prove less costly in the long term.

IJ Decisions: AILA has long been concerned about the quality of IJ decisions, including the common practice of issuing oral decisions which often fail to sufficiently describe the underlying reasoning for the decision. Unless waived by the parties, IJs should be required to issue a written decision in any 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. This is particularly true when merits hearings are continued midstream for many months. 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 will permit the IJ to review the actual record, rather than having to rely on notes and written pleadings to make 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.

Electronic Filing System: The immigration courts and the BIA must implement an electronic filing system, similar to those offered by federal and state courts. The paper-based system now in place is antiquated and inefficient, results in unnecessary delays in cases when filings are misplaced or lost, and unnecessarily burdens respondents and attorneys who live or practice far from the immigration court. Detained, pro se respondents are at a particular disadvantage under the current system, since mail at detention centers is often unreliable and interrupted by lockdowns or other disturbances. It often takes weeks, if not months, to resolve a late filing issue, and requires proof that a detainee may not be able to access. In some cases, detained respondents have been denied the right to appeal or even to pursue an application for relief because of the current paper filing system. In addition to handling applications and other filings, an electronic system should have the capacity to handle fee collection, as well as requests for fee waivers. 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 and appeal briefs, motions to reopen, and emergency stays of removal, including the payment (or arrangements for later submission payment) of any required fees.

Legal Orientation Program: The Legal Orientation Program (LOP) was created to inform immigrant detainees about immigration law and the immigration court process. Through grants from the Executive Office of Immigration Review, nonprofit legal service organizations provide the program at 27 detention facilities across the country, reaching around 15 percent of the immigrants held in detention each year. The LOP group and individual presentations provide detainee immigrants with basic information about their rights under immigration law, eligibility for relief from removal, how to accelerate the removal process, and how to represent themselves in front of the immigration court. Eighty percent of immigrants in detention go through the removal process without an attorney. Although LOP is not a substitute for legal representation, it is the only opportunity for most detainees to obtain information about their rights and responsibilities under the law, information vital for them to be able to make informed decisions about how to proceed. In addition to helping protect due process rights of pro se respondents, LOP offers significant fiscal benefits. Research shows that program participants move through the immigration court process an average of 13 days faster than detainees who do not have access to LOP, resulting in less time spent in detention, and significant savings for both the immigration court and the DHS immigration detention system. The Attorney General has recognized LOP as a "critical tool for saving precious taxpayer dollars." Congress should fund LOP at a level that guarantees every detainee in immigration detention access to this valuable resource.

III. DUE PROCESS IN IMMIGRATION COURTS

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 and to provide counsel paid for by the government when the respondent cannot afford a private attorney. 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.

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.

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 NTA and supporting evidence for legal and factual sufficiency prior to initiating proceedings. In the vast majority of cases, removability is not challenged. However, when it is, IJs frequently do not require DHS to meet its burden. Other preliminary matters, such as motions to suppress challenging the validity of the underlying arrest, should also be resolved during the initial phase of removal proceedings. However, IJs will often avoid these threshold issues by collapsing the inquiry of removability or validity of the arrest, and eligibility for relief into one step, thereby requiring respondents to prepare expensive and complicated applications, prior to even considering whether the government has sustained its burden of establishing removability. 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 addition, it creates even more barriers to representation. Respondents who have some economic means may still not have sufficient resources to pay an attorney to prepare an entire case for relief as well as pay unnecessary application fees. Pro bono attorneys are forced to expend valuable resources presenting every avenue of relief for a single client, rather than using those resources to represent multiple clients. IJs should follow the statute and require that the government to first prove removability before requiring the respondent to demonstrate eligibility for relief. Resolving these threshold issues in advance of any relief phase will efficiently resolve cases that lack of legal or factual basis to proceed, before expending scarce court resources.

Stipulated Orders: Stipulated orders are motions filed with the immigration court in which the immigrant admits that she is removable from the U.S. and gives up all due process rights, including the right to apply for relief from removal or appeal the order of removal. Stipulated orders offer the possibility of considerable savings for DHS. A person provided an in-person hearing spends on average 41 days in detention while someone who does not require a hearing spends on average 16 days. With pressure on DHS to increase the number of removals per year and at the same time cut costs, stipulated removals are particularly appealing. As a result DHS has begun seeking stipulated orders not only for immigrants in ICE custody, but also for those with ICE holds who are still in pretrial detention in the criminal system and, as a result, have no access to LOP or even a library with immigration law materials. These are not the serious criminals who will go through immigration court proceedings while serving their prison sentences but rather include the 60 percent of individuals swept up by Secure Communities who have never been convicted of a serious offense or any offense.

In some cases, stipulated orders are beneficial to immigrants who want to be deported as quickly as possible. However, for immigrants who are unrepresented and unfamiliar with the immigration law and court proceedings, stipulated removals can result in the unknowing and involuntary waiver of rights, and, ultimately, the deportation of individuals eligible for relief from removal. At particular risk are immigrants who are illiterate, have low levels of education, have little familiarity with the American court system, or are victims of violence and may be eligible for VAWA, U-visa, or T-visa relief but are unaware of these options. Although ICE obtains the signature of the immigrant, ultimately, it is the immigration judge who decides whether to grant or deny the motion for removal. EOIR should put in place a policy that an immigration judge cannot grant a stipulated order motion signed by a pro se respondent until the respondent has appeared before the IJ—who as an obligation to determine whether the respondent is eligible to apply for relief from removal—or at least has attended an LOP presentation. Such a policy will help ensure that the due process rights of pro se respondents are protected.

Video Hearings: Videoconferencing is now a staple in many immigration courts across the country for respondents in immigration detention or criminal custody. With many detention centers located far from city centers, videoconferencing eliminates the need to establish immigration courts in remote locations or to expend time and money transporting immigrants to and from court. However, videoconferencing also poses numerous due process concerns. For the reasons described below, AILA recommends first that EOIR ensure detained respondents are always provided the option of having in- person removal hearings. Second, as DHS moves forward with detention reform, including moving detention centers from remote areas to areas closer to city centers, it is imperative that EOIR work together with DHS to ensure that these facilities have courtrooms for in-person hearings.

Conducting a hearing via a television screen necessarily makes communication through body language, eye contact, facial expressions, and intonations of voice less effective. This is particularly concerning for applicants seeking asylum and other protections where IJs must make credibility assessments based not just on what is said, but also on demeanor. These communication barriers also diminish the accuracy of translations, negatively impacting the ability of a respondent to participate in the hearing. Videoconferencing raises more practical concerns as well. A respondent's lawyers must choose between attending the hearing with the client—and thereby be able to communicate more freely with the client throughout the hearing—or appearing in person before the IJ. In a jail setting, IJs must rely on guards, rather than trained court personnel, to assist the court. In some cases, respondents have been provided the wrong form, resulting in delays in their proceedings or even removal orders as a result of missed filing deadlines. For respondents unaccustomed to videoconferencing technology, appearing before a judge via a television screen can be a surreal experience, negatively impacting their ability to meaningfully participate in their own removal proceedings. In short, video hearings are not a substitute for in-person hearings.

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.

IV. BOARD OF IMMIGRATION APPEALS AND DUE PROCESS

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.

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.