OOD
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To: All of EOIR
From: James R. McHenry III, Director
Date: November 30, 2020

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**ENHANCED CASE FLOW PROCESSING IN REMOVAL PROCEEDINGS**

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| PURPOSE: | Implementation of an enhanced case flow processing model for non-status, non-detained cases with representation in removal proceedings |
| OWNER: | Office of the Director |
| AUTHORITY: | 8 C.F.R. §§ 1003.0(b), 1003.9(b) |
| CANCELLATION: | None |

As part of its continued commitment to ensuring efficient and fair adjudications and that each alien with a claim to relief or protection from removal receives a hearing in a timely manner, EOIR is implementing a new case flow processing model for non-status removal cases involving non-detained aliens with representation.[1]

I. Background

EOIR encourages parties in immigration court to advance or resolve cases through written pleadings, stipulations, and joint motions. *See* EOIR Policy Memorandum (PM) 20-13, *EOIR Practices Related to the COVID-19 Outbreak* at 5 (Jun. 11, 2020), https://www.justice.gov/eoir/page/file/1284706/download. Such actions help cases progress through the immigration court system in a timely and efficient manner, reduce the need for the parties to appear at hearings, saving them time and expense, free up additional docket space for

[1] This model will not apply to cases of detained aliens, aliens not placed in removal proceedings (whose removability is already established and who are also generally detained), and aliens proceeding pro se. Further, this model will not apply to cases that have been appropriately placed on a status docket—*e.g.* a case of an unaccompanied alien child with an asylum application pending before the Department of Homeland Security (DHS). *See* EOIR, *PM 19-13: Use of Status Dockets* (Aug. 16, 2019), https://www.justice.gov/eoir/page/file/1196336/download. Additionally, this model will not apply to cases in which a protective order has been issued or that involve the handling of classified information. *See* 8 C.F.R. § 1003.46; EOIR Operating Procedures and Policy Memorandum (OPPM) 09-01, *Classified Information in Immigration Court Proceedings* (Feb. 5, 2009) https://www.justice.gov/sites/default/files/eoir/legacy/2009/02/11/09-01.pdf; EOIR OPPM 09-02, *Protective Orders and the Sealing of Records in Immigration Proceedings* (Feb. 9, 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/02/11/09-02.pdf. Finally, Immigration Judges retain discretion to deviate from this model as appropriate.

Immigration Judges, and narrow contested issues to assist in the resolution of the case.[2] The ultimate disposition of any particular case, however, remains committed to the Immigration Judge consistent with applicable law.

For similar reasons, EOIR also discourages holding master calendar hearings in cases involving represented aliens solely for the purpose of filing an application and then scheduling a subsequent individual merits hearing:

> Scheduling and holding a master calendar hearing solely for the filing of an application by a represented alien and the scheduling of an individual merits hearing on a future date is a disfavored practice. For cases involving represented respondents for whom removability has already been determined, the case is not on a status docket, and the case is not yet scheduled for an individual merits hearing, immigration judges are encouraged to issue a pre-hearing scheduling order establishing a deadline for the filing of any applications for protection or relief from removal in lieu of scheduling a master calendar hearing solely for the purpose of filing that application and scheduling a future individual merits hearing. If an application is not filed within the time set by the immigration judge, the opportunity to file that application or document shall be deemed waived. 8 C.F.R. § 1003.31(c). Upon expiration of the filing deadline, the immigration judge shall either schedule the case for an individual merits hearing or issue an appropriate order (*e.g.* for removal, voluntary departure, or withdrawal of application for admission).

*Id*. at 6.

Many immigration judges have utilized written pleadings for represented respondents for several years. *See* Immigration Court Practice Manual (ICPM), App'x L (Sample Written Pleading). The use of written pleadings has become a well-established procedure that helps cases progress more efficiently to a timely resolution.

Immigration Judges are authorized to issue orders for pre-hearing statements. 8 C.F.R. § 1003.21(b), (c). Subject to meeting certain criteria, Immigration Judges are also authorized to issue standing orders, and immigration courts are authorized to adopt local operating procedures pursuant to 8 C.F.R. § 1003.40. *See generally* EOIR PM 20-09, *The Immigration Court Practice Manual and Orders* (Feb. 13, 2020), https://www.justice.gov/eoir/page/file/1249276/download.

EOIR does not require any application to be filed in open court. *See*, *e.g*., EOIR PM 21-02, *Cancellation of Certain Operating Policies and Procedures Memoranda* (Nov. 6, 2020) https://www.justice.gov/eoir/page/file/1335101/download ("Relatedly, EOIR now allows the filing of an asylum application by mail, at the window, in court, or, where available, electronically, through either the EOIR Courts & Appeals System (ECAS) or email, and it will continue to accept the filing of an asylum application through those methods until further notice."). Additionally, the

[2] Joint or stipulated requests for the disposition of a pending case—*e.g.* requests for a stipulated order of removal, a stipulated order of voluntary departure, or a stipulated order granting protection or relief from removal; or joint motions to terminate or dismiss proceedings—are to be adjudicated expeditiously by an Immigration Judge. PM 20-13 at 5-6.

continued deployment of ECAS to immigration courts, scheduled for completion in 2021, has made electronic filing of case documents more accessible and convenient for both parties.

Most aliens in removal proceedings, especially those seeking asylum, have representation.[3] Further, removability is not contested in most cases, and representatives frequently waive the reading of charges and the giving of various advisals. In short, for most non-detained aliens in removal proceedings with representation, there is generally not a reason to hold a master calendar hearing, and needlessly requiring parties to appear for brief hearings—even by telephone or video teleconferencing—simply incurs unnecessary costs for respondents and representatives and creates inefficiencies in case processing for immigration courts. Thus, reducing the number of superfluous hearings to deal with preliminary and routine matters will save time and expense for both aliens and representatives and will improve docketing efficiency for immigration courts overall.

## II. New Case Flow Processing Model

In general, under the new model,[4] for non-detained cases in which a representative, *see* 8 C.F.R. §§ 1001.1(j) and 1292.1, files a Form EOIR-28 at least 15 days before a master calendar hearing, the hearing will be vacated[5] and a scheduling order will be sent to the parties, setting deadlines for the filing of written pleadings, any evidence related to the charges of removability, and any applications[6] for relief or protection sought by the respondent. The order will also contain a copy of the biometrics notice and instructions,[7] along with the consequences of failing to comply with that notice.

The parties generally will be given at least 45 days from the date of the vacated hearing to submit written pleadings, evidence related to removability, and any applications for relief or protection from removal, though the specific deadline remains committed to the discretion of an Immigration Judge. 8 C.F.R. 1003.31(c). Once an Immigration Judge has received the pleadings, any evidence related to removability, and any applications for relief or protection, the Immigration Judge will

[3] EOIR cannot track representation until a representative files a Form EOIR-28 with an immigration court. Consequently, cases in which an alien has representation in fact but the representative has not yet filed a Form EOIR-28 are treated by EOIR as unrepresented cases; thus, EOIR's data likely undercounts actual representation. Nevertheless, in FY 2020, 85 percent (85%) of asylum cases in EOIR proceedings had representation.

[4] To facilitate this new model, a copy of the list of pro bono legal service providers and a notice of the respondent's appeal rights will be included with the initial hearing notice that is served on all respondents by mail, and the provision of those items will be reflected or noted in the record.

[5] Respondents and their representatives remain obligated to appear at any scheduled hearing until notified by the relevant immigration court that a hearing has been vacated and rescheduled. An alien who fails to appear for a scheduled hearing may be ordered removed *in absentia*. INA § 240(b)(5).

[6] The scheduling order deadline will apply only to the filing of the application itself, though respondents are encouraged to submit supporting documents as well. The Immigration Judge's subsequent scheduling order will set a deadline for the filing of supplemental documentation in support of the application in advance of the merits hearing consistent with 8 C.F.R. § 1003.31(c). Nothing in this PM limits an Immigration Judge's discretion to allow a respondent to supplement or amend an application.

[7] A copy of the current notice and instructions is available at https://www.uscis.gov/sites/default/files/document/legal-docs/Pre%20Order%20Instructions%20EOIR.pdf.

then, in general,[8] either issue an order resolving the case[9] or a hearing notice scheduling the case for an individual hearing on any and all outstanding issues, including contested removability and the merits of any applications for relief or protection from removal. If the Immigration Judge issues a hearing notice, he or she will also issue another scheduling order setting deadlines for the filing of any motions,[10] briefs,[11] or supporting documents[12] prior to the scheduled hearing. That scheduling order will also instruct DHS to confirm whether the respondent has provided biometrics and other biographical information.[13]

If the Immigration Judge subsequently resolves the case through a dispositive order—*e.g.* granting a motion to terminate or a motion to pretermit—prior to the scheduled hearing, the Immigration Judge will issue an order accordingly, and the hearing notice will be vacated.[14]

For non-detained cases in which a representative files an EOIR-28 less than 15 days before a master calendar hearing—or does not file it until the master calendar hearing—the hearing will

[8] If an alien challenges his or her removability from the United States, does not seek to apply for any relief or protection from removal if found to be removable, and the issue of removability turns solely on a purely legal question that does not require a hearing—*e.g.* whether the alien's conviction constitutes an aggravated felony—then the Immigration Judge will not schedule a hearing, but may issue an order requesting further briefing on the issue from the parties if the record contains insufficient information on which to issue a dispositive order.

[9] If the respondent requests solely voluntary departure pursuant to 8 C.F.R. § 1240.26(b) or withdrawal of an application for admission pursuant to 8 C.F.R. §§ 1235.4 and 1240.1(d), then DHS shall be given 10 days in which to provide its position in response unless the respondent's request includes a stipulation from DHS. ICPM, App'x D (Deadlines). If removability is established and the respondent does not file an application by the established deadline, the opportunity to file that application or document shall be deemed waived, and the Immigration Judge will issue an appropriate order. 8 C.F.R. § 1003.31(c).

[10] For example, the respondent may file a motion to terminate proceedings, or DHS may file a motion to pretermit the respondent's application.

[11] "Scheduling and holding a hearing for a represented respondent on a contested issue of removability which involves solely a pure legal question (*e.g.* whether a respondent's criminal conviction constitutes a conviction for a particular category of aggravated felony) is a disfavored practice. Immigration Judges are encouraged to resolve such issues based on briefing from the parties." PM 20-13 at 6.

[12] The deadline for the filing of supplemental proposed evidence, other than rebuttal or impeachment evidence, will generally be 30 days in advance of the merits hearing, though the specific deadline remains committed to the discretion of the Immigration Judge.

[13] A failure to provide biometrics and other biographical information may result in a finding that the application has been abandoned unless the respondent demonstrates that the failure was due to good cause. 8 C.F.R. § 1003.47(d). Even where a respondent demonstrates good cause, however, nothing in the applicable regulations requires that an Immigration Judge postpone an individual hearing solely because a respondent failed to provide biometrics and other biographical information. *See* 8 C.F.R. § 1003.47(f) (if DHS has not reported on the completion and results of all relevant identity, law enforcement, or security investigations or examinations by the time of an individual hearing, an Immigration Judge may grant a continuance for DHS to do so or may "hear the case on the merits"). Rather, where a respondent demonstrates good cause for failing to provide biometrics and other biographical information or DHS has otherwise not reported on the completion and results of relevant investigations and examinations, Immigration Judges may nevertheless proceed with adjudicating the merits of an application, though they cannot grant the application until DHS has reported on the results. *See* 8 C.F.R. § 1003.47(g); *cf.* 8 C.F.R. § 1003.1(d)(6)(iv) (the Board of Immigration Appeals (Board) is not required to hold or remand a case on appeal because of incomplete or outdated investigations and examinations if the Board decides to dismiss the appeal or deny the relief sought); 8 C.F.R. § 1003.47(f) (an Immigration Judge may hear a case on the merits even when DHS has not reported results of investigations or examinations).

[14] Immigration Judges are encouraged to resolve dispositive motions in advance of an individual hearings expeditiously. In situations where an individual hearing is vacated, immigration courts should endeavor to fill that docket slot with another individual hearing as expeditiously as possible after providing notice.

not be vacated, and the representative and the respondent are required to appear at the scheduled hearing. In such cases, unless the case can be resolved at the hearing, the Immigration Judge generally will then issue the scheduling order described above at the hearing, though the Immigration Judge retains discretion to take any appropriate action consistent with the law.

Finally, as the Supreme Court has recognized, "[o]ne illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible." *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985). Moreover, "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 323 (1992). Although EOIR recognizes that this new case flow processing model presents opportunities for gamesmanship for representatives seeking to delay proceedings for respondents, it nevertheless expects all representatives to comport themselves in an ethical and professional manner. Efforts to deceive an Immigration Judge regarding a respondent's representation may constitute grounds for disciplinary action. *See* 8 C.F.R. § 1003.102(n) (conduct prejudicial to the administration of justice). Practitioners are further reminded that they may not engage in frivolous behavior which includes actions that are taken for an "improper purpose, such as to . . . cause unnecessary delay." 8 C.F.R. § 1003.102(j)(1). Additionally, failure to abide by the deadlines set by the immigration court may constitute grounds for disciplinary action. *See, e.g.*, 8 C.F.R. §§ 1003.102(n) (conduct prejudicial to the administration of justice), 1003.102(o) (competent representation), and 1003.102(q)(2) (complying with time and filing limitations).

The ICPM will be updated to reflect the new case flow processing model outlined in this PM. 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. Nothing herein should be construed as mandating a particular outcome in any specific case. Nothing in this PM limits an Immigration Judge's independent judgment and discretion in adjudicating cases or an Immigration Judge's authority under applicable law.

Please contact your supervisor if you have any questions.