# IMMIGRATION COURT PROCEDURES

Submitted by:
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## I. INTRODUCTION

The immigration courts operate under the Justice Department and are separate from the U.S. federal court system. The attorney general hires the immigration judges who hear immigrants' cases and the Board members who review the appeals. For all purposes, in the administrative immigration court system, the Attorney General serves as a one-man Supreme Court with the authority to overturn any decision issued by any immigration judge or the Board of Immigration Appeals.

Recently, the Justice Department proposed regulations, which would allow the Board of Immigration Appeals (BIA) to more easily issue "affirmances without opinion." Those affirmances are when a single BIA judge, rather than a three-judge panel, upholds a lower court's removal decision without issuing an explanation, something it cannot do now. Second, the regulation would change the way the BIA can make its decisions public — the step that gives those decisions the force of binding precedent for all 400 immigration judges and the appeals court itself. Currently, the BIA can declare a binding precedent only if a majority of all permanent sitting judges vote to do so. The regulation would do away with that requirement and allow a two-judge majority of any three-judge panel that decides a case to declare it a precedent. It would also give the attorney general that power — allowing him to set as precedent any three-judge panel's decision he chooses.

## II. IMMIGRATION COURT PROCEDURE

As a preliminary statement, the Immigration and Nationality Act governs the law applicable in the immigration proceedings. The regulations at Title 8, govern the procedure in implementing the statute. The Immigration Court Practice Manual is a comprehensive guide that sets forth uniform procedures, recommendations, and requirements for practice before the Court. It is important to also state that many of the forms of relief considered by the Court are structured with instructions as to how to fill them out and where to file them. Do not disregard these instructions because the instructions are incorporated into the regulations. *See* 8 C.F.R. § 103.2(a)(1). Of course, the binding precedent decision of the Board of Immigration Appeals and the respective Circuit Court and Supreme Court decisions are binding.

## III. APPEARANCES

Attorneys, accredited representatives, family members representing minor children, reputable individuals, law students, law graduates, and accredited officials from foreign governments may appear at the hearing held before the Immigration Court.

Attorneys and accredited representatives must register with EOIR in order to practice before the Immigration Court. All representative must file a Notice of Entry of Appearance as Attorney or Representative (Form EOIR-28) before they can be allowed to appear. A copy of the Notice of Appearance must be served on DHS. Of course, a respondent may appear without counsel and represent him/herself.

After registering with the EOIR **eRegistry**, the attorney or accredited representatives may file an electronic or paper Form EOIR-28. The instructions for the EOIR **eRegistry** can be found at www.justice.gov/eoir. Remember that a paper Form EOIR-

28 will have to be filed on (1) bond redeterminations; (2) motions to reopen or reconsider; (3) motions to recalendar proceedings that were administrative closed; (4) motions to substitute counsel; and, (5) a case in which there is more than one open proceeding. Remember to use the most current version of the forms submitted to the Court. Do not forget that you must identify the scope of your representation, whether for a specific hearing or all hearings.

Generally, law students and law graduates may appear before the Immigration Court if approved by the Immigration Judge. They do not have to register with the EOIR and cannot electronically file an EOIR-28.

Less common appearance are representations by adult family members of minor children in proceedings before the Court; reputable individuals appearing on a case-by-case basis; and accredited officials of foreign governments. An Immigration Judge has the discretion to allow reputable individuals to appear on behalf of an alien if the individual is capable of providing competent representation. The reputable individual must have good moral character; appear on an individual basis at the request of the alien; receive no direct or indirect remuneration; file such a declaration; have a preexisting relationship with the alien; and, be official recognized by the Court.

For substitution of counsel, the new attorney must submit a written or oral motion, accompanied by a paper-filed EOIR-28 and not electronically. The motion should indicate the extent of the representation; the reason for the substitution in conformance with the applicable state bar and other ethical rules; evidence that prior counsel has been notified; and, evidence that the alien has consented to the substitution. If the motion for substitution is granted, the prior counsel does not have to file a motion to withdraw.

For motions to withdraw, counsel must indicate: which portion of the proceeding he or she is withdrawing from; the reason for the withdrawal that comply with the applicable state bar or other ethical rules; the last known address of the alien; a statement that the alien has been notified; evidence that the alien has consented or a statement why the consent was unobtainable; and, evidence that the counsel notified or attempted to notify the alien of the pending deadlines, scheduled hearings, and consequences for failing to appear.

Another attorney appearing on behalf of the primary attorney can submit a notice of appearance Form EOIR-28. Under these circumstances, the attorney must notify the Immigration Judge of the special appearance, file the EOIR-28 and serve the DHS, and be authorized by the Immigration Judge to make the special appearance.

## IV. FILING WITH THE COURT

An application or document is not deemed "filed" until it is received by the Immigration Court. The Court does not observe the "mailbox rule". The documents are filed either with the Immigration Judge during a hearing or with the Immigration Court outside of a hearing. Some documents are filed at a separate location known as "Administrative Control Courts". A list of these locations and the Administrative Control Courts responsible for the remote hearing locations are available on the EOIR website.

In some instances, two or more Immigration Courts share administrative control of cases. Typically, this where one court is in the prison or other detention facility and the other court is at a different location. Under these circumstances, the documents are filed at the hearing location. A list of the shared administrative control courts is available on the EOIR website.

The Immigration Court does not accept faxes or other electronic submissions unless the Immigration Court staff or the Immigration Judge has specifically requested the transmission. Observe the filing deadlines set by the Court. Normally, if not otherwise specifically set by Immigration Judge, there is a 15 day filing requirement in advance of a non-detained hearing and responses must be filed 10 days thereafter. For detained cases, the Immigration Judge may specify the deadlines.

The practitioner should be keenly aware of the filing deadlines set by the regulations, the practice manual, or the Immigration Judge. The untimely submission of a filing may have serious consequences, such as: (1) the application for relief is deemed waived or abandoned; (2) if the motion is untimely, it is denied; (3) if a brief is untimely, the issues in question are deemed waived or conceded; (4) if an exhibit is untimely, it is not entered into evidence or it is given less weight; (5) if the witness list is untimely, the witnesses are barred from testifying; and/or (6) if a response to a motion is untimely, the motion is deemed unopposed.

If the filings are untimely, the party should, nonetheless file them and request that they be accepted, explaining the reasons for the late filing by showing good cause for acceptance of the filing.

Do not forget to serve an identical copy of any filings on the opposing party and submit a written declaration of the proof of service as to who was served, when, and the method of service.

**Documents**

All documents filed with the Immigration Court must be in the English language or accompanied by a certified English translation. *See* 8 C.F.R. §§ 1003.33, 1003.23(b)(1)(i).

An affidavit or declaration in English by a person who does not understand English must include a certificate of interpretation stating that the affidavit or declaration was read to the person in a language that the person understands and that he or she understood it before signing it. The certificate must also state that the interpreter is competent to translate the language of the document, and that the interpretation was true and correct to the best of the interpreter's abilities. The certificate of translation must be typed, signed by the translator, and the foreign-language document must be attached.

In submitting the applications, documents, or motions to the Court, be familiar with the Immigration Court Practice Manual at Chapter 3.3. The Immigration Court expects the application packages to come in a certain order. The filing should contain a table of contents, tabbed, and paginated. All documents should be submitted on standard 8½ by 11 paper, in the preferred "Times Roman 12 point" fonts, in double-spaced text, and single-spaced footnotes. All filing should always have pre-punched holes along the top, centered and 2¾ inch apart.

If an application for relief or motion requires a fee, do not forget to show proof payment in advance to the Department of Homeland Security. If evidence of payment of the filing fees is not submitted, the filing is defective and will be rejected by the Immigration Court. The Immigration Court does not collect fees.

**Asylum applications**

At this point, I will single out the filing of asylum applications because of the benefits/consequences that flow from a timely/untimely filing/lodging of the applications. An alien claiming fear of persecution must file an application for asylum within one year of the date of arriving in the United States. The application can be filed with USCIS or with the

Immigration Court. If the properly filed asylum application is pending for more than 180 days, the alien may seek work authorization. If the case is before the Immigration Judge, any adjournment for alien-related reasons will stop the clock until the next hearing.

Those applications that are **not filed** in open court may be sent to the Court by mail or sent by courier or filed at the Immigration Court window. These are considered "lodged asylum applications". These are **not** deemed "filed application" and when received by the Immigration Court, the application is stamped "lodged not filed" and it will be returned to the alien. This is important because the DHS will consider the "lodged date" that is stamped on the application for the purpose of determining eligibility for employment authorization.

When sending an asylum application by mail or courier, the application must be accompanied by a self-addressed stamped envelope or comparable return delivery packaging. It must also be accompanied by a cover page or include a prominent annotation on the top of the front page of the form stating that it is being submitted for the purpose of lodging. Proof of service to DHS is not required to lodge an application.

The asylum application submitted for lodging may be rejected and the clock for purposes of work authorization considered by DHS will not run. Defective submissions include: (1) the application does not have the alien's name; (2) the application does not have the A number; (3) the application is not signed; (4) the application has already been lodged with the Court; (5) the application has already been filed with the Court; (6) the application was referred to the Court by USCIS; (7) the application is being lodged at the incorrect court location; (8) the case is pending before the BIA; or, (9) the case is not pending with the Immigration Court.

The asylum application submitted by mail can be also be rejected if the application is not accompanied by a self-addressed stamped envelope or the application is not accompanied by a cover page or does not include a prominent annotation on the top of the front page stating that it is being submitted for the purpose of lodging.

**Signatures**

No forms, motions, briefs, or other submissions are properly filed without an original signature from either the alien or the alien's representative. Signature stamps and computer-generated signatures are not acceptable on documents filed with the Immigration Court.

## V. MOTIONS FOR CHANGE OF VENUE

On January 17, 2018, Immigration Chief Judge Mary Beth Keller issued OPPM 18-01, which sets forth guidance to mitigate the problems in caseload management. Among the policies and procedures set, an Immigration Judge should ensure that "good cause has been shown" before granting a motion to change venue. What constitutes "good cause" is set forth in 8 C.F.R. § 1003.20(b).

The motion to change venue can be made orally or in writing. The regulation provides authority to grant a change of venue only when one of the parties has filed a motion for COV and the other party has been given notice and an opportunity to respond. *See* 8 C.F.R. § 1003.20(b). No change of venue will be granted without identification of a fixed street address, including city, state, and ZIP code, where the respondent applicant may be reached for further hearing notifications. *See* 8 C.F.R. § 1003.20(c). Immigration Judges may not *sua sponte* change venue.

Prior to granting a motion for COV, the assigned Immigration Judge is suppose to make every effort, consistent with procedural due process requirements, to complete as much of the case as possible in the time available. Specifically, the Immigration Judge will attempt to obtain pleadings; resolve the issue of deportability, removability, or inadmissibility; determine what form(s) of relief will be sought; set a date certain by which the relief application(s), if any, must be filed with the court; and state on the record that failure to comply with the filing deadline will constitute abandonment of the relief application(s) and may result in the Judge rendering a decision on the record as constituted.

In cases where the Immigration Judge has completed these actions but not yet scheduled the case for an individual merits hearing, the Immigration Judge will also determine, when granting a change of venue, whether the case should be scheduled for a master calendar hearing or an individual merits hearing at the new court. In situations where a non-detained case is already scheduled for an individual merits hearing and a change of venue is subsequently granted, the case will be scheduled for an individual merits hearing at the new venue without an intervening master calendar hearing.

For cases to be scheduled on a master calendar after a change of venue has been granted, the master calendar hearing at the new court is anticipated to occur as soon as practicable and no later than 14 days (for a detained case) or 60 days (for a non-detained case) after the date the change of venue was granted. Note, however, that in the case of a defensive asylum application, a copy of the asylum application, Form I-589, submitted to support a motion for COV is not considered filed. In those situations, if the motion for COV

is granted, the Form I-589 must be separately filed with the court, either at the window or by mail.

### Venue in Detained Cases

For various reasons, DHS sometimes relocates detained aliens after charging documents have been filed. The Immigration Court does not automatically change venue. If DHS fails to produce a detainee because that alien has been moved to another location, the Immigration Court retains venue and administrative control over the case. If DHS produces the alien at a court in another location, absent a valid order changing venue or a new charging document, venue and administrative control does not reside at that location, except for bond redetermination requests, if any.

## VI. THE HEARINGS

### Master Calendar

The purpose of the master calendar hearing is to: (1) advise the alien of his rights to an attorney; (2) present evidence; (3) examine and object to evidence and cross-examine any witnesses present by DHS; (4) explain the charges and factual allegations in the NTA; (5) take pleadings; (6) identify and narrow the factual and legal issues; (7) provide deadlines for filings; (7) schedule subsequent hearings; (8) advise the alien of the consequences for failing to appear; and, (9) advise the alien of the right to appeal any decision made by the Immigration Judge.

The pleadings may be taking orally at the time of the hearing or they can be submitted in writing. The alien must also identify what relief, if any, he or she intends to seek with the Immigration Court.

**Individual hearings**

Evidentiary hearings on contested matters are referred to as individual calendar hearings or merits hearing. The parties should file all applications for relief, proposed exhibits, and motions as appropriate in compliance with the deadlines set by the Court.

The Immigration Judge will decide how each hearing is conducted, but the parties should be prepared to (1) make an opening statement; (2) raise any objections to the other party's evidence; (3) present witnesses and evidence on all issues; (4) cross-examine opposing witnesses and object to testimony; and, (5) make a closing statement.

After the parties have presented their cases, the Immigration Judge will render a decision, which can be orally at the conclusion of the hearing or render a written decision at a later date.

## VII. THE USE OF THE PRE-HEARING CONFERENCES

Pre-hearing conferences are held to narrow issues, obtain stipulations, exchange information voluntarily, and simplify the proceeding. They are authorized by the regulations. 8 C.F.R. § 1003.21(a). The request for the pre-hearing conference may be made orally or by motion. If made by motion, the cover page should be labeled 'MOTION FOR PRE-HEARING CONFERENCE". Whether to grant the request is discretionary decision of the Immigration Judge.

A wisely structured pre-hearing document that outlines the facts and the law may be beneficial to the respondent's case. It will draw out the contested issues. It will allow the alien's attorney to review the evidence the government will present. A well-written accompanying brief will narrow the legal and factual issues in dispute. Keep in mind that if

the DHS fails to comply with the pre-hearing orders issued by the Immigration Judge, that the Judge can exclude the government's arguments and evidence.

A pre-hearing brief should include: (1) a concise statement of the facts, set out chronologically; (2) a statement of the issues; (3) a statement of the burden of proof; (4) a summary of the argument; (5) the argument with appropriate citations; and, (6) a short conclusion stating the precise relief or remedy sought.

The narrowing of the issues may lead to a request for the issuance of subpoenas for government officers who provided reports detrimental to your client's case. This may be an important tool to challenge the credibility of the documents submitted by the government. In order to have the Immigration Court issue a subpoena, counsel must: (1) provide the court with the proposed subpoena for signature; (2) state what is expected to be proven by such witness or documentary evidence; and, (3) show the affirmative efforts made in obtaining the evidence without success.

## VIII. OTHER PROCEEDING BEFORE THE COURT

### Rescission proceeding pursuant to section 246 of the Act

The rescission proceeding begins when the DHS serves an alien with the Notice of Intent to Rescind. The alien has 30 days to submit a sworn answer to the DHS by denying the allegations or by requesting a hearing before the Immigration Judge. The Immigration Judge conducts rescission proceedings in the same manner as removal proceeding.

### Expedited removal hearing

Aliens subject to expedited removal proceedings are afforded a credible fear hearing or claimed status hearings. Aliens subject to reinstatement of a prior order are not entitle to removal proceedings, but may be placed in reasonable fear proceedings. These aliens

that are subject to the limited proceedings may be detained until a resolution of their case is made. Immigration Judges do not have jurisdiction to consider a bond hearing in their cases.

Credible fear review by the Immigration Judge is not as complete as an asylum hearing in removal proceedings. The Immigration Judge reviews the DHS asylum officer's determination, allowing the parties to introduce any oral or written statements or evidence at his discretion. If the Immigration Judge finds that the alien's fear is credible, the alien will be permitted to file an asylum application.

Aliens who have a reasonable fear of persecution or torture, will be permitted to file an application for withholding and relief under Article III of the Convention Against Torture. These aliens do not qualify for asylum.

An individual subject to expedited removal who claims to be a lawful permanent resident or a citizen of the United States or aliens who have been granted asylum or admitted to the United States as refugees are entitled to have a claimed status hearing before an Immigration Judge if the inspecting immigration officer is not able to verify the alien's status. These hearing are scheduled promptly, no later than 7 days after the case is referred to the Immigration Court and, if possible, within 24 hours. An individual in a claimed status hearing is entitled to consult with an attorney who may be present at the hearing before the Immigration Judge, but the attorney is not entitled to present the case. If the Immigration Judge determines that the individual has established the status claimed, the Judge will terminate the proceedings and vacate the expedited removal order. If the status is not verified, the individual is returned to the DHS for expedited removal. There is no appeal of the Immigration Judge's decision.

**Bond hearings ---- 8 C.F.R. § 1003.19**

An alien who has been detained and has been issued a Notice to Appear, whether filed with the Immigration Court or not, may apply to the Immigration Judge where the alien is detained to redetermine his custody status. The initial request can be made orally or in writing. Any subsequent requests are required to be made in writing. The hearing may be held telephonically at the discretion of the Judge.

The Immigration Judge does not have jurisdiction to consider applications for bonds for arriving aliens nor alien subject to mandatory detention identified in section 236(c) of the Act.

Either party may appeal a bond decision issued by an Immigration Judge within 30 days thereafter. 8 C.F.R. § 1003.38(b). If the DHS appeals the Immigration Judge's decision, the decision will remain in effect unless the BIA issues an emergency stay or the decision is automatically stayed by regulation. There will be an automatic stay of the bond decision when the DHS has determined the alien should not be released or has set a bond of 10K or more and the DHS files a notice of intent to appeal the custody redetermination within one business day of the Judge's order. 8 C.F.R. § 1003.19(i).

Even if the case is appealed to the BIA, the Immigration Judge will retain continuous jurisdiction to redetermine a subsequent request by the alien for a new bond. *Matter of Valles-Perez*, 21 I&N Dec. 769 (BIA 1997). If, after the bond appeal has been filed, the Immigration Judge grants a new bond redetermination, the appeal will be deemed moot. *Id.*

Do not worry about the information you present to the Immigration Judge that you may think can be used against your client in the removal aspect of the case. It cannot be

used. Worry about the information the DHS presents in the removal aspect of the case against your client because that information can be considered in the bond hearing.

The Immigration Judge will lose jurisdiction to hearing a bond case when the alien: (1) departs the United States; (2) is granted relief from removal and the DHS does not appeal; (3) is granted relief from removal by the BIA; (4) is denied relief from removal and the alien does not appeal; or, (5) denied relief from removal by the BIA.

## IX. OTHER ISSUES OF CONCERN

The applicability of the immigration laws is evolving and it is certainly not alien friendly. As an introductory statement of this presentation, it was mentioned that the Immigration Courts are operated under the Department of Justice and are separate from the Article III federal courts. It is the Attorney General who heads the Department of Justice and it is he/she who selects the immigration judges and the members of the Board of Immigration Appeals. It is he/she who has the final administrative decision on immigration matters. For all purposes, in the administrative immigration court system, the Attorney General serves as a one-man Supreme Court with the authority to overturn any decision issued by any immigration judge or the Board of Immigration Appeals.

Recently, the Justice Department proposed regulations, which would allow the BIA to more easily issue "affirmances without opinion." Those affirmances are when a single BIA judge, rather than a three-judge panel, upholds a lower court's removal decision without issuing an explanation, something it cannot do now. Second, the regulation would change the way the BIA can make its decisions public. Currently, the BIA can declare a binding precedent only if a majority of all permanent sitting judges vote to do so. The regulation would do away with that requirement and allow a two-judge majority of any

three-judge panel that decides a case to declare it a precedent. It would also give the Attorney General that power — allowing him to set as precedent any three-judge panel's decision he chooses.

This presentation was not intended to discuss interpretations of the statutes, regulations, the BIA or Federal Court decisions. This presentation was only intended to discuss the procedures used in the Immigration Courts. Not all Immigration Judge are strict-down-the-line proceduralists who give would disregard substantive claims because of defects in the form the claims were submitted. It is recommended that the practitioner become familiar with the Immigration Court Practice Manual and the Immigration Judges they appear before. Thank you.