



OOD
PM 21-03

Effective: November 6, 2020

To: All of EOIR
From: James R. McHenry III, Director
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IMMIGRATION COURT HEARINGS CONDUCTED BY TELEPHONE AND VIDEO TELECONFERENCING

PURPOSE:	Memorializes EOIR policies regarding the use of the telephone and video teleconferencing to conduct hearings
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	Operating Policies and Procedures Memorandum (OPPM) 04-06, <i>Hearings Conducted Through Telephone and Video Conference</i>

This Policy Memorandum (PM) cancels and replaces OPPM 04-06. It memorializes EOIR policies regarding the use of the telephone and video teleconferencing (VTC or VC) to conduct hearings in proceedings before an immigration judge.

I. TELEPHONIC HEARINGS

The Immigration and Nationality Act (INA) places no limitation on conducting hearings in removal proceedings telephonically, except that “[a]n 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 through video conference.” INA § 240(b)(2)(B). The INA also authorizes, without limitation, the use of telephonic hearings for credible fear reviews conducted by immigration judges. INA § 235(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.25(c).

All EOIR courtrooms are equipped with telephones, and all immigration judges may conduct any hearing by telephone if feasible, subject to applicable law such as INA § 240(b)(2)(B). The use of telephonic hearings is determined principally by operational need¹ or a motion filed by either party. Additionally, consistent with PM 20-09, *The Immigration Court Practice Manual and Orders*

¹ Operational need may be embodied in policy. For example, following the outbreak of COVID-19, EOIR adopted a policy that “[h]earings amenable to being conducted by telephone or VTC [video teleconferencing], especially for cases involving detained aliens, should be conducted through those mediums to the maximum extent practicable in accordance with the law.” PM 20-13, *EOIR Practices Related to the COVID-19 Outbreak* (Jun. 11, 2020). Nothing in this PM alters that policy.

(Feb. 13, 2020), immigration judges may issue standing orders and immigration courts may adopt local operating procedures addressing appearances by telephone or allowing such appearances without the need to file a motion. Thus, telephonic appearances at a hearing by an alien and by a representative for either party are generally subject to the discretion of the immigration judge, any applicable law, and any applicable requirements of the Immigration Court Practice Manual (ICPM), a standing order, or a local operating procedure.

Nothing in this PM requires immigration judges to decide any motion for a telephonic appearance in any particular way, though the record should reflect a clear decision on any such motion filed. As in all cases, immigration judges “exercise their independent judgment and discretion,” subject to applicable law, when deciding motions to appear by telephone. 8 C.F.R. § 1003.10(b). Further, no EOIR officer or employee may direct an immigration judge to grant or deny such a motion or direct an immigration judge to allow or disallow an appearance by an alien or a representative of either party by telephone, though an immigration judge’s decision on a telephonic appearance may ultimately be subject to review in an appeal to the Board of Immigration Appeals (Board) and a standing order or local operating procedure remains subject to the approval of the Chief Immigration Judge consistent with PM 20-09 and 8 C.F.R. § 1003.40(c).

II. HEARINGS BY VIDEO TELECONFERENCING

EOIR has used VTC to conduct immigration hearings since the early 1990s, and Congress statutorily authorized the use of VTC in immigration proceedings in 1996. INA §§ 235(b)(1)(B)(iii)(III), 240(b)(2)(A)(iii). In 2004, EOIR established a Headquarters Immigration Court² to hear cases by VTC in order to assist other courts with their dockets and provide flexibility in addressing resource needs. Fact Sheet, *EOIR Headquarters Immigration Court* (July 21, 2004), <https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/27/HQICFactSheet.pdf>. At that time, EOIR reiterated and emphasized that hearings conducted by VTC comport with due process to the same extent as hearings conducted in person:

VC provides real-time transmission of audio and video between two or more locations and permits individuals to see, hear, and speak with each other as though they are at the same location. VC hearings are held in Immigration Courts throughout the United States pursuant to congressional mandate at 8 U.S.C. 1229a(b)(2)(A)(iii), section 240(b)(2)(A)(iii) of the Immigration and Nationality Act. Congress made no distinction between an in-person hearing and a hearing conducted by VC, including no requirement for consent of the participants to conduct a VC hearing.

VC does not change the adjudicative quality or decisional outcomes. Hearings conducted by VC are fair and fully protect the participants’ right to procedural due process. There is a means of transmitting and receiving additional evidence between all locations and all participants. The audio/video transmission is secure and the participants’ privacy is protected.

Id.

² The Headquarters Immigration Court operated between 2004 and 2014. It was subsequently renamed the Falls Church Immigration Adjudication Center when it resumed hearing cases in 2017.

By 2007, EOIR described the use of VTC for hearings as a “proven success.”³ *Jurisdiction and Venue in Removal Proceedings*, 72 Fed. Reg. 14494 (Mar. 28, 2007) (“Due to improved technology, and encouraged by the proven success of video conferencing, EOIR has established a Headquarters Immigration Court (HQIC) based at EOIR Headquarters in Falls Church, Virginia.”). EOIR further acknowledged the benefits provided by VTC in 2009:

[The use of VTC] is beneficial to both the immigration courts and the alien respondent in immigration proceedings. For the immigration courts, VTC saves travel time for immigration judges – allowing them greater time to hear more cases. It also promotes effective case management by allowing immigration judges to conduct hearings, on an ad hoc basis, for their counterparts in other immigration courts and thereby assisting with unusually heavy caseloads. For the respondent, VTC can provide for a more expedient hearing.

EOIR’s Video Teleconferencing Initiative (Mar. 13, 2009),
<https://www.justice.gov/eoir/videoconferencingfactsheetmarch2009>.

In short, over twenty-five years after its first use, VTC remains a reliable and effective tool for EOIR for conducting immigration hearings in an efficient manner consistent with due process. *See Matter of R-C-R-*, 28 I&N Dec. 74, 81 (BIA 2020) (“[C]ourts have generally found that [VTC] proceedings afford aliens a full and fair hearing.”).

The INA does not place any prohibitions on the use of VTC for hearings, nor are there any substantive-law provisions of the INA that apply only to cases heard by VTC. The same substantive law applies to a case regardless of the hearing medium.

All EOIR courtrooms are equipped with VTC capability, and all immigration judges may conduct any hearing by VTC if feasible. 8 C.F.R. § 1003.25(c) (“An Immigration Judge may conduct

³ Many other administrative adjudicatory agencies use VTC more extensively than EOIR does, and they have also determined that its use does not violate due process or affect case outcomes. *See, e.g.,* Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 83 Fed. Reg. 57368, 57374 (Nov. 15, 2018) (“Moreover, there is no evidence that the use of VTC technology [in hearings on disability claims conducted by the Social Security Administration] adversely affects the outcome of the decision making process. An internal report prepared in FY 2017 by our Office of Quality Review (OQR) showed there was not a significant difference in outcome or policy compliance for VTC and in person hearings. OQR found a high degree of policy compliance and quality for both types of hearings.”). Rather, the evidence and applicable law determine the outcome of a case, not the hearing medium. *See, e.g.,* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW U. L. REV. 933, 972 & n.174 (2015) (“Curiously, however, when pressed to explain whether video actually interfered with their ability to win a specific claim on behalf of a client, most [attorneys] responded consistently with the results of the quantitative data. That is, attorneys confessed that they could not identify a case in which televideo adversely affected the outcome of their clients' claims for relief. As one attorney succinctly explained, ‘I can't think of any case that I've handled where I could say that [televideo] might have made a difference.’ . . . Another commented: ‘[I]f you have a decent case [for relief], you will still probably win it. I don't think just because you're doing it over video, that's going to determine whether or not you win the case.’ . . . Many other practicing attorneys made similar statements. . . .(‘I can't honestly say that I felt somehow unfairly treated because of that [video] arrangement.’) . . .(‘I would offer that a good attorney or a good judge is probably going to be as good on VTC as they are in person.’) . . .(‘I don't feel like my presentation really suffered [over video].’) . . .(‘Most of the cases that we end up getting, they win. So they win despite VTC, right, which is great.’) . . .(‘I think that if you are doing everything you are supposed to and you are well prepared, any inconvenience of the televideo is minimal.’).”

hearings through video conference to the same extent as he or she may conduct hearings in person.”). Currently, the use of VTC is determined principally by operational need⁴—*e.g.* to reach locations where no permanent immigration court is located; to increase convenience and accessibility for respondents; to reduce travel costs; to consolidate and manage dockets; to ensure timely adjudication of cases, especially detained cases or cases subject to statutory or regulatory deadlines; to reduce “dark” unused courtrooms in order to help ensure that an alien receives an opportunity to be heard in a timely manner; and, more recently, to allow for increased social distancing in response to the outbreak of COVID-19. Thus, consistent with INA § 240(b)(2)(A)(iii) and 8 C.F.R. § 1003.25(c), EOIR’s policy remains that VTC may be used for any immigration court hearing, particularly when operational need calls for its usage.⁵

Recently, in response to requests from stakeholders, EOIR has begun to increase its ability to conduct hearings by VTC through the use of the Webex platform which is compatible with EOIR’s existing VTC system and allows a respondent or a representative for either party to appear by VTC from a location outside an immigration court.⁶ Once Webex compatibility is available at an immigration court, for the duration of the declared national emergency related to COVID-19⁷, either party may file a motion for the alien or the representative for either party to appear at a hearing by VTC through Webex rather than in person. Further, consistent with PM 20-09, immigration judges may issue standing orders and immigration courts may adopt local operating procedures addressing appearances by VTC. Thus, like appearances by telephone, appearances by VTC at a hearing by an alien or by a representative for either party based on a motion are generally subject to the discretion of the immigration judge, any applicable law, and any applicable requirements of the ICPM, a standing order, or a local operating procedure.⁸

Nothing in this PM requires immigration judges to decide any motion for a VTC appearance in any particular way, though the record should reflect a clear decision on any such motion filed. As in all cases, immigration judges “exercise their independent judgment and discretion,” subject to applicable law, when deciding motions to appear by VTC. 8 C.F.R. § 1003.10(b). Further, no EOIR officer or employee may direct an immigration judge to grant or deny such a motion or

⁴As with telephonic hearings, operational need for VTC hearings may be embodied in policy. *See* note 1, *supra*. Nothing in this PM alters the policy contained in PM 20-13 regarding the use of VTC for hearings.

⁵Although this PM applies to immigration court proceedings, operational need also determines when VTC is utilized in proceedings before the Board or the Office of the Chief Administrative Hearing Officer (OCAHO). For example, subject to authorization by the Deputy Attorney General or his designee, 8 C.F.R. § 1003.1(e)(7), the Board may conduct oral argument by VTC, if appropriate. Additionally, OCAHO has previously utilized VTC to allow a witness to testify from India, *see Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1100, 4 (2003), and may otherwise use VTC for hearings as appropriate.

⁶This PM will continue to apply to any successor VTC technology or platform. Additionally, should EOIR develop and implement the capability for immigration judges to conduct hearings by VTC from remote locations other than immigration courts, this PM will apply to such hearings as well.

⁷On March 13, 2020, President Trump issued a proclamation declaring that the COVID-19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15337 (Mar. 13, 2020). While that proclamation remains in effect, EOIR will allow either party to file a motion to appear by VTC using Webex once it is available. EOIR will indicate on its website and through public messaging when Webex has become available for hearings at a particular immigration court. The ICPM will also be updated to reflect the availability of appearances by VTC using Webex.

⁸Appearances by VTC may also be subject to nationwide system capacity restrictions or other technological limitations.

direct an immigration judge to allow or disallow an appearance by an alien or a representative of either party by VTC, though an immigration judge's decision on a VTC appearance may ultimately be subject to review in an appeal to the Board and a standing order or local operating procedure remains subject to the approval of the Chief Immigration Judge consistent with PM 20-09 and 8 C.F.R. § 1003.40(c).

III. ORDERS AND DECISIONS ISSUED IN HEARINGS CONDUCTED BY TELEPHONE OR VTC

Subject to the statutory limitation on the use of the telephone to conduct “an evidentiary hearing on the merits” in removal proceedings, INA § 240(b)(2)(B), immigration judges may conduct any other type of hearing by telephone or by VTC. When doing so, immigration judges must create a clear record of where the hearing is taking place. At the beginning of each session of the hearing, the immigration judge must identify himself or herself for the record. The immigration judge must note that he or she is sitting via telephone or VTC and identify the specific hearing location where he or she is conducting the hearing. In addition, the immigration judge should note the location of the respondent, the respondent's counsel or representative, if any, and counsel for the Department of Homeland Security, in order to create a clear and complete record.

Any order or decision by an immigration judge in a hearing conducted through VTC or telephone where the case was docketed for a hearing location (as opposed to an administrative control court/base city court) must include the hearing location in the caption. The order or decision must include a statement that the hearing was conducted through VTC or telephone and a statement that sets forth the administrative control court and address for purposes of correspondence and post-hearing motions.

Finally, hearings conducted by telephone or VTC may raise knotty choice of law issues regarding the body of circuit court law applicable to a particular case when the parties and the immigration judge are in different locations. Immigration judges should continue to follow any applicable circuit precedent in resolving those issues.⁹

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Further, nothing in this PM should be construed as mandating a particular outcome in any specific case.

Please contact your supervisor if you have any questions.

⁹ In 2007, EOIR proposed a regulatory change to address choice of law issues in the context of VTC and telephonic hearings, 72 Fed. Reg. at 14495-96, but that rulemaking has not been finalized.